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FEDERAL DECISIONS.

CASES ARGUED AND DETERMINED

IN THE

SUPREME, CIRCUIT AND DISTRICT COURTS

OF THE

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VOL. XV.
EQUITY — ESTATES.

ST. LOUIS, MO.:
THE GILBERT BOOK COMPANY.
1886.

FEDERAL DECISIONS.

CASES ARGUED AND DETERMINED

IN THE

SUPREME, CIRCUIT AND DISTRICT COURTS

OF THE

UNITED STATES.

COMPRISING

THE OPINIONS OF THOSE COURTS FROM THE TIME OF THEIR ORGANIZATION TO
THE PRESENT DATE, TOGETHER WITH EXTRACTS FROM THE OPIN-
IONS OF THE COURT OF CLAIMS AND THE ATTORNEYS-
GENERAL, AND THE OPINIONS OF GENERAL
IMPORTANCE OF THE TERRI-
TORIAL COURTS.

ARRANGED BY

WILLIAM G. MYER,

*Author of an Index to the United States Supreme Court Reports;
also Indexes to the Reports of Illinois, Ohio, Iowa, Missouri
and Tennessee, a Digest of the Texas Reports, and
local works on Pleading and Practice.*

VOL. XV.

EQUITY — ESTATES.

ST. LOUIS, MO.:

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DAVID ATWOOD,
PRINTER AND STEREOTYPED,
MADISON, WIS.

EXPLANATORY.

1. The cases in this work are arranged by subjects, instead of chronologically. They are assigned to the various general heads of the law, and each subject is divided and subdivided, for convenience of arrangement and reference, with head-notes, or table of contents, at the head of each subject, the same as an ordinary digest.

2. At the head of each division of a subject will be found a digest or summary of the points of law in the cases assigned to such division. This SUMMARY is confined exclusively to the statement of the points of law applicable to the particular division under which the case is published, other points of law in the case, if any, being transferred to other subjects, or to other subdivisions of the same subject. Where points in a case are carried to another division of a subject, they are put into the foot-notes, or notes following the cases, and reference is made to the case by section numbers in parenthesis at the end of the section.

3. The cases in full are arranged, generally, according to the order of the sections of the SUMMARY. Where the court states the facts of the case, it is so indicated by the use of the words STATEMENT OF FACTS at the beginning of the opinion. Where it is necessary to state the facts apart from the opinion, the statement is made as brief as possible, and is confined to the facts necessary to enable the reader to understand the points decided. The cases are also divided into convenient paragraphs, with a brief statement at the beginning of each paragraph of the point of law discussed or decided. Reference is here had to the *italic* sections scattered through the opinion. These take the place of the syllabus usually placed at the head of the opinion, and, besides bringing out every point of law actually decided, in some instances call attention to a review of authorities, as well as various points of law which would ordinarily be classed as *dicta*.

4. At the end of a series of cases is a digest of points applicable to the particular subdivision of the subject. This digest matter is obtained from four sources: 1st. Cases assigned originally to the general head, but digested and thrown out in the final arrangement, not to appear in full in any part of the work. 2d. Points taken from cases which will appear in full under some other division of the same subject. 3d. Points taken from cases which are assigned to some other general head. 4th. A digest of cases from state reports, law periodicals, and the opinions of the Court of Claims and the Attorneys-General.

5. Cases that will not appear in full in any part of the work are denoted by a *star* following the name of the case, thus, *DOE v. ROE*.* The tables of cases will also contain a similar designation of rejected cases, so that in consulting them the reader will readily see whether he is referred to a case in full or only a digest.

6. The *italic* matter at the head of the SUMMARY takes the place of the side-heads, or catch-words, usually prefixed to the sections, and is intended as an index to the contents of the SUMMARY. At the end of each section of the SUMMARY the name of the case of which the section is a digest is given, followed by the numbers of the sections into which the case is divided, so that after the reader has read the section of the SUMMARY, and found that it is what he wants, he can at once turn to the case in full.

CERTIFICATE OF APPROVAL.

I have examined with care the cases under the title of EQUITY in this volume, and have compared the cases which are reprinted in full with those which are digested merely. I am of opinion that the compiler has made the selection of cases to be reprinted in full, with judgment and discrimination; and that, considering the plan of the work, none of the cases which he has presented in the abridged form are of sufficient importance to be reprinted in full. I find these latter cases to consist, for the most part, of cases which have been affirmed or reversed on appeal, in which cases the decision of the supreme court is reprinted in full; of cases which turn on questions of fact, or which decide points of practice merely; and of cases which involve ordinary and familiar applications of well settled principles.

SEYMOUR D. THOMPSON.*

St. Louis, Mo., June 4, 1886.

*Judge of the St. Louis Court of Appeals. Author of *Homesteads and Exemptions*; *Liability of Stockholders*; *Liability of Officers and Agents of Corporations*; *Carriers of Passengers*; *Law of Negligence*; *Juries*; *Charging the Jury*; *Cases on Self-Defense*, etc.

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ABBREVIATIONS.

Abbott's Admiralty	Abb. Adm.	Lowell	Low.
Abbott's U. S.	Abb.	McAllister.....	McAl.
Albany Law Journal	Alb. L. J.	McCahon.....	McCahon.
American Law Register...	Am. L. Reg.	McCrary	McC.
Baldwin	Bald.	McLean	McL.
Bee	Bee.	MacArthur	MacArth.
Benedict	Ben.	Marshall.....	Marsh.
Bissell	Biss.	Martin	Martin (N. C.).
Black	Black.	Mason	Mason.
Blatchford.....	Blatch.	Montana Territory	Mont. T'y.
Blatchford's Prize Cases...	Bl. Pr. Cas.	Newberry.....	Newb.
Blatchford & Howland....	Bl. & How.	National Bankruptcy Regis-	
Bond	Bond.	ter	N. B. R.
Brewster	Browster.	Olcott	Olc.
Brockenbrough	Marsh.	Opinions of Attorneys-Gen-	
Brown.....	Brown.	eral.....	Opp. Att'y Genl.
Call	Call (Va.).	Oregon	Oreg.
Central Law Journal.....	Cent. L. J.	Otto	Otto.
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Clifford	Cliff.	Peters	Pet.
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Connecticut Reports.....	Conn.	Peters' Circuit Court	Pet. C. C.
Cooke	Cooke (Tenn.).	Philadelphia Reports	Phil.
Court of Claims.....	Ct. Cl.	Pittsburgh Reports	Pittsb. R.
Crabbe	Crabbe.	Sawyer	Saw.
Cranch	Cr.	Smith	Smith (N. H.).
Cranch's Circuit Court....	Cr. C. C.	Sprague	Spr.
Curtis	Curt.	Story	Story.
Dakota Territory.....	Dak. T'y.	Sumner	Sumn.
Dallas	Dal.	Taney	Taney.
Daveis.....	Dav.	Utah Territory	Utah T'y.
Day	Day (Conn.).	Vermont Reports	Vt.
Deady	Deady.	Wallace	Wall.
Dillon	Dill.	Wallace's Circuit Court	Wall. C. C.
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Gilpin	Gilp.	Wheaton	Wheat.
Hempstead	Hemp.	Wheeler's Criminal Cases ..	Wheeler.
Hoffman.....	Hoff.	Woods.....	Woods.
Holmes.....	Holmes.	Woodbury & Minot	Woodb. & M.
Howard	How.	Woolworth	Woolw.
Hughes	Hughes.	Wyoming Territory	Wyom. T'y.
Law and Equity Reporter..	Law & Eq. Rep.	Van Ness	Van Ness.
Legal Gazette Reports	Leg. Gaz. R.		

FEDERAL DECISIONS.

EQUITY.*

[See FRAUD; MISTAKE; RECEIVERS. As to Practice and Pleading in Equity, see those titles. For the application of equity principles to particular subjects, see the appropriate general heads of the work, such as BONDS, CONTRACTS, CONVEYANCES, CORPORATIONS, PARTNERSHIP, USES AND TRUSTS, etc. Specific performance of Contracts, see CONTRACTS; LAND.]

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| <p>I. EQUITY PRINCIPLES, §§ 1-858.</p> <ol style="list-style-type: none">1. <i>In General</i>, §§ 1-598.2. <i>Fraud</i>, §§ 599-637.3. <i>Trusts</i>, §§ 638-687.4. <i>Nuisance</i>, §§ 688-722.5. <i>Reformation of Instruments</i>, §§ 723-745.6. <i>Cancellation and Rescission</i>, §§ 746-858. <p>II. JURISDICTION, §§ 859-1268.</p> <ol style="list-style-type: none">1. <i>In General</i>, §§ 859-1082.2. <i>Remedy at Law</i>, §§ 1083-1268. | <p>III. INJUNCTIONS, §§ 1269-1772.</p> <ol style="list-style-type: none">1. <i>In General</i>, §§ 1269-1591.2. <i>Injunction Bond</i>, §§ 1592-1616.3. <i>Violation of Injunction</i>, §§ 1617-1652.4. <i>Damages</i>, §§ 1653-1663.5. <i>Procedure</i>, §§ 1664-1772. <p>IV. CREDITORS' BILLS, §§ 1773-1959.</p> <p>V. RELIEF AGAINST JUDGMENTS, §§ 1960-2118.</p> <p>VI. DISCOVERY, §§ 2114-2167.</p> <p>VII. BILL OF PEACE. QUIETING TITLE.
CLOUD ON TITLE, §§ 2168-2225.</p> <p>VIII. MASTER IN CHANCERY, §§ 2226-2323.</p> |
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I. EQUITY PRINCIPLES.

1. *In General.*

SUMMARY—*Stale demand; limitations; voluntary disabilities*, § 1.—*Parol promise of heirs in place of a will*, § 2; *not a trust; specific performance*, § 3.—*Innocent purchaser; improvements*, § 4.—*Time as of the essence of a contract*, § 5.—*Partition*, §§ 6-9.—*Proceeding for distribution; res adjudicata; estoppel*, § 10.—*Unliquidated damages*, § 11.—*Failure to set up defense at law*, § 12.—*Compelling transfer of stock*, §§ 13, 14.—*Foreclosure by trustee; by bondholders*, §§ 15, 16.—*Set-off*, §§ 17, 18.—*Insufficient allegations in bill against state officers*, § 19.—*Deeds of trust; indorsers and sureties; unrecorded deed; purchaser with notice*, § 20.—*Application of the maxim that "he who comes into equity must come with clean hands,"* § 21.—*Interpleader*, §§ 22-25.—*Equitable mortgage*, § 26.—*Equitable titles*, §§ 27, 28.—*Equitable liens*, § 29.—*Lost deed; subsequent purchaser*, § 30.—*Rule as to purchaser of an equity*, § 31.—*Bill to set aside a sale*, § 32.—*Proceedings against one while in the Confederate army*, § 33; *against absent defendant; want of notice; bill to redeem*, § 34.—*Judgment lien; sale of land to different purchasers*, § 35.—*Equity will not prevent setting up satisfaction of judgment, when*, § 36.—*Enforcing decree of state court*, § 37.—*Specific performance of contracts*, §§ 38-43.—*Contracts against public policy*, § 44.—*Contract entered into by one in straightened circumstances*, § 45.—*Release obtained from one while under arrest*, § 46.—*Release of no greater weight than the account settled*, § 47.—*Purchase of outstanding title by an attorney*, § 48.—*Retiring partner; entitled to an account*, § 49.

§ 1. S., being about to die, desired to make a will, leaving all of his property to his natural daughter. Being assured by his two brothers, his heirs-at-law, that he was in no immediate danger, and that they would see that the daughter got every cent of it, he did not do so, and died intestate. The brothers conveyed one-third of the property to the daughter and kept the

* Edited by PERCY D. MADDIN, Esq., of Nashville, Tennessee. Digesting by CHARLES N. BROWN, Esq., of Madison, Wisconsin, and THEODORE B. WALLACE, Esq., of Kansas City, Missouri.

rest. The daughter married twice; and her second husband, ten years after she attained majority, and twenty-five years after the death of S., and after the death of both brothers, filed a bill against their heirs, seeking an account and recovery. *Held*, that the demand was a stale one, and was barred by the statute of limitations, which applies in equity in such cases as well as at law, voluntary disabilities, such as coverture, whether cumulative or not, not being a defense to staleness in equity. *Beddian v. Seaton*, §§ 50-53.

§ 2. A mere parol promise, without consideration, by heirs-at-law, that they will see that one whom the ancestor intends to make the sole object of his bounty will get the property, will not, in the absence of fraud, be enforced in equity against the statute requiring wills to be in writing. *Ibid*.

§ 3. If heirs expectant, brothers of one about to die, fraudulently prevent him from making a will in favor of his daughter by promising to see that she gets the property, and do not fulfill their promise but keep it themselves, it is not a case of trust which adheres to the title in the hands of the promisors and their heirs, but merely a parol promise which, on account of the fraud practiced, chancery will enforce specifically. On the death of the promisors the remedy in equity is against their personal representatives, and not their heirs. *Ibid*.

§ 4. It seems that a court of equity will grant active relief in favor of a *bona fide* purchaser of land for a valuable consideration, without notice of any defect in his title, who has made permanent meliorations and improvements, by sustaining a bill brought by him against the true owner therefor, after the latter has recovered the premises at law, such owner having allowed the improvements to be made without giving notice of his title. *Bright v. Boyd*, §§ 54-57.

§ 5. The respondent, being the owner of certain judgments, entered into a contract with the complainant that if the latter would pay a certain sum he should be the owner of the judgments, the transmission of the title and the payment of the price being intended to be contemporaneous. The complainant never accepted the offer, or tendered payment of the price, or asserted any claim to the judgments until eight years later, when he filed his bill making claim to them. In the mean time the complainant had joined the rebellion and had waited three years after his return before bringing the suit. It was held that the rule in equity that time is not considered as of the essence of the contract applies only when compensation can be made for its lapse, and is inapplicable in case of an offer that requires an acceptance to make a contract, and that it might well be doubted whether the complainant had any rights under the contract which a court of equity would enforce. *French v. Hay*, §§ 58, 59.

§ 6. The equity powers of the courts to make partition of estates are aided in some states by statutes authorizing the appointment of commissioners to execute the conveyances in the names of the parties, or making the decree itself operative as a conveyance of title. But where there are no such statutes, a decree of partition in chancery of itself has no effect upon the actual ownership or upon the title of the parties. *Gay v. Parpart*, §§ 60-65.

§ 7. The purpose of a partition in chancery is to make division among the parties before the court of real estate in which they have interests or estates which are not in controversy among themselves. It does not deal with or decide questions of controverted title. *Ibid*.

§ 8. In partition by decree in chancery the transfer of title can be effected only by the execution of conveyances between the parties, which may be decreed and compelled by attachment; while at common law a judgment on a writ of partition operates by way of delivery and estoppel. *Ibid*.

§ 9. A decree of partition in chancery erroneously declared the interest of A. in the land as a life estate, with remainder in fee to his children, while the estate in A. was a fee. The conveyances made in pursuance of the decree did not follow this construction of A's interest, but conveyed the estate to him without describing its extent or mentioning his children. There was an agreement of the same date by all of the parties, but there was nothing in it by which A. consented that his estate was one for life only. During his life-time, A. made a mortgage of his share as an estate in fee. His only surviving child, after his death, brought a bill to have a conveyance of her share to her in accordance with the decree, and to have the mortgage declared void as against her estate. As soon as A. became aware of the construction placed upon the decree as regarded his estate, he brought a bill of review to set aside and correct it. He was successful, and the decree obtained by him remained in force twelve years, when it was reversed by the state supreme court, on the sole ground that the partition decree was by consent and that such consent cured all errors. The fact of such consent, concerning which the evidence was conflicting, was deemed immaterial in this suit, as neither the decree, the conveyances, nor the agreement made any actual transfer of title different from that which resulted from the will of the ancestor. It was during these twelve years that the mortgage was made. It was held that, as there was no consideration from the children to A. to bind him to such consent, as he had used due diligence to repudiate such supposed consent, and had it set aside by

bill of review, and as all the parties interested were either volunteers or purchasers with notice, it would be inequitable to decree a conveyance in accordance with the original decree, and against what seemed to have been the intention of the parties at that time, the court regarding it as not against the doctrine of *res adjudicata* to refuse to follow the partition decree and to inquire into the equities of the parties, under such circumstances. *Ibid.*

§ 10. The complainant filed a bill against an administrator for a discovery and a distribution of undevised property. There was a plea that the defendant had contested the right of the complainant to the distributive share claimed by him in the probate court where the decision was favorable to the complainant, but that this decision had been reversed by the supreme court on appeal, and the cause remanded. It was held (1) that, as the decision of the supreme court did not make any final or conclusive determination of the rights of the parties, but left those rights precisely as they were before the original decree, such decision was not a bar to the present suit; (2) that the complainant was not estopped from proceeding in chancery by his election to proceed in the probate court, pursuit of the remedy in the latter court having become fruitless; and (3) that the jurisdiction of the federal court of equity was not ousted by any supposed pendency of the cause in the probate court or any probate conflict between the separate jurisdictions. *Harvey v. Richards*, §§ 66-71.

§ 11. Unliquidated damages, when they form one of the items in controversy between the parties in a suit in chancery, may be determined, and the mode by which the amount is ascertained in such cases is either by a reference to a master, or by sending an issue of *quantum damnificatus* to be tried by a jury. *Kelsey v. Hobby*, §§ 72-78.

§ 12. A suit in equity will not lie to give effect to defenses against a claim when they might have been fully set up in an action at law. There must have been some fraud practiced upon the court, or some unconscientious advantage taken of the defendant without any fault or negligence on his part; or there must be some newly discovered evidence which could not have been obtained at the trial, and which, if produced, would have changed the result, before a court of equity will interfere with the judgment rendered or the contract upon which it was recovered. So, on a bill in equity seeking the cancellation of two policies of insurance, and an injunction against the enforcement of a judgment recovered thereon in an action at law, alleging as a ground that the deceased procured the policies in contemplation of suicide, and that his wife and son, in whose favor they were obtained, were parties to this fraud; it was held that, as these matters might have been set up and would have been a good defense in the action at law, they could not afford ground for the relief asked in equity; and that it could make no difference that they were set up in the action at law and subsequently withdrawn. *Life Insurance Company v. Bangs*, §§ 79, 80.

§ 13. A court of equity has jurisdiction to compel a bank to open its transfer books and permit a transfer of stock by one holding it in trust to his *cestui que trust*, where by the charter and by-laws of the bank such transfer can only be made on the books. An action at law would not afford an adequate remedy, nor is the distinction between the specific performance of contracts, with reference to real estate, and those which relate to personality applicable. *Mechanics' Bank of Alexandria v. Seton*, §§ 81-93.

§ 14. On a bill in equity by a *cestui que trust* to compel a bank to allow the trustee in whose name it stands to transfer stock to the complainant on the books of the bank, the bank cannot avail itself of the stock to satisfy a debt due from the trustee contracted without reference to this stock as security, and with full knowledge that the stock was held in trust for the complainant. Nor will an agreement between the trustee and the bank to treat the stock as security avail, when made with knowledge of the trust on the part of the bank. *Ibid.*

§ 15. The trustees in a mortgage by a railroad company cannot foreclose without the concurrence of some of the bondholders secured by the mortgage. Bondholders can, however, foreclose without any action on the part of the trustees. When the trustees foreclose, the bondholders who join in the proceeding are the real parties, and foreclose in their own behalf through the trustees, and the trustees do not represent the rights of any who do not join. Where, therefore, a trustee in such a mortgage brings a bill to foreclose another mortgage claimed to have preference, in which he is also trustee, the fact that such trustee is a party will not make any of the bondholders parties by representation. *Mercantile Trust Co. v. Lamolille Valley R. Co.*, §§ 94-97.

§ 16. The holder of first mortgage bonds of a railroad company filed a bill in the United States circuit court to foreclose, and to remove the trustees, alleging that one of the trustees was the sole trustee in a claimed preference mortgage which he was seeking to foreclose in a state court, and that the other trustee was one of the receivers of the property appointed in the same proceeding. It was held that the court could not lawfully go so far with the proceedings as to take the possession of the property from the state court, or in any manner interfere with the possession of that court or its officers, but could determine any question of right or grant any relief not going to that extent; that the fact that some relief which the bill might

cover would interfere with that possession would not prevent the granting of other relief; that a foreclosure would not interfere with such possession, as it would only cut off the equity of redemption of the bonds; that the objection on account of the receivership could not prevent proceeding in the cause so far as would not interfere with the receivership; that a foreclosure would not involve such interference, and that it was no objection to the foreclosure that the sum due in equity would have to be ascertained, and that the court could not settle the accounts of the receivers to ascertain how much they had in their hands to apply to the mortgage debt, since the plaintiff was no party to the proceedings in which the receivers were appointed. *Ibid.*

§ 17. Courts of equity do not act upon the subject of set-off in respect to distinct and unconnected demands, unless some other peculiar equity has intervened calling for relief; as, for example, in cases where there has been a mutual credit given by each upon the footing of the debt of the other, so that a just presumption arises that the one is understood by the parties to go in liquidation or set-off of the other. *Dade v. Irwin*, §§ 98-100.

§ 18. A court of equity will not interfere in favor of a set-off which has not been presented or claimed for thirteen years, and which is clouded with presumptions against its original foundation and present validity. *Ibid.*

§ 19. A state, having guarantied the bonds of a railroad company, and desiring to recover and destroy them, passed an act for the issue of scrip instead of such bonds, which scrip should be received in payment of taxes and other dues to the state, and providing for the ultimate redemption of the scrip by the levy of an annual tax. The legislature of the state afterwards passed an act manifestly inconsistent with the undertaking of the state as expressed in the first act. A holder of some of these bonds who had, before the passage of this second act, surrendered his bonds in exchange for scrip, brought a bill in equity for an injunction, commanding the comptroller to cease from refusing to levy the annual tax provided for, and a county treasurer to cease from refusing to receive scrip for taxes and other dues. It was held that, as he had not alleged that he had been or would be injured by this act, or that the comptroller or the treasurer had neglected to perform their duties under the first act, or refused or threatened to refuse to receive the scrip in payment of taxes and other dues, or to levy the annual tax provided for, the bill showed no equity in the complainant, and the court would not decide the abstract question of the validity of the second act. *Williams v. Hagood*, § 101.

§ 20. Woodson, for a loan, executed his note to the bank, with Swan as indorser. Afterwards the name of Holcombe was added as indorser, upon the requirement of the bank. Woodson executed a deed of trust to secure Holcombe only, and also executed other deeds of trust on the same land to secure other creditors, and among them one Venable, under whose deed the land was sold, Venable himself becoming the purchaser for the amount of his debt. The deed for the benefit of Holcombe was not recorded, but full notice was given to Venable, who, on obtaining his deed of trust, valued the property at a sum sufficient to discharge the debt due to himself, after discharging all prior incumbrances, including that of Holcombe. This computation was again made at the sale, and the land at that time was thought a good purchase, supposing it to be charged not contingently but positively with the debt to the bank. A higher price was offered for the land at the time it was struck off to Venable. Venable having died, his executors proposed to the bank to pay the debt, provided the bank would put the note in suit against Swan for their benefit. This was acceded to, and a judgment obtained against Swan, whereupon he filed his bill, stating the foregoing circumstances, alleging his ignorance of these transactions until after the judgment was rendered, and praying for an injunction. The executors admitted their liability to Holcombe but insisted that the lien of Holcombe, as he had not been compelled to pay anything, could not be set up by the plaintiff. It was decided (1) that as Swan was the first indorser he could not avail himself of the security created for the benefit of Holcombe, unless such right grew out of transactions subsequent to the giving of the security; (2) that if Swan had been compelled to pay the debt he could have no pretext for claiming the aid of Holcombe's deed as against the holder of any subsequent deed or against any purchaser at a sale made in pursuance of such deed; (3) that had the bank, without the interposition of the executors of Venable, proceeded to coerce payment from Swan, he could not perhaps have obtained the aid of a court of equity; and (4) that, as the executors had been the means of inducing the bank to proceed against a surety having no indemnity, rather than one holding an indemnity from the original debtor, a court of equity, regarding also the circumstances attending the making of the trust deed and the sale thereunder, would not sustain the transaction. It was considered as an additional reason for this latter holding that if Venable should be allowed, by using the name of the bank, to coerce payment from Swan, he would thereby give Swan a right of action against Woodson, and thus render Woodson liable for the money which his land was intended to secure. *Swan v. Bank of United States*, § 102.

§ 21. The maxim that "he who comes into equity must do so with clean hands" applies only to the conduct of the party with reference to the particular transaction. It does not mean a

general depravity, but must have an immediate relation to the equity sued for. Thus where one came into equity to reopen the settlement of an account on the ground of usury, undue influence and violated confidence, amounting to an alleged fraudulent imposition by the defendant upon the plaintiff, it was held that this maxim could not be applied to bar the plaintiff of his relief, because he had used threats and other improper means to induce his wife to sign a certain deed and mortgage which had been given by him in settlement. *Bateman v. Fargason*, §§ 103, 104.

§ 22. The principle on which relief by bill of interpleader is given is that two or more persons are claiming the same thing, by different or separate interests, of a person who does not claim any interest therein himself, and does not know to whom he ought to surrender it; and that one or both have brought or threatened to bring actions against him. In such a case he may appeal to a court of equity to protect him from the vexation attending such suits, and also from being compelled to respond to several parties for the same thing. *City Bank of New York v. Skelton*, §§ 105-107.

§ 23. One in possession of a fund against whom separate suits are pending by separate and adversary claimants thereof cannot maintain a bill of interpleader in the circuit court of the United States, if one of the suits is in a state court. *Ibid.*

§ 24. A bank is entitled to relief by bill of interpleader against separate and adversary parties who claim title to moneys therein deposited. *Ibid.*

§ 25. A., B. and C. deposited certain funds in the City Bank of New York, and the bank delivered to C., with the knowledge and consent of the other two, a bank book in which the deposit was placed to the credit of C., and reciting that no part of said deposit was to be withdrawn before the 1st day of the next September, unless upon the request of B. Shortly before the said 1st of September, D. and E. filed a bill against the bank and C. in the chancery court of the state, claiming the fund. An injunction was granted in this suit restraining the bank from parting with the funds, but it was subsequently dissolved. Some time after this C. instituted actions of trover and *assumpsit* in the circuit court of the United States against the bank to recover the fund. On a bill filed in the latter court by the bank, it was held that C. should be enjoined from prosecuting his suit until the suit in the chancery court of the state, to which he was a party, and in which the conflicting rights of the parties were in issue, was terminated. *Ibid.*

§ 26. The question whether, in equity, a deed from a third party to B. is to be treated as between B. and C., who claims an interest therein, as an equitable mortgage, depends upon the existence of a debt between B. and C. for the consideration of the deed. *Tufts v. Tufts*, §§ 108-129.

§ 27. This was a bill by one claiming the equitable title to land, for a conveyance of the legal title. Davis held the legal title of the land in dispute as trustee for Hubbard. The complainant claimed under Hubbard through several mesne conveyances. Hubbard had sold other land to Schram, the title to which was outstanding. Schram required security for the title; and, in order to make him secure, Butler, a relative of Hubbard, got one Knab to give a bond for title, and bind himself jointly with Butler as security. Knab required of Hubbard security to indemnify him for this; and, for this security, Hubbard got Davis to convey the land in controversy to Knab. At the same time the title bond to Schram was made, Knab executed to Butler a bond to convey the land in dispute to Butler, if the latter would procure a deed from the trustees of Hubbard and comply with the bond to Schram. Butler failed to procure the deed, and Hubbard did so himself. Butler assigned to the respondent the bond given him by Knab, and this bond was alleged by the bill to be a fraudulent contrivance on the part of Butler to cheat Hubbard. The complainant obtained deeds from Davis and Knab; but as Davis had already conveyed to Knab, nothing passed by his deed unless an equity of redemption resulted to him. And as the respondent had filed a bill in a state court against Knab, which was pending when complainant took his deed from Knab, and as Knab was not allowed to disavow his own bond, respondent got a decree against Knab for a conveyance of the legal title (which conveyance was regularly made), and therefore the deed from Knab to complainant was of no value. The complainant asserted Hubbard's equity and Davis's right of redemption. It was held that as Hubbard had conveyed before the pendency of this suit by the respondent against Knab, and as neither he nor the complainant nor the intermediate owners of this equity were parties to it, this equity was in no wise impaired thereby; that this equitable title, being distinct from the legal title in controversy between the respondent and Knab, was a lawful subject of *bona fide* sale and transfer by deed; that, after the bond for title given to Schram was satisfied Knab held the naked legal title with a right in Hubbard to call for its surrender; that Knab's assignee stood on the same footing; and that therefore the complainant was not precluded from relief in equity as being the assignee of an equitable interest in contestation. *Smith v. Orton*, §§ 180, 181.

§ 28. It is of no consequence in a suit in equity, by one claiming the equitable title to land,

to procure the conveyance of the legal title, that neither of the parties is or ever has been in actual possession of the premises. *Ibid.*

§ 29. It is held that an equitable lien may be created under the following circumstances: Complainant, having an indefinite understanding with his father-in-law that a certain house and lot would be conveyed to him, entered into possession of it and in pursuance of that agreement made valuable improvements upon the property under the expectation that in pursuance of the agreement the title would in due time be vested in him. These improvements were held to be a valuable consideration and (fraud being disproved) to create as against the creditors of the father-in-law an equitable lien, the contract being too indefinite to be specifically enforced. *King v. Thompson*, §§ 132-137.

§ 30. The complainants were the real owners of a piece of land, claiming by several mesne conveyances under one G. The defendants, on discovering that the deed from G. was lost, procured another deed from G. for the same lot, and turned the complainants' tenant out of possession, the defendants having notice of the complainants' title, or notice of such facts as would have led by the use of ordinary diligence to a full knowledge of the state of such title. On a bill filed to obtain the title, it was held that the defendants should convey all their right and title to the premises to the complainants. *Hinde v. Vattier*, §§ 138-143.

§ 31. The rule with regard to purchasers of a mere equity is, *prior in tempore potior in jure*. *Hallett v. Collins*, §§ 144-148.

§ 32. One who comes into equity to have the sales of his property by which his debts were satisfied set aside and possession given to him, on the ground that the proceedings were irregular and voidable, and who admits the indebtedness, must do equity by making a tender in court of what is justly due. A willingness to pay what may be found to be due upon the adjustment of the accounts for rents and profits is not the kind of offer which is required. *McQuiddy v. Ware*, §§ 149, 150.

§ 33. A debtor left his home in Missouri in 1861, and joined the Confederate army. In 1862 and 1863, his creditors proceeded against him as a person whose residence was unknown, and upon affidavits of this fact and upon this ground obtained a sale of his lands to pay their claims. After the judgments he could have filed a bill of review within three years, but did not do so. In 1871, he filed a bill in equity to set aside the sales and to have possession of the lands again, upon the ground that the affidavits upon which the suits were based were false, and that his residence was well known. There was no averment that he did not have actual notice of the proceedings against him in time to protect his rights. It was held that a court of equity would not thus aid a party who went away to engage in the rebellion without providing for the payment of his debts, to which there was no just defense, and who had waited so long before bringing his suit, without excuse for the delay, where the only ground for interference was that the creditors had adopted the wrong methods of enforcing their claims. *Ibid.*

§ 34. The complainant, a resident of a distant city, had several small judgments rendered against her in her absence. To pay these, land belonging to her was sold for about one-fiftieth part of its value, while it was unusual to sell land to pay so small a debt when there were readier means for collecting it by levy and extent or by sale of personalty. All due forms required were observed. She had no actual notice. The creditor intentionally failed to give notice, not being legally bound to do so. The creditor, who was also the purchaser at the sale, sold to one who could not claim to be a *bona fide* purchaser. Both of these were made defendants to complainant's bill to redeem the estate. *Held*, that courts of equity were instituted to relieve against such mischances, and that she was entitled to the relief asked, although the statutory period for redemption had expired. *Burgess v. Graffam*, §§ 151-154.

§ 35. The Indiana statutes provide that a judgment binds not only the lands owned by the debtor at the time it was rendered, but also those subsequently acquired, from the moment of acquisition. Clark was the owner of land bound by the lien of a judgment against him, and afterwards bought other land which he sold to Barth, the complainant, having in the meantime sold the land first owned to Makeever and others. The marshal sold the Barth land under the execution, and Barth filed this bill to have the sale set aside as an abuse of process, claiming that the other land sold to Makeever was first liable. *Held*, that the Makeever land having been sold first, the Barth land was primarily liable, and there was no abuse of process to give the court jurisdiction irrespective of citizenship. *Barth v. Makeever*, §§ 155-159.

§ 36. Where a judgment has been satisfied at law equity will not interfere to prevent the defendant from setting up such satisfaction unless it appears that such satisfaction has been obtained by fraud or deceit, or made under some mistake of fact. *Magniac v. Thomson*, §§ 160-166.

§ 37. In a suit in equity in the circuit court of the United States to enforce a decree of a state court, the court will give effect to the decree according to its terms, and is not bound by any executing order of the state court which is no part of the decree and under which nothing has been collected. *Bank of Circleville v. Iglehart*, §§ 167, 168.

§ 38. The grounds on which courts of equity take jurisdiction to decree specific performance of contracts is, that a court of law can give for the breach of a contract no other remedy than damages; that in the particular case damages are an inadequate and imperfect remedy; that it is against conscience to leave to a party his election to pay damages or perform; and that it is unjust to the complainant to leave him to recover by suit at law such damages as a jury may think proper, in a case where the damages are uncertain and conjectural. *Higgins v. Jenks*, §§ 169-173.

§ 39. The defendants being engaged in the building of a ship, the plaintiff entered into a written contract with them for the purchase of three-eighths of her, upon which he was to pay at a certain rate per ton, part in money and notes and part in furnishing rigging. It was further agreed that he should superintend the completion and rigging of the ship for his board, and that when completed he should be the master. The plaintiff, being apprehensive that the defendants were about to disable themselves from performing their contract by a sale and transfer of the vessel, filed a bill to enjoin the sale of that part bargained to him, and on their disavowal of any such intention, amended his bill, praying an injunction against the sale of the other five-eighths, except with notice of his contract and subject to his rights, with a further prayer for an injunction against appointing any other person as master, and for a specific execution of the contract. After the filing of the bill, the defendants transferred five-eighths of the ship to persons who purchased with full notice of the contract with plaintiff, and a further amendment made the purchasers parties, and asked the same remedies against them. The original defendants pleaded surprise, in that they had since found out that the plaintiff was an irresponsible person and unfit to command the ship. The court was of opinion that, if this was a real surprise, the plaintiff ought to be left to his remedy at law, but found the fact to be otherwise. It was held that as his right, if of any value, might be lost by a transfer to a *bona fide* purchaser without notice, he was entitled to the first injunction prayed; that the right to the second injunction prayed depended on the right to specific performance, which latter right was to be determined only on the final hearing; and as it appeared to be a case for the exercise of the remedy by specific performance, the second injunction should be granted also. *Ibid.*

§ 40. Courts of equity will not interfere to direct a specific performance of a contract, where the terms of the agreement are not all full and definite, and its nature and extent are not made out by clear and unambiguous proofs. *Smith v. Burnham*, §§ 174-179.

§ 41. In this case, which was a bill in equity alleging a partnership between the plaintiff and defendant in the purchase and sale of lands, advances made by the plaintiff in pursuance thereof, and certain purchases made by the defendant, and praying for an account and dissolution and a conveyance to the plaintiff of his equitable share, where all knowledge of the case was derived from after conversations and loose confessions of the defendant, which, if confided in, left the nature and terms of the agreement so loose and indefinite that it was impossible to ascertain its exact and full import in all respects, so as to enable the court to enforce it with a full confidence that it understood the whole intentions of the parties, relief was refused. *Ibid.*

§ 42. A court of equity will not enforce a contract that is not precise and definite in its terms, and clearly established by the evidence. It will leave the party to his remedy at law. *Tilghman v. Tilghman*, §§ 180-187.

§ 43. A contract in consideration of marriage will not be enforced in equity in favor of one who does not appear by its terms to have an interest in it or in the fund provided by it. *Ibid.*

§ 44. A court of equity will not enforce a contract of which the consideration is void, as being against public policy. So where it was agreed between an executrix and a purchaser of her insolvent testator's realty at a sale by her for the purpose of raising money to be applied upon debts due from the estate, that she might remain in possession and that he would reconvey to her whenever she could repay the money advanced and interest, it was held that such contract, being against public policy, would not be enforced in equity. *Tufts v. Tufts*, §§ 108-20.

§ 45. Where a person voluntarily enters into a contract for the compromise of disputed questions and rights, after ample time for inquiry, examination and reflection, such contract will be upheld by a court of equity though he was induced to enter into it by reason of his being in straitened circumstances, and his business affairs being complicated, and his being greatly embarrassed by the litigation compromised and in pressing need of money. *French v. Shoemaker*, §§ 188-190.

§ 46. The plaintiff in an equity suit in South Carolina, while in New York upon business, was unexpectedly arrested for a claim which was in controversy in the South Carolina suit; and while so detained and unable to obtain bail, the defendant obtained from him a release of the matters embraced in the New York suit, and also of matters not embraced in it, much more important in amount, and which he was prosecuting in the suit in South Carolina. The release was executed in the absence of the books and papers necessary for determining the cor-

rectness of the accounts; and the account was prepared by the defendant's clerk, and examined very briefly by the plaintiff, and differed materially from the one which the plaintiff was relying on in the suit in South Carolina. It was held that the account and release were, under the circumstances, entitled to no weight in a court of equity. *Kelsey v. Hobby*, §§ 72-78.

§ 47. A release, executed in consideration of the settlement of accounts between the parties, is entitled to no greater force in a court of equity than the settlement of the account upon which it was given, and if the account is impeached, the release will not prevent the court from looking into the settlement. *Ibid.*

§ 48. The complainant, having entered into an agreement with third persons for the sale to them of a piece of land, employed the respondent, an attorney usually employed by him when he had legal business to be done, to draw the contract. Afterwards while making an abstract of the title at the instance of the purchasers, the respondent discovered an outstanding title, which he bought at a nominal sum and had conveyed to his brother, concealing the fact from the complainant. He then engaged in a bitter litigation to recover the land from the complainant. Upon a bill filed showing these facts, it was decreed that the complainant should deposit in the clerk's office the amount which the respondent paid for the outstanding title, and that the title so purchased should be conveyed to the complainant. *Baker v. Humphrey*, §§ 191-198.

§ 49. On the retiring of one of the partners from a firm, the remaining partners agreed to take charge of and collect the assets, pay the debts for which the firm was liable, and pay over to the retiring partner a certain sum as soon as they collected enough for that purpose after payment of the debts. It was held, on a bill filed by the retiring partner, that he was entitled to an account; and that, if upon that accounting anything was found to be due him, he was entitled, upon well-settled principles of equity, to a decree for its payment. *Kelsey v. Hobby*, §§ 72-78.

[NOTES.— See §§ 194-598.]

BEDILIAN v. SEATON.

(Circuit Court for Pennsylvania: 8 Wallace, Jr., 279-288. 1860.)

STATEMENT OF FACTS.— In 1831 Thomas Seaton sent for two friends to come and aid him make his will. He was in a dying condition, and for some reason his friends did not arrive before his death. He especially desired to execute his will to give his estate to his natural daughter, Harriet. His brothers, John and James Seaton, begged him not to make himself uneasy, that Harriet should have it all, "every cent of it." After his death, John and James conveyed to a trustee for Harriet one-third of the property. During her minority, Harriet married Barry. She attained her majority in 1844, and in 1848 Barry died. She married the plaintiff, Bedilian, in 1851. This bill was filed in 1854, and prayed for a discovery and account of the property of her deceased father, and that it be decreed to her. Both the brothers, John and James Seaton, the heirs and next of kin of Thomas Seaton, were dead, and this bill was filed against their heirs, but neither their executors nor administrators were made parties. There was a demurrer to the bill upon grounds which appear sufficiently in the opinion of the court.

§ 50. *A promise by heirs to an intestate to convey property to a third person is a mere naked promise.*

Opinion by GRIER, J.

If the property had been devised to John and James under a parol agreement by them, that they would hold it in trust for Harriet, the case would be like that of *Hoge v. Hoge*, 1 Watts, 163, and numerous others, in which equity treats the fraudulent procurer of the legal title as a trustee *ex maleficio*.

But in this case the title of the brothers did not arise by deed from Thomas. Their title was by descent; cast upon them by the law of the land, because of the intestacy of their brother. The intention of Thomas to make a devise of his property to his natural daughter having never been legally executed, gave

her neither a legal nor equitable title to it. John and James are not the fraudulent grantees of the land, and have not received or accepted a legal title in trust from Thomas. They have made a solemn promise to their brother on his death-bed; and assuming the conspiracy charged in the bill (though not substantiated in the evidence) that in consequence of that promise a will was not made, was this anything more than a parol contract of which chancery is asked to enforce the specific execution? The bill sets forth no acts or declarations from which a *fraudulent* intention would necessarily be inferred. The exhortation to the brother to make his mind easy, that he was not in danger of immediate dissolution, may have been made in perfect good faith and kindness. Nor does the fact that the decease took place before the arrival of the scrivener, leave any necessary inference that a will would have been made if the promise had not been made. As a naked promise, without consideration, it would not be enforced by equity in the face of the statute. As a trust it could not be, where the alleged trustee did not receive the property by some gift or devise to which a trust was annexed. Nor was the trust left out of a will or conveyance on account of any promise of the devisee or executor, as in the case of *Oldham v. Litchfield*, cited from 2 Vernon, 505, where lands were charged with an annuity on proof that the testator was *prevented* from charging them in his will, by a promise of payment by the devisee; nor is the case like the other case cited from 1 Vernon, 296, *Thynn v. Thynn*, where a son *induced* his mother, *by promising to be a trustee for her*, to prevail on her husband to make a new will and appoint him executor in her stead. In these cases from Vernon, the conduct of the devisee was a fraud practiced not only on the party intended to be benefited, but on the testator from whom he received the legacy or devise. A mere *promise* is not enough to take the case out of the statute, else the statute which requires a will to be in writing would be inoperative. The foundation of the decree is the *fraud* of the person who has obtained the legal estate, or other benefit under the will, by means of a promise which he never intended to perform.

§ 51. *A promise that creates a personal trust does not run with the land.*

II. But assuming the charges of the bill to be true and well pleaded, and that the heirs expectant, when they made this promise, *fraudulently* prevented the intestate from making a will in favor of his daughter (as on a demurrer we are bound to assume); still the bill does not present a case of a trust which adheres to the title in the hands of the promisees, and their heirs or others having notice; it is but a parol promise or contract which, on account of the fraud practiced on the intestate and his intended devisee, chancery will compel the heir to specifically execute, either by transfer of the property or its value to the intended devisee. But as a parol contract, and not a trust descending with the land, or a covenant binding it in the possession of the heirs, how can a bill to enforce a mere *personal* contract be maintained against the *heirs alone*? Admit that a chancellor would have compelled the brothers on a bill filed in their life-time to make good this promise made to Thomas in favor of his daughter, either by actual transfer of the property itself or payment of its value. Still the remedy in equity, as at law, would be against the personal representatives, the executors or administrators of the promisors. The estates of the decedents, whether they came by inheritance from the intestate brothers or otherwise, might have been taken in execution to satisfy the judgment or decree. In this way the property inherited by the present defendants might all have been made liable as assets.

* § 52. *Defense of staleness. The rule as to statutes of limitations in equity.*

III. But assuming that the bill might be so amended by making the executors parties, if any there be, and that the claim of complainants might be relieved from this difficulty by leave of the court, still it is met by the defense of staleness. Except in cases of direct trusts not denied, the statute of limitations is as applicable to bills in equity as to suits at law. It would be superfluous to repeat the well established doctrines of courts of equity on this subject, further than referring to *Wagner v. Baird*, 7 How., 234.

§ 53. — *cumulated disabilities not admissible.*

IV. Infancy is an involuntary disability, and would justly be considered in a case of this sort, but as in courts of law cumulated disabilities will not be permitted to hinder the running of the statute of limitations, so in courts of equity voluntary disabilities, such as coverture or absence from the state, even where not cumulative, will not be received as a defense against the charge of staleness. At all times this jurisdiction of enforcing parol trusts or parol promises to convey property is one to be cautiously exercised. Courts of chancery proceed in these cases against the letter of the statute on the ground of preventing frauds from being successful by pleading the statute *against frauds*. But the spirit as well as the letter of these statutes would be wholly annulled if legacies or devises not written in a will, or contracts for the sale of realty enforced, by the vague, uncertain and too often imaginary recollections of old women or old men after a great number of years. Those who swear to conversations are never accurate; the omission of a part of a conversation, the leaving out of a single adverb, pronoun or preposition, may unintentionally convert a partial truth into a great lie.

V. After forty years' experience at the bar and on the bench, I must say that I think courts had better never have relaxed the stringent rule of these statutes. Courts, as well as juries, are too apt to be led away by the cry of "Fraud!" We all hate fraud, and are too willing to assume the functions of an overruling Providence, and punish it by arbitrary power. This feeling of virtuous self-compacency too often leads to hasty decisions and dangerous precedents. I have known a valuable property converted into a trust by the testimony of an old woman who recollected and construed a *nod*, after some twenty-two years, into the acknowledgment of a trust. See *Jones v. McKee*, 3 Barr, 496.

The promise which this bill calls upon us to enforce against the heirs of the promisors (on the recollection of one or two old women, who do not agree with one another, nor with that laid in the bill) purports to have been made some twenty-five years ago. The disability of infancy was over more than ten years before the filing of this bill. There is no allegation of any fraudulent concealment of her rights from the complainant; no reason why she might not as well have brought her suit during the life of her first husband as in that of her second. However romantic the story may be that seeks to divest men of property held in descent by the second generation, on a cry of fraud set up after all the alleged parties to it are long dead and their executors after them, I am happy to say that the rules which govern a court of chancery in cases of this kind fully justify me in dismissing this bill as stale, and that the lapse of time appearing from the face of the bill itself is a complete bar to the relief sought. Decree for defendants.

BRIGHT v. BOYD.

(Circuit Court for Maine: 1 Story, 478-499. 1841.)

Opinion by STORY, J.

STATEMENT OF FACTS.—The opinion of the court was briefly stated at the argument, and an order passed accordingly. But I have since thought the whole subject deserved a fuller examination and statement; and have, therefore, since that time drawn up our views more at large. Two titles are set up in the bill, as grounds of relief. The first is, that the plaintiff claims, by intermediate conveyances, the land in controversy, under an administration sale, made for the payment of debts, by the administrator with the will annexed of John P. Boyd, the testator, under whose will the defendant claims title as his devisee, and in virtue thereof has recovered the premises in an action at law, against Bright (the plaintiff). It is admitted that the administrator was duly licensed to make the sale in 1832; and that he complied with all the requisites of law necessary to the validity of the sale, except that previous to the sale no bond with sureties was given by the administrator, for the faithful discharge of his duty, to and approved by the judge of probate. In point of fact it seems that a bond with sureties was executed before the sale, and the names of the sureties were satisfactory to the judge of probate; but the bond was not approved by the judge or filed in the probate office until several years afterwards, in 1835. Upon this case coming out on the trial of the action at law (a writ of entry), the court held that the giving of the bond was by law an essential prerequisite to the sale; and it not having been complied with the sale was consequently invalid, and passed no title to the purchaser. (See acts of Maine of 20th of March, 1821, ch. 51, § 68; March 21, 1821, ch. 52, § 2; March 16, 1830, ch. 470, § 6; 1 Maine Laws (ed. 1821), pp. 223, 227; 3 Maine Laws p. 315.)

§ 54. *Courts of equity cannot relieve against the defective execution of a power created by law.*

It is now argued, that however correct this doctrine may be at law, yet, in a court of equity, the omission to give the bond within the stipulated time ought not to be held a fatal defect; but it should be treated as a mistake, or inadvertence, or accident, properly remediable in a court of equity. We do not think so. The mistake was a voluntary omission or neglect of duty and in no just sense an accident. But if it were otherwise, it would be difficult, in the present case, to sustain the argument. This is not the case of the defective execution of a power, created by the testator himself, but of a power, created and regulated by statute. Now, it is a well settled doctrine, that although courts of equity may relieve against the defective execution of a power created by a party, yet they cannot relieve against the defective execution of a power created by law or dispense with any of the formalities required thereby for its due execution; for otherwise the whole policy of the legislative enactments might be overturned. 1 Story, Eq. Juris., §§ 96, 177, 2d ed. There may, perhaps, be exceptions to this rule, but if there be, the present case does not present any circumstances which ought to take it out of the general rule. 1 Story, Eq. Juris., § 177, and note (1), 2d ed.; 2 Chance on Powers, arts. 2985-2987; Sugden on Powers, p. 370, 3d ed.; Lord Mansfield in *Zouch v. Woolston*, 2 Burr. 1146; *Earl of Darlington v. Pulteney*, Cowp. 266, 267. Therefore, it seems to us, that the non-compliance with the statute prerequisites, in the present case, is equally fatal in equity as it is in law.

§ 55. *Where land has been sold for taxes, under the statutes of Maine, and the original owner wishes to redeem he should make a tender of the proper sum to the person possessed of the tax title. In ascertaining who is in possession of the title he may rely upon the records of the county.*

Then, as to the tax title. It is admitted that the sale of the land for the taxes in August, 1832, was valid, and the title conferred thereby on the purchaser was good, subject to the statute right of redemption within five years, and, in case of minors (in which predicament the defendant was at the time of the sale), of eight years. Statute of Maine, 12th of March, 1831, ch. 501; 3 Maine Laws, 349. The land by intermediate conveyances under this sale became vested in Allen Gilman in 1837 (under whom the plaintiff claimed title to the premises by the administration sale); and the defendant within the eight years after the tax sale, to wit: in April, 1839, offered to redeem the same from Gilman, and to pay him the amount then claimed by him under the tax sale. Gilman declined to receive payment, and waived any formal tender. So that, if the tender was made to the right party, the redemption was sufficiently claimed to entitle the defendant to reassert his original right.

It has been suggested at the argument that the tender ought not to have been made to Gilman, but to the original purchaser at the tax sale, or to the present plaintiff, Bright. We think otherwise; for upon the natural, and indeed, almost necessary construction of the statute, the right of redemption must be against the party who is possessed of the tax title at the very time of the redemption; for such party alone is entitled to the redemption money, as holding the conditional estate; and a tender to any other person, in whom the title is no longer vested, would displace his rights and might deprive him of the intervening charges which had been incurred by him, for which he might justly claim a remuneration under the statute. Now, Gilman alone possessed the tax title at the time of the supposed tender; and the plaintiff (Bright) has never received any conveyance thereof from Gilman; but, at most, he only claims by way of estoppel against Gilman, founded on the former conveyance of the administration title. Surely it is not for the owner to trace out and search for titles originating collaterally, or by estoppel, before he is entitled to redeem. He can look only to the legal title, as it stands upon the public records of the country, under derivative conveyances from the purchaser. It has also been said that the amount due was not ascertained or tendered to Gilman. But the true answer is, that it was his duty at the time of the proffered tender to state the full amount, which he, or those under whom he claimed, were entitled to; and, by waiving the tender, he waived any objection on this head.

§ 56. *Title acquired by tenant pendente lite. Relief by injunction.*

There is another consideration which bears upon the tax title. It was purchased pending the suit at law; and, by the local decisions, it has been established that such a title so obtained cannot constitute any defense to the action at law. Thus, in *Andrews v. Hooper*, 13 Mass., 472, it was held that a tenant in a real action cannot give in evidence a title, obtained by him since the commencement of the suit, by way of defense. The ground of the decision was, that a different course would operate unequally and unjustly by enabling the tenant to fortify a defective title, and avoid the payment of the costs of the action. I confess, as a new point, I should feel some difficulty in assenting to the doctrine upon such a ground; for it can hardly be said, that if the demandant has not a perfect title, there is either injustice or inequality in not

allowing him to recover against a tenant, who at the very time of the trial is in possession under a higher or a better title. If the tenant has obtained a paramount title to the demandant, subsisting in a third person, what reason is there why he should be ousted of his possession by a demandant under an inferior and defective title? If the title is derived from and under the demandant himself, why should he be permitted to defeat the effect of that title? There may be good reason for saying that an outstanding title in a third person, with whom the tenant has no privity, shall not be interposed to defeat a present, although inferior title of the demandant. But, when there is a privity of title established in the tenant, it is not easy to see why the tenant may not avail himself of it. It is by no means true, as a general proposition, that a defense, arising *pendente lite*, may not even at the common law be made effectual as a defense to the suit. Pleas *puis darrein continuance* are of this sort. It was said by Lord Ellenborough in *Le Bret v. Papillon*, 4 East, 502, that no matter of defense, arising after action brought, can be properly pleaded in bar of the action generally. That is true; and yet it is equally true that it may be pleaded against the further maintenance of the suit, as was established by the judgment of his lordship in that very case.

Besides, what is the effect of the doctrine? Either a recovery in the action at law will operate as a bar to any future action, brought by the tenant against the demandant, founded upon the title so acquired *pendente lite*, which would certainly be most unjust and inconvenient, and has never, to my knowledge, been established as sound law; or, it will only turn the tenant round to a new writ of entry, to recover the premises from the demandant, after he shall have acquired possession under a writ of *habere facias possessionem*; a circuitry of action which certainly has nothing to recommend it, since it would only multiply costs. There is this additional consideration, which has no small weight, that, if the paramount or derivative title had its origin and existence before the suit was brought, it shows that the demandant relies on an originally defective title; and that the real difficulty in the case is, not that the outstanding title ought not to be a bar, but that the tenant, until he has acquired a privity thereunto, is prohibited by technical principles from availing himself of it. There certainly are cases in which a mere disseizor may avail himself of the defective title of the demandant as a defense, although he may not connect himself with it. The case of *Wellington v. Gale*, 13 Mass., 483, 489, sufficiently establishes that.

However, I do not mean to do more than to express my doubts, if the question were new. Considering it as a settled doctrine of local law, it is very clear that relief ought to be granted by way of injunction in equity, where the tenant has, *pendente lite*, acquired a paramount title to that of the demandant, if he cannot avail himself of it as a defense to the original suit at law; or, if he cannot after the recovery maintain an action to regain the possession. In my opinion, the recovery would, under such circumstances, operate no bar to a future action at law by the tenant; and, therefore, no relief in equity would seem to be required, founded upon the title acquired *pendente lite*. But as the tax title in the present case, for the reasons already stated, never became absolute, the bill under any aspect of the case does not seem maintainable, so far as respects that title.

§ 57. *Bona fide purchaser entitled to compensation for improvements, when.*

The case, then, resolves itself into the mere consideration whether the plaintiff is entitled to any allowance for the improvements made by him, or

by those under whom he claims title, so far as those improvements have been permanently beneficial to the defendant, and have given an enhanced value to the estate. There is no doubt that the plaintiff in the present bill is a *bona fide* purchaser for a valuable consideration, without notice of any defect in his title. Indeed, he seems to have had every reason to believe that it was a valid and perfect title; and this, also, seems to have been the predicament of all the persons who came in under the title by the administration sale; for it is not pretended that any one of them had actual notice that no bond was given to the judge of probate previous to the sale. And, indeed, all of them, including the purchaser at the sale, acted upon the entire confidence that all the prerequisites necessary to give validity to the sale, had been strictly complied with. The original purchaser was, if at all, affected only by the constructive notice which put him upon inquiry as to the facts necessary to perfect the right to sell. The statute of Maine of 27th of June, 1829, ch. 47, commonly called the Betterment Act, will not aid the plaintiff, for that statute applies only to cases where the tenant has been in actual possession of the lands for six years or more before the action brought, by virtue of a possession and improvement, which term had not elapsed when this writ of entry was brought. So that, in fact, the whole reliance of the plaintiff must be upon the aid of a court of equity to decree an allowance to him for the improvements, made by him, and those under whom he claims, upon its own independent principles of general justice.

Two views are presented for consideration. First, that the defendant has lain by, and allowed the improvements to be made without giving any notice to the plaintiff, or to those under whom he claims, of any defect in their title, which of itself constitutes a just ground of relief. Secondly, that if the defendant is not, by reason of his minority and residence in another state at the time, affected by this equity, as a case of constructive fraud or concealment of title, yet, that as the improvements were made *bona fide*, and without notice of any defect of title, and have permanently enhanced the value of the lands, to the extent of such enhanced value the defendant is bound in conscience to make compensation to the plaintiff *ex æquo et bono*.

In regard to the first point, it has been well remarked by Sir William Grant (then master of the rolls) in *Pilling v. Armitage*, 12 Ves., 84, 85, "That there are different positions in the books with regard to the sort of equity, arising from laying out money upon another's estate through inadvertence or mistake; that person, seeing that, and not interfering to put the party upon his guard. The case with reference to that proposition, as ordinarily stated, is that of building upon another man's ground. That is a case, which supposes a total absence of title on the one side, implying, therefore, that the act must be done of necessity under the influence of mistake; and undoubtedly it may be expected that the party should advertise the other, that he is acting under a mistake." The learned judge is clearly right in this view of the doctrine; and the duty of compensation in such cases, at least, to the extent of the permanent increase of value, is founded upon the constructive fraud, or gross negligence, or delusive confidence held out by the owner; for, under such circumstances, the maxim applies: *Qui tacet, consentire videtur; qui potest et debet vetare, jubet, si non vetat*. See 1 Story's Equity Juris., §§ 388, 389, 390, 391; *Green v. Biddle*, 8 Wheat., 1, 77, 78 (Constr., §§ 191-206); 1 Madd., Ch. Pr., 209, 210. Whether this doctrine is applicable to minors, who stand by and make no objection, and disclose no adverse title, having a reasonable dis-

cretion from their age to understand, and to act upon the subject; and whether, if under guardianship, the guardian would be bound to disclose the title of his ward; and how far the latter would be bound by the silence or negligence of his guardian; and whether there is any just distinction between minors living within the state, and minors living without the state; these are questions of no inconsiderable delicacy and importance, upon which I should not incline to pass any absolute opinion in the present state of the cause, reserving them for further consideration, when all the facts shall appear upon the report of the master. There are certainly cases in which infants themselves will be held responsible in courts of equity for their fraudulent concealments and misrepresentations, whereby other innocent persons are injured. See 1 Story on Equity Juris., § 385; 1 Fonbl. Eq. Juris., B. I., ch. 3, § 4; *Savage v. Foster*, 9 Brod., 35.

The other question, as to the right of the purchaser, *bona fide* and for a valuable consideration, to compensation for permanent improvements made upon the estate, which have greatly enhanced its value, under a title which turns out defective, he having no notice of the defect, is one, upon which, looking to the authorities, I should be inclined to pause. Upon the general principles of courts of equity, acting *ex æquo et bono*, I own that there does not seem to me any just ground to doubt that compensation, under such circumstances, ought to be allowed to the full amount of the enhanced value upon the maxim of the common law, *Nemo debet locupletari ex alterius incommodo*; or, as it is still more exactly expressed in the digest, *Jure naturæ æquum est, neminem cum alterius detrimento et injuria fieri locupletiores*. Dig., lib. 50, lit. 17, l. 206. I am aware that the doctrine has not as yet been carried to such an extent in our courts of equity. In cases where the true owner of an estate, after a recovery thereof at law, from a *bona fide* possessor for a valuable consideration without notice, seeks an account in equity, as plaintiff, against such possessor, for the rents and profits, it is the constant habit of courts of equity to allow such possessor (as defendant) to deduct therefrom the full amount of all the meliorations and improvements, which he has beneficially made upon the estate, and thus to recoup them from the rents and profits. 2 Story on Eq. Juris., §§ 799*a*, 799*b*, 1237, 1238, 1239; *Green v. Biddle*, 8 Wheat., 77, 78, 79, 80, 81 (Const., §§ 191–206). So, if the true owner of an estate holds only an equitable title thereto, and seeks the aid of a court of equity to enforce that title, the court will administer that aid only upon the terms of making compensation to such *bona fide* possessor for the amount of his meliorations and improvements of the estate, beneficial to the true owner. In each of these cases the court acts upon an old and established maxim in its jurisprudence, that he who seeks equity must do equity. See, also, 2 Story's Eq. Juris., § 799*b*, and note; *id.*, §§ 1237, 1238. But it has been supposed that courts of equity do not and ought not to go further, and to grant active relief in favor of such a *bona fide* possessor, making permanent meliorations and improvements by sustaining a bill brought by him therefor, against the true owner, after he has recovered the premises at law. I find that Mr. Chancellor Walworth, in *Putnam v. Ritchie*, 6 Paige, 390, 403, 404, 405, entertained this opinion, admitting at the same time that he could find no case in England or America where the point had been expressed or decided either way. Now, if there be no authority against the doctrine, I confess that I should be most reluctant to be the first judge to lead to such a decision. It appears to me, speaking with all deference to other opinions, that the denial of all compen-

sation to such a *bona fide* purchaser in such a case, where he has manifestly added to the permanent value of an estate by his meliorations and improvements, without the slightest suspicion of any infirmity in his own title, is contrary to the first principles of equity. Take the case of a vacant lot in a city where a *bona fide* purchaser builds a house thereon, enhancing the value of the estate to ten times the original value of the land, under a title apparently perfect and complete, is it reasonable or just that in such a case the true owner should recover and possess the whole, without any compensation whatever to the *bona fide* purchaser? To me it seems manifestly unjust and inequitable thus to appropriate to one man the property and money of another who is in no default. The argument, I am aware, is, that the moment the house is built it belongs to the owner of the land by mere operation of law, and that he may certainly possess and enjoy his own. But this is merely stating the technical rule of law, by which the true owner seeks to hold what, in a just sense, he never had the slightest title to; that is, the house. It is not answering the objection, but merely and dryly stating that the law so holds. But, then, admitting this to be so, does it not furnish a strong ground why equity should interpose and grant relief?

I have ventured to suggest that the claim of the *bona fide* purchaser, under such circumstances, is founded in equity. I think it founded in the highest equity; and in this view of the matter I am supported by the positive dictates of the Roman law. The passage already cited shows it to be founded in the clearest natural equity. *Jure naturæ equum est*. And the Roman law treats the claim of the true owner, without making any compensation under such circumstances, as a case of fraud or ill faith. *Certe* (say the Institutes) *illud constat; si in possessione constituto ædificatore, soli Dominus petat domum suam esse, ne solvat pretium materiæ et mercedes fabrorum; posse eum per exceptionem doli mali repelli; utique si bonæ fidei possessor, qui ædificavit. Nam scienti, alienum solum esse, potest objici culpa, quod ædificaverit temere in eo solo, quod intelligebat alienum esse*. Just., Inst., lib. 2, tit. 1, §§ 30, 32; 2 Story on Eq. Juris., § 799b; Vinn., Com. ad Inst., lib. 2, 1, § 30, n. 3, 4, pp. 194, 195. It is a grave mistake sometimes made that the Roman law merely confined its equity or remedial justice on this subject to a mere reduction from the amount of the rents and profits of the land. See *Green v. Biddle*, 8 Wheat., 79, 80 (CONST., §§ 191–206). The general doctrine is fully expounded and supported in the digest, where it is applied, not to all expenditures upon the estate, but to such expenditures only as have enhanced the value of the estate (*quatenus pretiosior res facta est*), (Dig., lib. 20, tit. 1, l. 29, § 2; Dig., lib. 6, tit. 1, l. 65; id., l. 38; Pothier, Pand., lib. 6, tit. 1, n. 43, n. 44, n. 45, n. 46, n. 48), and beyond what he has been reimbursed by the rents and profits. Dig., lib. 6, tit. 1, l. 48. The like principle has been adopted into the law of the modern nations, which have derived their jurisprudence from the Roman law; and it is especially recognized in France, and enforced by Pothier, with his accustomed strong sense of equity, and general justice, and urgent reasoning. Pothier, *De la Propriété*, n. 343 to n. 353; Code Civil of France, arts. 552, 555. Indeed, some jurists, and among them Cujacius, insist, contrary to the Roman law, that even a *mala fide* possessor ought to have an allowance of all expenses, which have enhanced the value of the estate, so far as the increased value exists. Pothier, *De la Propriété*, n. 350; Vinn. ad Inst., lib. 2, tit. 1, l. 30, n. 4, p. 195.

The law of Scotland has allowed the like recompense to *bona fide* possess-

ors, making valuable and permanent improvements; and some of the jurists of that country have extended the benefit to *mala fide* possessors to a limited extent. Bell, Comm. on Law of Scotland, p. 139, § 538; Ersk., Inst., b. 3, tit. 1, § 11; 1 Stair, Inst., b. 1, tit. 8, § 6. The law of Spain affords the like protection and recompense to *bona fide* possessors, as founded in natural justice and equity. 1 Mor. & Carl. Partid., b. 3, tit. 28, l. 41, pp. 357, 358; Asa & Manuel, Inst. of Laws of Spain, 102. Grotius, Puffendorf, and Rutherford, all affirm the same doctrine, as founded in the truest principles *ex æquo et bono*. Grotius, b. 2, ch. 10, §§ 1, 2, 3; Puffend., Law of Nat. & Nat., b. 4, ch. 7, § 61; Rutherf., Inst., b. 1, ch. 9, § 4, p. 7.

There is still another broad principle of the Roman law, which is applicable to the present case. It is, that where a *bona fide* possessor or purchaser of real estate pays money to discharge any existing incumbrance or charge upon the estate, having no notice of any infirmity in his title, he is entitled to be repaid the amount of such payment by the true owner, seeking to recover the estate from him. Dig., lib. 6, tit. 1, l. 65; Pothier, Pand., lib. 6, tit. 1, n. 43; Pothier, De la Propriété, n. 343. Now, in the present case, it cannot be overlooked that the lands of the testator now in controversy, were sold for the payment of his just debts, under the authority of law, although the authority was not regularly executed by the administrator in his mode of sale, by a non-compliance with one of the prerequisites. It was not, therefore, in a just sense, a tortious sale; and the proceeds thereof, paid by the purchaser, have gone to discharge the debts of the testator, and so far the lands in the hands of the defendant (Boyd) have been relieved from a charge, to which they were liable by law. So that he is now enjoying the lands free from a charge which in conscience and equity he, and he only, and not the purchaser, ought to bear. To the extent of the charge, from which he has been thus relieved by the purchaser, it seems to me that the plaintiff, claiming under the purchaser, is entitled to reimbursement, in order to avoid a circuitry of action, to get back the money from the administrator, and thus subject the lands to a new sale, or, at least, in his favor, in equity to the old charge. I confess myself to be unwilling to resort to such a circuitry, in order to do justice, where upon the principles of equity the merits of the case can be reached by affecting the lands directly with a charge, to which they are *ex æquo et bono*, in the hands of the present defendant, clearly liable.

These considerations have been suggested because they greatly weigh in my own mind, after repeated deliberations on the subject. They, however, will remain open for consideration upon the report of the master, and do not positively require to be decided until all the equities between the parties are brought by his report fully before the court. At present it is ordered to be referred to the master to take an account of the enhanced value of the premises by the meliorations and improvements of the plaintiff, and those under whom he claims, after deducting all the rents and profits received by the plaintiff and those under whom he claims; and all other matters will be reserved for the consideration of the court upon the coming in of his report.

FRENCH v. HAY.

(22 Wallace, 231-238. 1874.)

APPEAL from the Supreme Court of the District of Columbia.

STATEMENT OF FACTS.—In 1859 French and Lenox owned a railroad from Alexandria to Washington, and owed quite a number of debts. Hay in that

year lent them \$5,000, and in the winter of 1859-60, French bought in \$31,000 of the unsecured debts of the company, which, however, owed \$60,000, secured by mortgage on the property of the railroad company. These debts were reduced to judgments, which were assigned to Hay. In August, 1860, Hay executed an agreement to transfer, and a power of attorney to French authorizing him to dispose, at his discretion, of all the judgments, notes, etc., which he, Hay, held against the company. The agreement was to transfer to French all his judgments and other claims on the railroad company upon the payment to him (Hay) by French of \$5,000. This sum, however, was never paid. In May, 1861, French and Lenox went south, and did not return until the close of the war. In 1862 the railroad, franchise, etc., was sold under the mortgage, and Hay bought for \$12,500, and a new company was formed, of which Hay received a part of the stock, by the sale of which he satisfied the judgments he had assigned to French. In May, 1865, the sale was set aside and the old company reinstated in its possessions, and in July, 1868, this bill was filed by French, setting up the agreement to transfer as an assignment, and claiming all the money received by Hay, except the \$5,000. The bill was dismissed. Further facts appear in the opinion of the court.

§ 58. *An assignment of securities "upon payment of" a named sum is an executory contract.*

Opinion by MR. JUSTICE STRONG.

It is plain that no other equity is asserted in the bill of the complainant than such as grew out of the alleged assignment and power of attorney of August 24, 1860. There is none arising out of payments made by the complainant in the purchase of the debts and judgments. So far as it is charged by the bill, every dollar that was paid for the judgments was paid with the defendant's money, advanced by him to the complainant for the purchase. It is true the allegation is made that all the money over and above the \$5,000 advanced, that was paid in the purchase of the debts, was furnished by the complainant out of his own resources, but it is not averred that any more than \$5,000 in all were paid. It is, therefore, the alleged assignment of August 24, 1860, alone which is the basis of the complainant's equity.

§ 59. *In equity time is not of the essence of a contract. When that rule is inapplicable.*

That instrument, however, called an assignment, was, at most, but an executory agreement to assign. Construed with the power of attorney made at the same time, it admits of no other construction. The instrument was signed by Hay alone. French, the complainant, did not sign it, and it is not averred that he promised to pay the \$5,000. Hay undertook only that French should hold the judgments and claims "upon his payment" of the stipulated consideration with interest from the date. And the power of attorney given by Hay to French at the same time was an authority to deal with the securities in the name of Hay, and for Hay. The power was worse than useless, if the intention of the parties was that a present ownership of the judgment should be vested in French, without the payment of the agreed price. The utmost effect, therefore, that can be given to these two instruments of August 24, 1860, upon which alone the complainant must rely, is that they amounted to an offer that if French would pay the \$5,000 he should be the owner of the judgments. The transmission of the title and the payment of the price were intended to be contemporaneous. If this is so, how long was the defendant under obligation to hold the offer extended? No time for its acceptance was

mentioned. The offer was made in August, 1860. The complainant never accepted it. No acceptance is averred in his bill. He never paid or tendered the \$5,000; he never assumed to pay it. He asserted no claim to the judgments until 1868, when he filed this bill. Now, while it is true that in equity time is generally not considered as of the essence of a contract, it is only true when compensation can be made for its lapse, and the rule is inapplicable in case of an offer that requires acceptance to make a contract. In May, 1861, the complainant, having given no indication of acceptance, and having so far as it appears asserted no claim to the judgments, abandoned his home, and did not return until 1865. Not until three years after his return did he commence this action. Was the defendant under obligation to remain inactive and make no efforts to obtain the debts due him, uncertain whether French would ever elect to pay the \$5,000 and take the judgments? We think not. Nothing in the instruments of August, 1860, imposed such an obligation. To say the least, therefore, it may well be doubted whether the complainant has any right under those instruments that a court of equity will enforce.

And were it conceded that, by the instrument through which he claims, French became the owner of the judgment, as between himself and Hay, we do not perceive how the concession could aid him in this case. If, as the bill avers, Hay collected the judgments and now holds the money for the use of the complainant, there is a complete remedy at law. This is not a bill for discovery, and the aid of a court of equity is not needed.

But the judgments never were collected. It is not pretended that the judgment debtors ever paid anything, or that French or Lenox, who were sureties for the payment of the debts, ever paid anything. In 1862 the railroad and property of the railroad company was sold under a deed of trust which the company had given prior to any of the judgments, and Hay became the purchaser. He paid none of the purchase-money with the judgments he held. He could not have paid with those judgments, for his bid was less than the sum due under the deed of trust, and that sum was prior in right to any of the judgments. Nor is there any attempt to prove that any part of the purchase-money was paid by the judgments. The evidence shows that, after Hay purchased, a new company was formed; that a portion of its stock was allotted to him; that he subsequently sold the stock so allotted for a sum greater in amount than the aggregate of the judgments he held against the old company, and that, after the formation of the new company, he caused satisfaction of the judgments to be entered of record. In no other manner than this is it now pretended that the judgments have been collected. The presumption of collection that might arise from the entries of satisfaction, if unexplained, is rebutted by the proof that all the defendant received was the proceeds of sale of his stock in the new company, by no possibility the fruit of the judgments. And the complainant cannot claim an interest in that stock or its proceeds without affirming the trustees' sale of the railroad, and the subsequent formation of the new company, followed by the issue of the stock. Such a sale, if valid, would have destroyed the old company, three-quarters of the stock of which the complainant owned. But the sale has been judicially determined to have been invalid, the old company has recovered the property, and the new has been consequently adjudged never to have had a legal existence. The consequence of this is that the complainant now holds his full interest in the old company, unimpaired by any sale. After this it is impossible to see how he can assert that any part of the new stock or its pro-

ceeds belonged to him; and if it did not, nothing has been collected for him, even if he can be considered the owner of the judgments. Nor has he been injured by the entries of satisfaction, for if he became the owner of the judgments by force of the instruments of August 24, 1860, as he avers, he is the owner still, notwithstanding the entries of satisfaction, for no one but the owner could cause valid acknowledgments of satisfaction to be made. For these reasons the decree must be affirmed.

GAY v. PARPART.

(16 Otto, 679-699. 1882.)

APPEAL from U. S. Circuit Court, Northern District of Illinois.

Opinion by MR. JUSTICE MILLER.

STATEMENT OF FACTS.—The issues raised by the pleadings in this suit are so well stated in the opinion of the district judge, sitting in the circuit court where the decree was rendered, that we cannot do better than to state them in his language.

“By the original bill the complainant, Elizabeth Flaglor, charged that she was the sole surviving child of Charles D. Flaglor, deceased; that one Augustus Garrett died in the city of Chicago some time in the year 1848, seized of lot 25, in block 9, in the Fort Dearborn addition to Chicago, together with a large amount of other real estate, leaving Eliza Garrett, his widow, and no children nor descendants of a child or children, and leaving a will, which was duly probated in Cook county, whereof said widow, Eliza Garrett, James Crow and Thomas G. Crow were duly appointed executors, in which will said Garrett duly disposed of and devised his estate, and among other devisees in said will was the said Charles D. Flaglor; that in the year 1851 a bill for partition was filed in the circuit court of Cook county by said Eliza Garrett, James Crow and Thomas G. Crow against Letitia Flaglor, Frederick T. Flaglor and Charles D. Flaglor, and Lucy Louisa Flaglor and Elizabeth Flaglor, children of said Charles D., all of whom it was alleged were interested in said will; that upon the answers of the defendants to said bill, proofs taken, and the report of commissions, a decree was entered that partition be made of the real estate of which said Augustus Garrett died seized, among the persons to whom the same was devised by said will, and said lot 25, in block 9, was allotted and set apart to said Letitia Flaglor during her life, remainder over to said Charles D. Flaglor for his life, remainder in fee to his children him surviving, and on failure of children him surviving the fee to said James Crow and Thomas G. Crow; that the parties entered into possession of the several parcels of real estate as set apart to them, and executed and delivered to each other interchangeably deeds of conveyance so as to invest each of the parties to said bill with the title in severalty to the portions of said estate so set apart and allotted to them, and also a certain written contract in regard to the interests of the children of said Charles D. in the property set off to said Letitia and Charles D.

“The bill then alleged the death of said Letitia and Charles D. Flaglor, and that complainant Elizabeth was the sole surviving child of said Charles D., and entitled as such to an estate in fee to the lands so set off and allotted by said decree to said Letitia and Charles D., and prayed that said James and Thomas G. Crow, as surviving executors of the will of said Garrett, be required to execute proper deeds of conveyance of the fee to said lot 25 to said complain-

ant Elizabeth, and that said Jessell and the other tenants in possession account for and pay over to complainant the rents, issues and profits of said lot by them received after the death of said Charles.

“The bill also charged that said Charles D. Flaglor, on or about the 19th day of August, 1857, made and executed to Frederick T. Flaglor, his father, a certain mortgage deed of said lot 25, to secure the payment of the sum of \$20,000, on the 1st day of November, 1867, together with interest thereon at the rate of six per cent. per annum, payable annually, and that said defendant Catharine Reid was the holder of said mortgage.

“Soon after filing the original bill the said Elizabeth Flaglor, complainant, died, leaving a will whereby she devised all her estate to her mother, Lucy C. Flaglor, and by order of court said Lucy C., who has since intermarried with one Gay, was made complainant, and the suit has since proceeded in her name. James and Thomas G. Crow were served with process, but made no defense. Jessell appeared and answered. Catharine Reid, being a non-resident, was brought into court by publication, under the statute of Illinois, and such steps were taken that the case on the original bill was brought to hearing before the superior court of Cook county, at the August term, 1872, and a decree made directing said James and Thomas G. Crow, as executors, to convey to complainant the title in them, as surviving executors and trustees of Augustus Garrett, and that Jessell, who was a tenant of the premises under an unexpired lease from said Charles D. Flaglor, surrendered possession to complainant, and that the defendant Catharine Reid release the said mortgage made by said Charles D. to Frederick T. Flaglor, and that said mortgage be held void as against the estate of said complainant in said premises. In October, 1873, said Catharine Reid, by the name of Catharine Parpart (she having intermarried with Lewis Parpart), appeared in said cause, and on her motion said decree was opened, and she was let in to defend in said cause, whereupon she filed her answer.

“And afterwards, on the 1st day of February, 1875, she filed her cross-bill alleging that said Charles D. Flaglor made and delivered said mortgage in fee to his father, Frederick T. Flaglor, and that said Frederick T., on the 1st day of August, 1863, duly assigned said mortgage and the indebtedness thereby secured, to her, the said Catharine, and that the same was then held and owned by her, and that the whole of the principal sum of \$20,000, together with interest from the 2d day of June, 1862, remained unpaid. To this cross-bill Arthur W. Windett, the Connecticut Mutual Life Insurance Company and others were made defendants and a foreclosure of said mortgage was prayed. To this cross-bill answers were filed by Mr. Windett and the Connecticut Mutual Life Insurance Company, alleging, in substance, that, by the will of Augustus Garrett, said Charles D. Flaglor was only devised a life estate after the death of his mother, Letitia Flaglor, in the lands devised to him by said will, and that it was agreed between said Eliza Garrett, widow, and James Crow, Thomas G. Crow and said Letitia Flaglor, Frederick T. Flaglor, her husband, and said Charles D., that a partition should be made among them of the property devised by said will, and that by such partition only a remainder for life, after the death of said Letitia, should be vested in said Charles D., and that on his death the fee of the property so allotted to said Letitia and Charles should go to the children of said Charles D.; that in pursuance of said agreement, the bill for partition was filed in the Cook county circuit court, and that said Charles by his answer appeared and con-

sented to a decree, and that the decree in said partition cause was made in pursuance of such consent, and that said Charles was bound thereby and precluded from asserting or claiming any other than a life estate in said lands, and that said Frederick T. Flaglor and said Catharine Reid were bound by such decree. That said mortgage was given by said Charles to said Frederick without consideration, and that said Catharine was not a *bona fide* assignee for good or valuable consideration, and that said mortgage only conveyed the life estate of said Charles D. in the mortgaged premises.

"Before the answer of the insurance company was filed the cause was, on petition of said company, removed to this court, and on the 5th of November, 1877, the said Catharine, by leave of this court, filed her amended cross-bill, alleging that all the title and interest of Mr. Windett and the insurance company and the other defendants were acquired after and were subject and subordinate to the said mortgage held by her, and further alleged that said Charles was, by the will of said Garrett, given an estate in fee after the death of his mother Letitia; that no agreement was ever made by Charles to accept an estate for life, and that the fee should go to his children; that said Charles never consented to said decree in said partition case awarding him only a life estate in the property set off to him; that the deeds made interchangeably between the devisees of Garrett and the contract between said parties made at the same time were not made in pursuance of or for the purpose of satisfying said decree; that said Charles had never ratified said decree nor accepted a life estate in lieu of a fee in the lands set off to him, and that said decree was fraudulent and void as against said Charles.

"The answers of Mr. Windett and the insurance company to the amended cross-bill denied all frauds or mistake in the decree in the partition suit, and insisted that Charles and the cross-complainant were bound thereby, and also insisted that said decree was in accordance with and in furtherance of the interest of the will of said Garrett, so far as it related to the estate of said Charles in the lands allotted to him."

On a final hearing upon the pleadings and proofs, the circuit court rendered a decree in favor of Catharine Parpart, establishing the validity of the mortgage set out in the cross-bill and its assignment to her, adjudging to her the amount of the bond, with interest, declaring it to be a lien on the property in controversy paramount to that of all other parties to the suit, and providing that unless the amount was paid the property should be sold to satisfy the debt.

From this decree Arthur W. Windett, Lucy Flaglor Gay, and the Connecticut Mutual Life Insurance Company took an appeal, which brings it before us for review. The case, as it presents itself to us, concerns the interest of no other parties but these, and is limited to the proceeding growing out of the cross-bill.

The first question raised by these issues is the validity of the mortgage made by Charles D. Flaglor to Frederick T. Flaglor, his father, and of the assignment of that mortgage to Mrs. Parpart, then Catharine Reid. If this be decided in her favor, a second question is, whether at the date of the mortgage the estate of Charles Flaglor was a fee simple in the property mortgaged or only an estate for life.

As the least difficult of these questions, and the one which in the natural order of discussion should be first disposed of, we will consider the validity of the mortgage and its assignment.

There is but little question raised that as between Charles and Frederick Flaglor the transaction was an unexceptionable one. At that time, whether the estate was a fee simple or a life estate, certain transactions took place between them by which Charles became indebted to his father in the sum of \$20,000. This sum the father seemed disposed to permit to remain in the hands of his son on the security of a mortgage on this property. He accordingly, in the year 1857, took from Charles his bond for that sum, payable ten years after date, with annual interest at the rate of six per cent., secured by this mortgage. The interest was promptly paid, notwithstanding the death of Charles in 1858, up to the death of his father in 1865. There is no reason, therefore, to doubt the validity of the mortgage as between the parties thereto.

The assignment of the bond and mortgage by Frederick T. Flaglor to the present appellee is assailed on several grounds, which resolve themselves into a denial of the execution of the assignment and the immorality of the consideration on which it was made.

§ 60. *What is prima facie evidence of the execution of a deed.*

The assignment itself is on a separate piece of paper from the mortgage and the bond, and the signature is made by the cross-mark of Flaglor, instead of being in his own handwriting. As he was a man of some education, and it is shown that about that time he was in the habit of writing letters and signing his own name to them, that circumstance is deemed suspicious.

The relations at that time existing between him and Catharine Reid, which will be hereafter considered, are supposed to increase the force of these suspicions; also the fact that the bond and mortgage were permitted to remain in his possession. In answer to this; it is to be considered that he was a very old man, easily shaken by illness, and it was probably during some such attack, when he might not have been able to write, that he determined to make the assignment which his sense of justice dictated. Original specimens of his signature, written within a short time of this transaction and produced to this court, show a shaky and difficult handwriting, and lead to the conclusion that if he was ill it would be extremely natural to have somebody write his name, which he authenticated by making a cross under it. Its execution is attested as sealed and delivered in his presence by W. G. McDonald as a witness, and the original paper produced before us shows that the name of Flaglor is in the same handwriting as that in the body of the instrument, which is apparently that of the witness.

There is another consideration, however, of very great weight in favor of the validity of the assignment. Its execution was proved shortly after the date it bears, before a justice of the peace, in accordance with the laws of the state of New York, where Flaglor then resided. The certificate of this fact, with that of the clerk of the proper court, was such that by the laws of Illinois the assignment was admitted to record in the county of Cook of that state, and is *prima facie* evidence of its execution by Flaglor. When this assignment and certificate were produced in evidence, the *onus* of proving that it was not the act and deed of Flaglor devolved on the appellants. The witness was living at the time that the deposition of the appellee was taken in New York to prove the execution of the paper. He was competent to prove what was done in regard to its execution, and the fact that the appellants, with a knowledge of the case made by the positive testimony of Catharine Reid and the certificate, did not call the man whose name was affixed to the paper as a

subscribing witness, leaves but little doubt that it could not be thus successfully impeached.

§ 61. *When a conveyance to a woman with whom the grantor had illicit relations is not invalid.*

Reverting to the question of the consideration moving Flaglor to make this assignment, the facts seem to be that Catharine Reid had been for several years a domestic in his family while he was married to and living with a second wife, and she left his service while he and his wife were yet living together at Newburg, in the state of New York. Not long after this he separated from his wife and went to live in St. John, New Brunswick. After being there some time he wrote to Catharine Reid that he was not in good health, and needed somebody to take care of him, and requesting her to come and do so. With this request she complied, and, according to her testimony, he, after she arrived there, informed her that he had a divorce from his wife, and requested her to marry him. The certificate of the clergyman of St. John, with both her signature and his to the fact, leaves no doubt that they were married in that place on the 23d of January, 1862.

The fruits of this marriage were two children, both girls. Flaglor and Catharine returned to Newburg a year or so after this, and there she ascertained that he had not been divorced from his wife, and of course understood at once that her children were illegitimate, and that their father was liable to a prosecution for bigamy. He at that time, as we have said, was a very old man, and it does not appear that he and this family of his had any other means of support than the interest accruing on this mortgage.

Notwithstanding the assault made upon Catharine Reid in reference to her chastity, and the probability of illicit intercourse with Flaglor previously to this marriage, and the fact much relied on that she had an undue influence over him at the time the assignment was made, we cannot doubt that in executing and delivering it to her he did a meritorious act, honorable and just, as the only atonement he could make for the deception he had practiced upon her, and as placing in her hands the means of supporting the children of whom he was the father. It was not the case of a contract for future illicit intercourse of the class which the authorities hold to be against public policy, but an appropriate means of providing for the support of a woman whom he had married while he had a wife living, and of the children resulting from that marriage.

We are satisfied from these considerations that the mortgage in question was a valid instrument in the hands of the appellee, Catharine Parpart, and a lien upon such interest in the property which it conveyed as Charles D. Flaglor had at the time he made it. As we have already said, the question on this branch of the subject is whether Charles D. Flaglor at the time he made the mortgage owned a fee simple in the property conveyed by it or a life estate. Such interest as he had came to him primarily by the will of Augustus Garrett.

The first six sections of this will mention the beneficiaries of his bounty as regards the *income* of his estate until the death of his wife Eliza, Mary Banks and Letitia Flaglor, and throws very little light upon the question we are considering. The seventh section, which provides for the final disposition of his property after their decease, contains the language to be construed. It reads as follows: "Upon the death of my wife Eliza, and of Mary Banks and

Letitia Flaglor, I direct that the whole of my estate shall then be equally divided between Charles D. Flaglor, son of said Letitia, if he or his legitimate children survive said Letitia (in case he be dead, his legitimate children shall take as their father would if alive), and the said James Crow, and the said Thomas G. Crow, each taking one-third of the whole. But if Charles D. Flaglor be at that time dead, leaving no legitimate children, the whole of my said estate shall be divided between the said James Crow and Thomas G. Crow. In all cases the heirs and devisees of the said James Crow and the said Thomas G. Crow, respectively, shall succeed to the right and portion which their ancestor and decedent would have received had he been alive, and in all cases the heirs and devisees of the said James and Thomas, respectively, and the children (legitimate) of said Charles D. Flaglor, shall only succeed to and take the share or portion of income and of estate in general which their ancestor or decedent would have had, taking *per stirpes* and not *per capita*."

The precise question here raised has been repeatedly before the courts of Illinois, as has the whole subject of Charles D. Flaglor's interest under this will, and we think it may be affirmed, that by several well-considered opinions of the supreme court of that state, a construction has been established which gives to him, on the death of his mother Letitia, a fee-simple estate under that will. Indeed, we do not understand counsel here to seriously controvert that such is a true construction of that instrument, and as this accords with our own, we adopt it without further discussion.

On the death of Garrett, his will was admitted to probate on the 28th of February, 1849, and his widow, Eliza Garrett, having renounced the benefits of its provisions, asserted her right to dower, whereby she became entitled to one-half of the estate. In 1851, long before her death or that of any of these devisees, the parties interested determined to have a partition by a proceeding in chancery in the superior court of Cook county. In that proceeding the property, which is now in controversy, was allotted to the share which went to Letitia Flaglor during her life, and after her death to Charles D. Flaglor.

Under the construction of the will which we have just adopted, Charles D. Flaglor was, at the time of making the mortgage to his father, the owner in fee of the property conveyed by it, and there can be no doubt that the mortgage constituted a lien paramount to everything else in the way of a claim or title to the property. The appellants here rely upon the decree of partition to which we have alluded, and on certain deeds and agreements alleged to have been made by Charles D. Flaglor in connection therewith, as establishing and limiting his interest in this property to a life estate, with remainder in fee to his children on his death, and whether this contention be well founded or not, presents the main controversy in the case. That decree of partition, dividing the estate into three parts, does unquestionably declare "that the real estate by said commissioners set off and allotted to Letitia Flaglor, Charles D. Flaglor, and his children, if he die leaving any child or children, be and the same is hereby set off and allotted and the income thereof to the said Letitia Flaglor during her life, and the said Charles Flaglor, if he survive said Letitia, during his life, and the child or children of said Charles D., if he die leaving any child or children, in fee."

§ 62. *Difference between a judgment and partition at common law and a partition by decree in chancery.*

The first thing which suggests itself as proper to be considered in the solution of this question is to ascertain what was the law of the state of Illinois

on the subject of partition at the date of that decree. Looking at the statutes of the state as we find them in the revision of 1880, with reference to the sources from which this revision is taken, we find that they made provision distinctly for two modes of effecting a partition, one of which, as declared by the statutes of 1845, was by bill in chancery as theretofore, and the other by petition to the circuit court of the proper county. Very little is said on the subject of partition in chancery, as the provisions of the statutes are more specifically directed to the forms of proceeding by petition in the proper court.

The proceeding which we are now to consider declares itself on its face to be in chancery, and the supreme court of the state, in reference to this very decree, decides it to be so. *Wadhams v. Gay*, 73 Ill., 415. We take it for granted that the statute of Illinois, in making this provision, and in leaving the parties to proceed by bill in chancery, intended that such a proceeding should have the force and effect of a partition in the high court of chancery of England, and in the main conform to the established chancery practice. That system does not deal with or decide questions of controverted title. Its purpose is to make division among the parties before the court, of real estate in which they had interests or estates that were not in controversy as among themselves.

It is another principle of the chancery jurisdiction in partition that a decree itself does not transfer or convey title even after the allotment of the respective shares of each of the parties to the proceeding, but that the legal title remains as it was before.

In this respect a decree is unlike the writ of partition at the common law, which in such cases operates on the title only by way of estoppel. In chancery, however, this difficulty is remedied by a decree that the parties shall make the necessary conveyances to each other, and they may be compelled to do so by attachment, imprisonment, and other powers of the court over them in person.

In many of the states of the Union, where the equity powers of the courts have been aided by statutes to get rid of the difficulty of compelling parties in person to execute conveyances, the court is authorized to appoint a commissioner to execute the conveyances in the names of the parties. In other cases the statute declares that such a decree itself shall operate as a conveyance of the title.

At the time that the decree was rendered in the superior court of Cook county, which we are considering, we are not aware that any statute existed which gave such effect to the decree of the chancery court in partition. We find by the Revised Statutes to which we have alluded, section 29, on partition, that in the year 1861, ten years after this decree was passed, it was enacted that in suits for the partition of real estate, whether by bill in chancery or by petition, the court may investigate the question of conflicting or controverted titles, and remove clouds on the title of any of the premises sought to be partitioned, and invest titles by their decrees in the parties to whom the premises are allotted, without the forms of conveyance of "infants, unknown heirs, and other parties to the suit." Other powers are also conferred on the courts in such cases.

In the case of *Whaley v. Dawson*, 2 Sch. & Lef., 367, Lord Redesdale says: "Partition at law and in equity are different things. The first operates by the judgment of a court of law, and delivering up possession in pursuance of it; which concludes all the parties to it. Partition in equity proceeds upon

conveyances to be executed by the parties, and if the parties be not competent to execute the conveyances, the partition cannot be effectually had."

And in his work on Pleadings in Chancery, he gives this clear statement of the nature of the equity jurisdiction in partition:

"In the case of the partition of an estate, if the titles of the parties are in any degree complicated, the difficulties which have occurred in proceeding at the common law have led to applications to courts of equity for partition, which are effected by first ascertaining the right of the several persons interested, and then issuing a commission to make the partition required, and upon the return of the commission and confirmation of that return by the court, the partition is finally completed by mutual conveyances of the allotment made to the several parties. But if the *infancy of any of the parties*, or other circumstances, prevent such mutual conveyances, the decree can only extend to make partition, give possession, and order enjoyment accordingly, until effectual conveyances can be made.

"If the defect arise from infancy, the infant must have a day to show cause against the decree after attaining twenty-one; and if no cause be shown, or if the cause shown should not be allowed, the decree may then be extended to compel mutual conveyances. If a contingent remainder, not capable of being barred or destroyed, should have been limited to a person not in being, the conveyance must be delayed until such person shall come into being, or until the contingency shall be determined, in either of which cases a supplemental bill will be necessary to carry the decree into execution." Mitford's Pleadings, Jeremy's edition, 120. See *Attorney-General v. Hamilton*, 1 Madd., 214; *Cartwright v. Pultney*, 2 Atk., 380; Story's Equity Jurisprudence, secs. 652, 653.

Mr. Adams, in his admirable condensation of the equity jurisdiction, says: "The confirmation" (of the commissioner's report) "does not, like the judgment on a writ of partition, operate on the actual ownership of the land, so as to divest the parties of their individual shares and reinvest them with corresponding estates in their respective allotments, but it requires to be perfected by conveyances; and the next step, therefore, after confirmation of the return is a decree that the plaintiffs and defendants do respectively convey to each other their respective shares, and deliver up the deeds relating thereto, and that in the mean time the allotted portions shall respectively be held in severalty." Adams, Equity, 231.

This is precisely what was done in this case, except that no day in court was given to the infant children of Charles D. Flaglor, nor any decree for conveyances by them or by the other parties to the suit. That decree, therefore, did no more than to make a division and allotment of the land, and had no effect upon the actual ownership or upon the title of the parties, and did not even contain an order for possession in severalty. We must, therefore, look to the conveyances, which were made three days after this decree was entered, for any limitation of Charles D. Flaglor's interest to an estate for life in the share allotted to him and his mother, if any such there be.

In reply to this view of the effect of the decree, it is said that it was a consent decree, and must be held binding on him by reason of that consent. It is certainly true that on the face of the proceeding, as evidenced by the bill of Eliza Garrett and the two Crows and the answer of Charles D. and Letitia Flaglor, the partition was one previously agreed on by all these parties, and the bill itself gives a schedule of the different parcels of the property to be

allotted by the decree to each of the three interests concerned in it. The bill also sets forth very explicitly the interest of Charles D. Flaglor as being a life estate, with remainder in fee to his children, two of whom were then alive. To this bill an answer on behalf of Frederick T. Flaglor, Letitia Flaglor, and Charles D. Flaglor was filed by their solicitors, Arnold and Lay. It might admit of some question whether this answer was intended to admit that the estate of Charles D. Flaglor was merely a life estate; but as the supreme court of Illinois, in the case of *Flaglor v. Crow*, has decided that it shows consent, we assume it to be so. 40 Ill., 414.

§ 63. *When a court of equity will refuse to follow a decree in partition.*

Waiving at present the question on which there is much conflicting testimony, whether Charles D. Flaglor authorized these attorneys to assent for him to that construction of his interest in the property, we remark that the decree itself was incomplete and did not purport to transfer the title between parties, nor did it order or direct that such conveyance should be made in accordance with its provisions. This decree, however, was entered of record on May 26, 1851, and deeds were made *inter partes* on May 29. These deeds do not refer to the decree in any manner, nor do the deeds of the other parties to Letitia and Charles Flaglor profess to describe their interests in the property, and the deed as found in the record from the Crows is to Charles D. Flaglor alone, and none of the deeds mention his children.

The agreement of the same date was executed by all the parties to the partition, except the children of Charles D. Flaglor, and seems to have two purposes, explanatory of the deeds of conveyance made at the same time. The first of these purposes was to declare the proportion of the debts of the estate of Augustus Garrett which should be charged upon the interest of each of the parties, and the second to make some explanation of the relations to the estate of Charles D. Flaglor and his children.

The purpose of the provision on this latter subject was to have Letitia and Charles D. Flaglor and Frederick "to save and keep harmless the shares and portions of the estate allotted to Eliza Garrett, James Crow and Thomas G. Crow from all claim or claims which any child or children of Charles D. Flaglor may have or become entitled to under the said will or decree of any court now made or hereafter to be made." There is also a previous reference in said instrument to the interests of the children and descendants of Charles D. Flaglor which, under said will, such children or descendants may have or at any time be entitled to.

This court agrees with counsel for appellee that there is nothing in these deeds or this contemporary agreement by which Charles D. Flaglor agrees or binds himself, or consents that his interest in the property is a life estate. The deeds of conveyance are absolutely silent on the subject, and do not mention the children at all, but convey the estate to him and Letitia Flaglor. The explanatory agreement was evidently intended to refer this question to the true construction of the will, mentioning the rights of the children to be such as they may have under that will, and guarantying Eliza Garrett and the Crows against the effect of such construction of it as would make his interest a life estate with remainder to his children.

Assuming, then, that these conveyances *inter partes* were made as a part of the partition proceedings, they fail to carry into effect that part of them which declares as between Charles D. Flaglor and his children that his estate was an estate for life. It was undoubtedly in this view of the subject that,

after the death of Charles D. Flaglor and his mother, the advisers of Elizabeth Flaglor, his only surviving child, caused the commencement of the suit in chancery, in her name, of which the present cross-bill has become a part.

This bill of Elizabeth, upon its face, recites the proceedings in the original partition suit, and the contemporary conveyances and agreement, and the death of Letitia and Charles D. Flaglor and of one of his children; and considering the imperfection and insufficiency of all these proceedings to vest in the complainant, his surviving child, the title to the real estate allotted to him and his mother in the decree, it demands of all the other parties to make such conveyances as will perfect her title, and it prays for an account of rents and profits from those who have had the property in possession. To this bill Catharine Reid, now Catharine Parpart, was made a defendant under allegations setting out the mortgage on which the present decree was rendered, and alleging it to be a cloud on the title of the complainant, and praying that it be held to be no lien on the property.

Much of the argument of counsel in this case and the testimony on which the case was heard in the court below has relation, on both sides, to the question whether Charles D. Flaglor authorized his attorneys to give the consent to the limitation of his estate which is found in his answer to the original partition suit.

It is not to be denied that the testimony on this subject is conflicting, as were also his declarations and actions about the time of the rendition of that decree. We do not deem it material to the case before us to decide this question, because, as neither the decree itself, nor the deeds made three days after, nor the article of agreement assented to by the parties at the same time, made any actual transfer of title different from that which resulted from the will of Augustus Garrett, and as the very purpose of Elizabeth Flaglor's suit is to effect that which was not done by that decree, the only effect which the consent of Charles D. Flaglor to it could have, if he ever consented, would be to have estopped him, or some one claiming under him, from contesting the force of the decree.

In this view of the subject it is important to recur to what took place very soon after this decree was rendered. As soon as Charles D. Flaglor became aware of the construction which was put upon the decree as regards his estate in the property, he filed his bill of review, on the 16th day of April, 1853, in the proper court, to set aside and correct it, so far as it concerned that matter. To this bill his mother and father and two children were made defendants. A decree was rendered on the 11th day of May, 1854, in which the former decree in that respect was reversed and the one-sixth allotted to the Flaglors was declared to be vested in Letitia Flaglor, for and during the term of her natural life, with remainder in fee to Charles if he survived her. This decree remained in full force until after the death of both Letitia and Charles, when, in April, 1866, a writ of error was sued out of the supreme court of Illinois in the name of Elizabeth Flaglor, by James Link, her next friend, on which the decree on the bill of review was reversed, on the sole ground that the original decree of partition was by consent, and that such consent cured all errors.

It will be observed that the decree on the bill of review remained in force for over twelve years, that during two years of that time Charles D. Flaglor had come into the seizin of the fee-simple estate, which both that decree and the will declared to be in him, and that it was during this period that the

mortgage was made by him on which the decree we are now considering is founded.

Very shortly after this reversal in the supreme court, the original bill in the present case was filed by Elizabeth Flaglor, which was prosecuted in her name until August, 1867, when she died, leaving a will by which she devised all her property to her mother, Lucy C. Flaglor, now Lucy Flaglor Gay, one of the present appellants.

Early in 1872 the suit was revived in the name of Lucy Flaglor. By amended bills in her name and by the cross-bill of Catharine Parpart, formerly Catharine Reid, the issues in regard to the controversy now before us were finally raised.

§ 64. *A purchaser pendente lite chargeable with notice. An attorney for a party cannot be an innocent purchaser.*

No person now interested in this controversy obtained any interest whatever in this property by any purchase or by any transaction by which they parted with money or other valuable consideration until the purchase by Arthur W. Windett from Lucy Flaglor after her bill of revivor had been filed, and no one else but him and the Connecticut Mutual Life Insurance Company, another one of the appellants, has ever parted with anything of value on the faith of any of the transactions previously recited, except it be Frederick T. Flaglor, who loaned his son Charles the money on the mortgage now in question.

It is impossible to see how the doctrine of estoppel can operate in favor of any of these appellants. Such interest as Elizabeth Flaglor and Lucy Flaglor, her mother, had or acquired was by inheritance or devise. Neither of them ever paid a dollar or parted with anything of value or did anything to their detriment by reason of any act or deed of Charles D. Flaglor, nor by reason of the original decree of partition and the deeds made under it. The one was his child and took under his rights, the other was his wife and the mother of his child, and took under her will. Windett is, therefore, the first person who can pretend to have parted with any consideration for the title which he asserts to this property, and the insurance company holds under him. But both these parties became purchasers and acquired their interests during the pendency of this suit, and were bound to know that they purchased subject to its result. The existence of the mortgage which they now contest was recited in the original bill by Elizabeth Flaglor and in the bills of revivor and supplemental bills filed by Lucy Flaglor, and Catharine Parpart was a party to all those bills, and her right to a paramount lien was referred to and she was made a party in regard to it in them all.

It is urged in favor of the appellants that a decree *pro confesso* by a default on the publication of notice was made against Catharine Parpart declaring her claim invalid, and that very soon after this and before that default was set aside, Windett received his deed from Lucy Flaglor. It is strenuously urged that this fact confers upon him the character of an innocent purchaser for value, and removes him from the category of a purchaser *pendente lite*. But this argument is not sound.

The decree *pro confesso*, taken without any actual service on Parpart, could, within a period fixed by the laws of Illinois, be set aside upon her appearance and motion to that effect, and it was so done in this instance, and she was permitted to come in and file her answer and cross-bill.

Windett was bound to know, when he purchased, the inconclusive character

of the decree *pro confesso* on which he now relies, and that it was not in the power of himself and Lucy Flaglor to defeat the right which the law gave to the absent defendant, and render it of no avail by this transfer of title. In addition to this, it is impossible in any light to regard Windett as an innocent purchaser, since he was the attorney and counselor in that suit of Elizabeth Flaglor during her life-time, and of Lucy Flaglor afterwards, and so remains to the present hour. It is also in evidence that he was well aware of the existence of the mortgage and its possession by Catharine, and at one time had promised that it should be paid, and at another time had entered into negotiations for its purchase, all of which was prior to the date of the deed from Lucy Flaglor under which he now asserts title.

The Connecticut Mutual Life Insurance Company also acquired its interest *pendente lite*. That interest arises under a mortgage given by Windett to secure the loan of money, and it appears by the record that in addition to this mortgage they took other security in consequence of the uncertain condition of the title. They have also the security of Windett's personal obligation.

The only party in the litigation before us who has any just claim to the protection of an innocent purchaser without notice is the appellee Catharine Parpart. The mortgage which she now holds was given to Frederick T. Flaglor by his son Charles, for which the father gave full value at the time when Charles stood seized of the estate in fee-simple to the property in controversy, according to every source of information open to any one upon inquiry. Under the will of Augustus Garrett the title of Charles was clear; under the conveyances made between parties subsequently to the decree of partition and the contemporary agreement, it was clear. The decree itself, the only thing which cast any shadow upon that title, had, upon bill of review, been set aside in that respect, and the title of Charles declared to be an estate in fee, and the remainder of the decree stood affirmed as a division of the property. Under these circumstances the right of Frederick T. Flaglor to feel secure in taking the mortgage on the property which he did from his son Charles, in the faith that he was secured by a good title, is much stronger than that of Windett and the insurance company, purchasing during the existence of the litigation which pointed out clearly the defect in their title.

§ 65. *It seems that a party consenting to a decree is not estopped thereby as against volunteers.*

Without deciding whether Charles D. Flaglor ever gave his consent to the original decree, we remark, in the first place, as we have said before, that that decree did not *proprio vigore* transfer title from or to any one. In that suit, as between him and his children, there were no adversary proceedings, and such decree as was had, being dependent upon consent, did not operate as a judicial decision by the court of his rights and those of his children. There was, therefore, neither a judgment of the court nor any valuable consideration passing from the children to him to bind him to such consent beyond that of an ordinary, gratuitous promise, which may be retracted before it is performed. The deeds and the agreement made three days after the decree show that if at any time he had given his temporary consent to the decree, he had determined so far to retract as to keep the matter in his own power; and the bill of review and the decree which he obtained upon that review, and all his subsequent conduct in regard to the property, left no doubt in the minds of any one that he had determined to assert his full right of ownership in fee-simple under the will.

It is in the face of all these circumstances that many years after her father's death, and many years after the execution of the mortgage in this suit, proceedings were commenced in the name of Elizabeth Flaglor, then a child, to secure the benefit which her advisers supposed the original decree of partition conferred on her.

Under all the circumstances of this case, the diligence with which Charles D. Flaglor repudiated the supposed consent and had it set aside by a regular bill of review, the long period of twelve or fifteen years in which the matter was permitted to lie in that condition, the fact that the daughter and her mother are all volunteers, and that Windett is a purchaser with notice of the litigation and taking part in it as an attorney in the case, and the insurance company holding their interest also with full notice of the facts, we think it would be inequitable to make a decree now to do what was left undone in a former decree and which seems to have been so left by the intention of the parties to it. We cannot better express ourselves than in the following language from the opinion of the court in the case before referred to:

"We do not regard that it militates with the doctrine of the conclusive effect of what is *res judicata*, that where there is an incomplete decree, and it is ineffective for want of the provision of any means for its execution, and an application is made to a court of equity to supply the imperfection so as to render the decree effective, then it is admissible to look at the real nature and character of the decree as it may appear in the light of surrounding circumstances, for the purpose of determining whether there is such an equitable ground for action as will move a court of equity to interpose. Equity will penetrate beyond the covering of form and look at the substance of a transaction, and treat it as it really and in essence is, however it may seem. In outward semblance this partition decree is a decision of court upon the relative rights of Charles D. Flaglor and his children under the will of Garrett. In essential character it is but the judicially recorded supposed agreement of Flaglor. And upon an appeal to equity by original bill to lend its assistance for carrying it into execution, because of an omission in the decree in providing any means of its execution, it would seem reasonable that the same rule of the court's action should obtain as in case of any solemn agreement under seal; and where there are manifest the elements of injustice, mistake, surprise, misapprehension, *and want of consideration*, to remain passive." *Wadhams v. Gay*, 73 Ill., 415.

Decree affirmed.

HARVEY v. RICHARDS.

(Circuit Court for Massachusetts: 2 Gallison, 216-232. 1814.)

STATEMENT OF FACTS.—This was a bill in equity for a discovery and distribution of the undivided property of James Mowry, of whose estate defendant was administrator with the will annexed. To this bill there was filed a plea in bar to the effect that defendant had contested the right of complainant and her brother to distributive shares in the estate of Mowry in the probate court, where the decision was favorable to their claim, but that he appealed to the supreme court of probate, which decided that the decision of the probate court was erroneous, reversed its decree and remanded the cause to that court to be proceeded in according to law. To this plea there was a demurrer and a joinder in demurrer.

Opinion by STORY, J.

The question is whether the plea, as pleaded, is a good bar to the present bill. It is argued on the part of the defendant in the affirmative on various grounds, which I will, in the course of this opinion, distinctly consider. It is to be recollected that the proceedings before the probate court were not between the same parties, as in the present; there was a joinder of John Mowry with the present plaintiff, and unless in probate proceedings the parties are considered as prosecuting severally and for their several interests, as well as jointly, according to the course of the civil law, there would be a difficulty in sustaining the conclusiveness of the decree of the probate court upon technical principles, even supposing such decree to purport all that the defendant now contends for; for such a decree in general would not only bind parties and privies, and the present case would not be between the same parties. But waiving all controversy on this point, let us now proceed to the consideration of the legal effect of the decree, supposing it in fact to have been made between the same parties.

§ 66. *Effect of decrees in probate courts.*

The decree of the supreme court of probate purports, on the face of it, to be a simple reversal of the decree of the inferior court, and a remitter of the cause to that court for further proceedings. It does not, therefore, assume to make any conclusive or final decision on any rights or interests of the parties, but leaves those rights and interests precisely as they were before the original decree was made, unless by intendment of law a different result is to be attributed to such a decree.

§ 67. *The effect of a reversal of a judgment in a court of common law.*

At common law, if a plaintiff obtain a judgment in an inferior tribunal, which is reversed in the appellate court, it is very clear that the reversal operates no further than to nullify the original judgment. In other respects the parties are precisely in the same situation as to their rights and remedies touching the matter in controversy as if no such judgment had ever existed. If this case, then, were to be tried by the common law, the defendant's counsel could not sustain their objection. Upon what principles is a simple reversal of a probate decree to be held to have a more extensive operation?

It is argued that the reversal in this case must have been upon the merits of the controversy between the parties for all or some of the reasons assigned in the reasons of appeal, and therefore conclusive upon the parties, as the sentence of a court of competent jurisdiction upon the identical questions now before this court. It is difficult to perceive on what principles of law this argument is founded, and no authority in point has been adduced. The general doctrine is laid down with admirable clearness in the *Duchess of Kingston's Case* (11 St. Tri., 198; S. C., Hale, Hist. C. Law, by Runnington, note C. p. 39) by the lord chief justice of the common pleas, in delivering the opinion of all the judges.

§ 68. *Under what circumstances a judgment will support a plea in bar in another action.*

He says, "From the variety of cases relative to judgments being given in evidence in civil suits, these two deductions seem to follow as generally true:—First, that the judgment of a court of competent jurisdiction, *directly upon the point*, is, as a plea, a bar, or, as evidence, conclusive between the same parties, upon the same matter, *directly in question* in another court. Secondly, that the judgment of a court of exclusive jurisdiction, *directly upon the point*, is, in

like manner, conclusive upon the same matter, between the same parties, coming incidentally in question in another court for a different purpose. But neither the judgment of a concurrent or exclusive jurisdiction is evidence of any matter, which came collaterally in question, though within their jurisdiction, nor of any matter incidentally cognizable, nor of any matter to be *inferred by argument from the judgment.*" See *Hebsham v. Dulleban*, 4 Watts, 183, per Gibson, Ch. J.; *Arnold v. Arnold*, 17 Pick., 7-14; 1 Phil. on Ev., p. 321, note 557 to Am. ed. of 1839.

Now in the probate decree before the court, there is no decision of the court directly upon any point of fact or of law; and upon what grounds the decree itself was founded is nowhere stated, and cannot be collected by argument or inference; and even if it could, we are informed from the highest authority, that it would not be conclusive in another suit.

§ 69. *Powers of probate courts by statute in Massachusetts.*

The argument too proceeds upon a supposition, that in probate appeals the court are confined to the reasons of appeal, and cannot decree *aliunde*. But the statute of Massachusetts of the 12th of March, 1784, ch. 46, 1 Mass. L., 155, contains no such limitation; and, therefore, upon general principles, applicable to appeals according to the course of the civil and ecclesiastical law, the whole cause stands *de novo* in the appellate court, and may be decided upon, unaffected by the preceding sentence. But if it were otherwise, the case would present intrinsic difficulty, for it would still be uncertain, what was the particular reason upon which the reversal proceeded; and some at least of the reasons would seem in the nature only of temporary bars. Besides, there may be errors on the face of the decree, or the proceedings, untouched in the reasons of appeal, which may well authorize a simple reversal; yet the argument assumes, that the court were bound to adjudge between the parties, as to the merits of the appeal, in the manner by them stated, notwithstanding the most unquestionable errors.

§ 70. *The reversal of a decree has not the effect of a decree upon the merits.*

Another fatal objection to the argument is, that it attributes to a mere reversal of a decree all the legal efficacy of a subsisting decree upon the merits.

It is in general true, that a judgment or decree upon the merits of any cause of action is conclusive as to the rights of the same parties, while the judgment or decree remains in force; and if the same judgment or decree find any particular fact or issue directly, the same operates by way of estoppel conclusively upon the parties, while the record is in force. But a reversal, with few exceptions, affirms nothing but its own correctness. It simply nullifies the former judgment or decree, and declares that it shall henceforth be deemed void. It decides nothing upon the rights of the parties; but confines itself to the adjudication, that what has been done shall have no legal effect. To give it a more extensive operation, either as a bar or as an estoppel, it is necessary to show, that it directly affirms or denies some distinct fact in issue. There is no pretense that the present decree, on the face of it, does either.

§ 71. *A party is not estopped by a reversal of a judgment from proceeding afresh in another court of concurrent jurisdiction; nor a fortiori from resorting to equity.*

It is further argued that if the reversal be not a conclusive bar by its intrinsic force, it operates so indirectly, inasmuch as the plaintiff is estopped by her election to proceed in the probate court from pursuing any remedy elsewhere. I know of no such estoppel in this case. In general, the pursuit of a remedy

at law which has become fruitless, is no bar to the pursuit of a remedy in equity for the same subject-matter. So far from it, that in many instances the whole equity grows out of the incompetency of the law to afford any adequate relief. Much less is it true that an election to proceed in one court of competent jurisdiction, either of law or equity, where the suit is abandoned, operates as an estoppel to another suit in any other competent court.

It is further argued that the present bill ought not to be sustained because the original suit is still pending in the probate court and undetermined, and to assume jurisdiction would be to oust that court of its concurrent cognizance of the cause. Admitting that on a demurrer to a plea in bar like the present, such a consideration could properly arise (which in point of law cannot be conceded), the objection cannot be sustained, for there is no allegation of the actual pendency of such a suit; and if there were, it could not be pleaded in bar, but simply in abatement of the present bill. But in point of fact, upon the remitter of the cause from the supreme court of probate, I take it to be clear that the cause could not again depend in the inferior court, until the parties had done some act by which the authority of that court was called again into exercise.

An argument *ab inconvenienti* has also been drawn from the supposed conflict of jurisdictions which may ensue if this court should sustain its jurisdiction over this cause. To arguments of this sort, in proper cases, this court will be disposed to listen with all possible deference. We shall not incline to encroach on the state authorities or seek to withdraw causes from their proper forum. But when a suit is instituted by competent parties on a subject-matter cognizable by the court, I know of no authority that will justify us in declining the jurisdiction. We are not at liberty to shrink from the discharge of duties imposed upon us by the law, or to violate the rights of parties regularly before us merely because the cause may occasion personal or public inconvenience. Such considerations belong to another tribunal. On the whole, I am very clear that the plea in bar is insufficient and must be overruled.

KELSEY v. HOBBY.

(16 Peters, 269-280. 1842.)

Opinion by TANEY, C. J.

STATEMENT OF FACTS.—This is an appeal from the decree of the circuit court for the district of South Carolina. It appears from the record that Kelsey, M'Intyre and Hobby, for some time previous to the 9th of February, 1822, carried on business in Georgia, as merchants, under the firm of C. Kelsey & Company; and it having been agreed among the partners that Hobby should withdraw from the firm, they, on the day above mentioned, entered into the following agreement:

“Articles of agreement entered into at the dissolution of the firm of C. Kelsey and Company, between Alfred M. Hobby, of the first part, and Charles Kelsey and Charles M'Intyre, of the second part, witnesseth: That the said Alfred M. Hobby doth agree to withdraw from the said firm upon the following conditions, viz.: that the said parties of the second part are to take upon themselves the entire settlement of the business of the said firm, and are to pay to the said A. M. Hobby, after the debts of the said firm are all paid and discharged, and a sufficient sum collected out of the debts now due to the said firm, \$5,500, and in Bridge bills whenever he shall demand them, \$1,130. And

the said A. M. Hobby, for said consideration of the above sums of money to be paid, and the further sum of \$1 to him in hand paid, the receipt whereof is hereby acknowledged, hath relinquished, and by these presents doth transfer, to the said parties of the second part, all his interest or claims of whatever nature he has, or may have, as partner in the said firm. It is also stipulated and agreed, that the said A. M. Hobby of the first part, in consideration as above specified, is to protect the said parties of the second part from a certain judgment obtained against said firm by the branch of the United States Bank, in this city, and to hold them harmless from any balance, should there be any due, after the conclusion of the settlement between John M'Kinnie and Thomas Gardner, respecting the said judgment. And for the faithful discharge of this agreement, we bind ourselves, our heirs, executors, administrators or assigns."

At the time this agreement was executed, an inventory was taken of the assets and debts of the firm, by which it appeared that the goods and property on hand, together with the debts due to the partnership, were estimated at \$38,164.96; and that the debts due from it amounted to \$26,057.91, and that this schedule formed the basis of the agreement. In November, 1829, Hobby filed his bill against Kelsey and M'Intyre, charging that there was a surplus of partnership effects after paying all the debts sufficient to satisfy the \$5,500 mentioned in the contract, as well as the Bridge bills, and praying an account. These Bridge bills were notes issued by a company who had built a bridge in the state of Georgia; and these notes circulated as money, but at a heavy discount.

• On the 7th of February, 1830, M'Intyre put in his separate answer, in which he denies that the assets of the partnership produced the surplus charged by the complainant; and exhibited an account according to which the funds of the partnership realized only \$29,580.83, the debts paid amounted to \$28,874.66; and he insisted that large sums were also paid by them for interest on the debts of the firm, and heavy expenses incurred, which were not introduced into this account, but for which Kelsey and M'Intyre ought to be allowed credit; and that when these sums were added, they would amount to considerably more than had been collected, and that, in addition to this, they are entitled to an allowance of two and a half per cent. on all sums collected and paid by them. He also averred that Hobby did not perform his part of the agreement, and that an execution was afterwards issued by the branch of the United States Bank, and the goods of Kelsey and M'Intyre seized for the debt against which Hobby had covenanted to save them harmless; and that, by reason of that execution and seizure, they were put to great expense, and were seriously injured in their credit and embarrassed in their business as merchants; and insisted that they were absolved from their agreement by the failure of Hobby to perform his part. The answer further stated that although Kelsey and M'Intyre denied the right of the complainant to the Bridge bills he claimed, yet they were willing to give him an order for them on the attorney in whose hands they had been placed for suit, and who had prosecuted the claim to judgment. That the respondent had always been ready to account with the complainant, Hobby, and to deliver him these bills, but that no demand was made until this suit was about to be instituted.

Kelsey, the other respondent, had removed to New York, a short time before the bill was filed, and his answer was not put in until January 10, 1833. This answer is in substance the same with that of M'Intyre, to which it refers.

There was a general replication to these answers, and the accounts referred to a master, by order of the court; when his report came in, many exceptions were filed to it on both sides; and upon hearing, the court set aside the report, and returned it again to the master, with directions as to the principles on which it was to be stated. A good deal of testimony was taken on both sides, and the master made a second report at April term, 1839, according to which the respondents had paid \$2,031.05, beyond the assets which came to their hands. Many exceptions were again filed on both sides to this report, and it was by order of the court again returned to the master, with directions to take further proof as to one of the items in controversy.

In the latter end of August, 1839, while the accounts were pending before the master, as hereinbefore mentioned, Hobby went to New York, where Kelsey resided and was carrying on business; and a few days after he arrived there, he was arrested at the suit of Kelsey and M'Intyre, upon a claim for \$4,000 as damages for not having saved them harmless against the debt due the Branch Bank of the United States, according to his covenant in the agreement hereinbefore mentioned. It seems that Kelsey was advised by his counsel in New York that this claim could not be allowed him in the chancery suit, because the damages were unliquidated. Being a stranger in the city, he found difficulty in procuring special bail. But an acquaintance whom he had occasionally met in society, and to whom he applied, entered into a bail bond to the sheriff, conditioned that he would appear to the suit and put in special bail within twenty days after the 4th of September then next ensuing; Hobby assuring him that he expected some of his southern friends to be in New York in a few days, and that he would then be able to relieve him. The party who thus became his security informed Hobby, in the presence of the officer in whose custody he was, that he could not justify as special bail; and he was not, therefore, accepted as security in the bond until the officer consulted Kelsey's counsel and received his consent.

The southern friends, of whom Hobby spoke, when they arrived, offered to become his special bail, but not living in the state of New York, they could not be taken without the consent of Kelsey. And Hobby remained in New York, unable to procure special bail until the 6th of September, when he signed an admission of the correctness of an account concerning the whole controversy in the circuit court, which had been prepared some time before by one of Kelsey's clerks. According to this account, Kelsey and M'Intyre had paid \$15,859.73, under the agreement with Hobby, beyond the amount of the partnership funds that came to their hands. And at the same time that he signed the account he executed the following release:

Account of C. Kelsey and Company with the old Concern of C. Kelsey and Company. United States, South Carolina District. Being Sixth District, United States.

A. M. Hobby and Thomas C. Bond	}	Now pending before said court.
Charles Kelsey and Charles M'Intyre,		

In Chancery.

In this case, the parties, Alfred M. Hobby and Charles Kelsey, have come together, and examined the subject-matter in dispute, and they find the within account correct, and it is hereby admitted to be correct, and every entry in it.

And they do not deem it just or equitable that said suit should be further prosecuted. And in consideration of the premises, and \$1 paid, the parties in said suit hereby discharge each other from all demand in the same. And each party releases and discharges the other from all demand of every name and nature, and agree that the said suit should be discontinued. As witness our hands and seals, this 6th day of September, 1839.

A. M. HOBBY, [L. s.]

C. KELSEY. [L. s.]

Witness to the signatures and seals of A. M. Hobby and C. Kelsey:

GEO. H. KELSEY,

B. A. HEGEMON.

This release was attached to the account settled at the same time; and a letter written by Hobby to his counsel, and shown to Kelsey, stating that they had come to a settlement, and directing the suit in chancery to be discontinued; and Hobby was thereupon discharged from the arrest, and shortly afterwards left New York.

On the 8th of January, 1840, the release and settlement above mentioned were produced in court by the solicitors for the respondents, and a motion thereupon made to dismiss the bill. This motion was resisted on the part of the complainant, but the particular grounds upon which it was objected to are not set forth. The order of the court merely states that the release was impeached by the complainant's counsel, and authorizes both parties to take testimony in regard to the settlement and release. Under this order, sundry depositions were taken and returned on the part of the complainant, to show that the settlement and release were without consideration, and that they were extorted from him by the arrest under which he was detained in New York; his southern friends and acquaintances being refused as bail, because they did not reside in the state, and he being unable to leave the city until the temporary bail he had procured was discharged. And sundry depositions were also taken and returned on the part of Kelsey, to show that there was no harshness or oppression on his part, and no undue advantage taken of Hobby; and that the settlement and release were freely and voluntarily made.

The case came on for final hearing on the 30th of May, 1840, upon the report of the master, and the exceptions filed to it on both sides. The report, which stated, as before, a balance of \$2,031.95, in favor of Kelsey and M'Intyre, for payments and allowances made to them, over and above the sums realized by them from the partnership effects, was set aside by the court; and upon the testimony in the cause, the court proceeded to pass a decree in favor of the complainant for \$5,500, with interest, and for the Bridge bills mentioned in the agreement, and allowing to the respondents a set-off of \$300, for the damages sustained by reason of the execution issued against them by the Branch Bank of the United States, as hereinbefore stated. From this decree the respondents appealed to this court. This statement of the facts in the case may appear to be tedious; but from the nature of the proceedings it is necessary, in order to show how the points arose which were made in the argument in this court.

§ 72. *A retired partner, where the other members assume a settlement of the affairs, may proceed against them by bill in equity for settlement.*

The appellants contend that the court of chancery had no jurisdiction beyond that of compelling a discovery of the amount which Kelsey and M'Intyre

had received under the agreement; and that if anything was found due from them to Hobby, he was bound to resort to his action at law on the covenant in order to recover it. But the court think it was a very clear case for relief, as well as discovery in chancery. It is true he had ceased to be a partner, but the appellants had received the assets of the partnership upon a trust that they would collect them, and pay the debts, for which Hobby was liable as well as themselves; and would pay over to him the sum before mentioned as soon as they collected enough for that purpose after the payment of debts. He was, therefore, entitled to an account; and if upon that account anything was found due to him, he was, upon well-settled chancery principles, entitled to relief also.

§ 73. *The chancellor may set aside the master's report and enter up a decree in gross, where the nature of the case does not require a finding and statement of items.*

Neither can the objection be sustained as to the mode in which the amount due was ascertained. It is true, that according to the ordinary mode of proceeding in courts of equity, instead of setting aside the report of the master, the court should have passed its judgment upon each of the exceptions, or have remanded the account to the auditor, with additional directions as to the principles upon which it was to be stated. And if it had been necessary to ascertain precisely the amount which the appellants had collected over and above the debts they had paid, the proceeding adopted by the court would have been liable to the objections urged against it. For the decree could not in that case have been reviewed in the appellate court, and the exact balance ascertained, unless the record showed what items were allowed and what disallowed in the inferior court. But this is not a case of that description. If the appellants had received the sum claimed by Hobby beyond the amount of debts paid, it mattered not how much more they had received; and the case did not require a statement of the exact amount. And as the evidence, and accounts, and exceptions, are all in the record, this court can determine whether the sum mentioned is proved to have been collected or not. And if it appears to have been received, the decree must be affirmed, even although it may happen that items allowed by the circuit court are disallowed here; or items disallowed by that court are determined here to be correct and properly chargeable. And, as all the testimony is before us, and the exceptions show all of the disputed items, neither party can be taken by surprise.

It would extend this opinion to a most unreasonable length, if the court were to enter upon a particular and detailed examination of the various disputed items, and of the testimony and calculations relied on by the parties to support their respective claims. Fourteen exceptions were taken to the auditor's report by the complainants, and six by the defendants; and the evidence upon which they depend is voluminous. Four of them require a particular examination and comparison of different accounts, in order to arrive at a just conclusion. We have looked into the whole testimony very carefully, and unless the release and settlement in New York is to be regarded as conclusive, we are satisfied that Kelsey and M'Intyre have received from the partnership assets beyond the amount paid for debts, a larger sum than that decreed against them by the circuit court.

This brings us to examine the release, and the account stated at the time it was given.

§ 74. *A stipulation for dismissing a suit may be filed and a motion made to dismiss where neither party objects to that course. But regularly it should be presented by a supplemental pleading.*

Some objections have been made as to the manner in which the release was introduced into the proceedings. It was filed in the cause, and a motion thereupon made to dismiss the bill; and it is said that being executed while the suit was pending, and after the answers were in, and the accounts before the master, it should have been brought before the court by a cross-bill or supplemental answer, and could not in that stage of the proceedings be noticed by the court in any other way. It is a sufficient answer to this objection to say that it was admitted in evidence without exception, and both parties treated it as properly in the cause; and the complainant proceeded to take testimony to show that it was obtained from him by duress, and the defendants to show that it was freely and voluntarily given. It had the same effect that it would have had upon a cross-bill or supplemental answer, and the complainant had the same opportunity of impeaching it. And there is no propriety in requiring technical and formal proceedings, when they tend to embarrass and delay the administration of justice, unless they are required by some fixed principles of equity, law, or practice, which the court would not be at liberty to disregard.

§ 75. *A release in consideration of a settlement of account is a good consideration, but it may be examined into when impeached for fraud.*

The release and account being therefore regularly before the court, we proceed to inquire into their legal effect, and the degree of weight to which they are entitled. The effect of a release, executed in consideration of the settlement of accounts between the parties, is clearly stated in Story's Equity Pleadings, 529, § 685. If the account is impeached, the release will not prevent the court from looking into the settlement; and the release in such a case is entitled to no greater force in a court of equity than the settlement of the account upon which it was given. In the case before us, the settlement of the account was the only consideration for the release.

§ 76. *Equity may settle questions of unliquidated damages when they arise out of a case pending there. Method of such trial.*

The complainant, who resides in Georgia, and who had gone to New York upon business, was unexpectedly arrested for a claim which was then pending between the same parties in the circuit court of the United States for the district of South Carolina. The suit was brought for damages alleged to have been sustained by the failure of Hobby to indemnify the appellants against the claims of the Branch Bank of the United States hereinbefore mentioned. It is true that the plaintiffs in the suit were advised by counsel that they could not be allowed for these damages in the proceeding in equity, because they were unliquidated; and they ought not therefore to be held accountable for that error. Yet it is very clear that the suit should not have been brought; because these damages formed one of the items in controversy between the parties in the suit in chancery, which had been so long pending between them. And that court had not only jurisdiction over the subject, but it was bound to ascertain and allow them before it could adjust the account and grant the relief to which the complainant was entitled. The mode by which a court of chancery ascertains the amount in cases of that description, is either by a reference to the master or by sending an issue of *quantum damnificatus* to be

tried by a jury. The cases upon this subject are collected and arranged in 2 Story's Commentaries on Equity, c. 19, p. 104. And the damages in question were in fact ascertained by the court, and deducted from the amount due to Hobby in the decree now under examination. But, nevertheless, as Kelsey in this respect acted by the advice of his counsel, if the settlement which afterwards took place had been confined to the claim he was seeking to enforce, the agreement between the parties to fix the damages at any particular amount would have bound Hobby, unless it was evidently unreasonable and exorbitant, or he could prove it was obtained by improper means.

§ 77. *Detention of a party under process by the other party may be ground for impeaching an agreement then made.*

The mere circumstance of his being detained in New York, by reason of the process issued to recover the amount claimed, would be no objection to the validity of the agreement. But while Hobby was detained in the manner before stated, and unable to procure special bail, Kelsey obtained from him a release of matters not embraced in this suit, and much more important in amount, and which Hobby had been insisting on for years, and for which he was prosecuting a suit in the circuit court. Neither the circumstances under which the release was taken, and the account connected with it settled, nor the contents of these papers, can entitle them to weight in a court of equity. There is no evidence of any negotiations between the parties respecting this arrangement previous to the interview at which these papers were signed. Upon that occasion one of the clerks of Kelsey was present. He is one of the witnesses to the release. He does not say who proposed a settlement, but he states that the account admitted by Hobby had been prepared a long time before by one of Mr. Kelsey's clerks; that the examination of the account did not take more than ten minutes. And the interview at which it was acknowledged and signed, and the release executed, and a letter written by Hobby to his counsel in South Carolina to discontinue the suit against Kelsey and M'Intyre, did not last more than an hour.

§ 78. *Absence of books when one under arrest settled long accounts is evidence tending to show oppression and extortion.*

This is the testimony of the witness. No books or papers appear to have been produced, or to have been in the city of New York at the time, in the possession of either party, except the account produced by Kelsey and signed by him and Hobby. And yet the release states that the parties had "come together and examined the subject-matters in dispute," and found that account correct, and thereby "admitted it to be correct and every entry in it." And the account, too, which is thus admitted, contains items for "exchange paid," "loss by discount on money received in collection of the partnership debts," "rent for counting-room," traveling expenses, postage, clerk hire, incidental expenses, and sundry others which would have required much time to examine, and the production of many vouchers before Hobby could have known whether they were correct or not. The account in important particulars differs from the one on which Kelsey and M'Intyre had themselves relied in the circuit court of South Carolina; and is more unfavorable to Hobby by about \$20,000, than the one which Hobby had been so long insisting on in his suit. Such an account and release, executed under such circumstances, are not entitled to the consideration and weight which belong to instruments freely executed, and with opportunities of knowledge and examination. So far from strengthening the claims of the appellants, they, in the judgment of the court,

are calculated rather to bring suspicion upon them. They certainly cannot outweigh the testimony taken in the chancery proceedings, and the decree of the circuit court is therefore affirmed.

LIFE INSURANCE COMPANY *v.* BANGS.

(18 Otto, 780-783. 1880.)

APPEAL from U. S. Circuit Court, District of Minnesota.

Opinion by MR. JUSTICE FIELD.

STATEMENT OF FACTS.—In the case of Insurance Company *v.* Bangs [13 Otto, 435], we had occasion to mention and comment upon a suit in equity commenced in March, 1876, by the same company against these defendants in the circuit court of the United States for the district of Michigan, to obtain the cancellation of two policies of insurance, issued in November, 1875, upon the life of James H. Bangs. That case was an action at law upon the policies, to which the company pleaded the decree obtained in the equity suit. This decree was held to be void as against the infant defendant, because rendered by the court without having obtained jurisdiction over him. As all other defenses except such as arose upon this decree were withdrawn, judgment was rendered in favor of the plaintiff for the amount claimed.

The present suit is similar in its character and object to the one brought in the Michigan district. It seeks a cancellation of the two policies of insurance obtained by the deceased, and an injunction against the enforcement of the judgment recovered in the action at law. The bill avers that the policies were obtained upon representations that the insured was a person of good health and not subject or predisposed to any bodily infirmity; that at the time he applied for the policies he had conceived the design to commit suicide, but first to obtain an insurance upon his life in favor of his son, in order to leave a large amount to him and to his wife; that in pursuance of this design the policies were obtained, and soon afterwards he committed suicide by taking poison; and that the wife and son were cognizant of the design of the deceased, and conspired with him for its execution.

The bill charges a fraudulent purpose on the part of the insured to rob the insurance company, and then that he committed suicide to carry the purpose into execution. It charges a conspiracy between him and his wife and son to effect this robbery and death,—a conspiracy on the part of the wife to aid in the death of her husband, and on the part of the son to aid in the death of his father. These charges are of such dreadful crimes as to call for the clearest proof before a decree cancelling the policies could be based upon them. Instead of such proofs there is nothing of importance established which is not consistent with the integrity of all the parties,—insured, wife and son. The main and essential fact averred in the company's case is the contemplated suicide of the insured. The evidence to establish this—and it is stronger than the evidence produced upon any other material averment—is that he had inquired for insurance companies whose policies did not except death by suicide; that his death occurred not long after the policies were obtained, and was accompanied by convulsions stated to be similar to those attending death by strychnine. There is no evidence that he ever had any strychnine. The only evidence produced was that he was once seen in a druggist's store looking at jars containing various medicines, and among others one that contained this poison. There was no poison found in his body when submitted to a *post-*

mortem examination. And as to the convulsions at his death, the wife attributed them to injuries which he had received in his back a few days before. That is all. Everything else consisted of mere suspicions growing out of the action of the wife in refusing to consent to a *post-mortem* examination of the deceased, and her departure from the state, both of which might have been, and, according to her answers to the interrogatories of the bill, were prompted by worthy considerations. The transactions with which she is charged as proof of guilty complicity, viewed in the light of her explanations and the evidence produced, merely evince a very natural sensitiveness to the imputations cast upon the character of her husband by suspicions thrown out by agents of the insurance company, and a great repugnance to having his remains, after interment, disturbed and subjected to the knife of the surgeon and the analysis of the chemist. It is sufficient to say that no case is presented which would justify any court in holding that a conspiracy existed to defraud the insurance company, the execution of which involved the suicide of the insured, and the assent of wife and son to the death of husband and father.

§ 79. *A recovery in a suit at law concludes all matters which might have been urged in defense.*

Aside from this, the judgment in the action at law was a bar to this suit. Its recovery concluded all matters which might have been urged as a defense to the policies. A fraudulent purpose in procuring them, subsequently carried into execution, would have been a good defense. It was in fact originally pleaded and afterwards withdrawn. Its withdrawal did not authorize a suit in another forum for its establishment against the demand of the plaintiff. When an action at law is brought upon a contract, the defendant denying its obligation, either from fraud, payment or release, or any other matter affecting its original validity or subsequent discharge, must present his defense for consideration. A recovery is an answer to all future assertions of the invalidity of the contract by reason of any admissible matter which might have been offered to defeat the action. The contract is merged in the judgment. *Cromwell v. County of Sac*, 94 U. S., 351.

§ 80. *Upon what grounds equity will relieve against a judgment at law.*

A suit in equity will not lie to give effect to defenses against a claim when they might have been fully set up in an action at law. There must have been some fraud practiced upon the court, or some unconscientious advantage taken of the defendant without any fault or negligence on his part; or there must be some newly discovered evidence which could not have been obtained at the trial, and which, if produced, would have changed the result, before a court of equity will interfere with the judgment rendered, or the contract upon which it was recovered. There is no pretense here that any such fraud was committed or unconscientious advantage taken, or that there is any newly discovered matter not known when the trial took place. *Home Insurance Co. v. Stanchfield*, 1 Dill., 424 (§§ 1163–65, *infra*); *Marine Insurance Co. v. Hodgson*, 7 Cranch, 332; *Phoenix Insurance Co. v. Bailey*, 13 Wall., 616.

Decree affirmed.

MECHANICS' BANK OF ALEXANDRIA *v.* SETON.

(1 Peters, 299-310. 1828.)

Opinion by MR. JUSTICE THOMPSON.

STATEMENT OF FACTS.—The appellees, who were the complainants in the court below, filed their bill against the Mechanics' Bank of Alexandria, setting out their right to \$3,000 of the capital stock of that bank, which was standing in the name of Adam Lynn, but which was avowedly purchased and held by him as trustee for John Wise, the grandfather of the complainants, and from whom they derived their right and title to the stock in question; that they were desirous of having their stock transferred to their guardian, which the trustee, Adam Lynn, was willing to do, and offered to transfer the same; but that, on application to the bank, permission was refused, on the allegation that Adam Lynn was a debtor to the bank, and that it held a lien for that debt on all the stock of the bank which stood in his name. The bill alleges that when the stock was purchased by Adam Lynn for John Wise, and transferred to him upon the books of the bank, it was well known to the president and directors that the purchase was made by and transferred to Lynn in his character of trustee for John Wise, although the trust was not expressed in the transfer.

The bill prays that the bank may be compelled to open its transfer book, and permit Adam Lynn to transfer the \$3,000 in stock to the said Louisa and Anna Maria Seton, or to their guardian, Nathaniel S. Wise.

The bank, by its answer, denies that the board of directors knew or had any notice that Adam Lynn held the stock as trustee, but alleges that all the stock standing upon the books of the bank in the name of Adam Lynn was considered by the board of directors as his own stock, and avers that, at the time the answer was put in, there was no stock standing in his name on the books, but that the whole of it had been applied by the bank to the payment of his debts to it, according to articles of agreement between him and the cashier of the bank. The bank also sets up the right, under its charter, to hold the stock for the payment of Lynn's debt, but had, under the agreement made with the cashier, as before mentioned, become the purchaser of the stock, for a full and fair consideration, without any knowledge that the complainants had any interest in the same.

The court below, upon the bill, answer, and exhibits and proofs taken in the cause, decreed that the bank should cause its transfer book to be opened, and to permit Adam Lynn to transfer the stock to Nathaniel S. Wise, guardian of the complainants, to be by him held in trust for their use. From this decree there is an appeal to this court, and the following points have been made, upon which a reversal of that decree is claimed: 1. That the subject-matter of the bill is not properly cognizable in a court of chancery; but that the remedy is at law, and the party to be compensated in damages. 2. That there is a want of proper parties. 3. That upon the merits, the bank has a right to hold and apply the stock, in payment of Adam Lynn's debt to it.

§ 81. *A court of chancery will decree specific performance of contracts relating to personalty where compensation for a breach cannot be made in damages.*

With respect to the first objection, it has been said that a court of chancery will not decree a specific performance of contracts, except for the purchase of lands or things that relate to the realty, and are of a permanent nature; and, that where the contracts are for chattels, and compensation can be made

in damages, the parties must be left to their remedy at law. But notwithstanding this distinction between personal contracts for goods, and contracts for lands, is to be found laid down in the books, as a general rule, yet there are many cases to be found where specific performance of contracts relating to personalty have been enforced in chancery; and courts will only weigh with greater nicety contracts of this description, than such as relate to lands.

§ 82. *Corporations may be compelled by courts of chancery to open their books and permit transfers of stock.*

But the application of this distinction to the present case is not perceived. If this had been a bill, filed against the bank, to compel a specific performance of any contract entered into with it, for the sale of stock, it might then be urged that compensation for a breach of the contract might be made in damages; and that the remedy was properly to be sought in a court of law. But the bill does not set up any contract between the complainants and the bank; nor does it seek a specific performance of any express contract whatever entered into with the bank. It only asks that the bank may be compelled to open its transfer book, and permit Adam Lynn to transfer the stock. By the charter and by-laws of the bank, such transfer could only be made upon the books of the bank; and it was by their consent alone that this could be done.

Although it might be the duty of the bank to permit such transfer, it would be difficult to sustain an action at law for refusing to open its books and permit the transfer. Nor have the appellants shown such a claim to the stock as to authorize the court to turn the appellees round to their remedy at law, against Lynn, admitting they might have it. At all events, the remedy at law is not clear and perfect, and it is not a case for compensation in damages, but for specific performance, which can only be enforced in a court of chancery.

§ 83. *Objection for want of proper parties may be taken at the hearing. When it should prevail upon final hearing on appeal.*

2. The second objection, that Adam Lynn ought to have been made a defendant, would seem to grow out of a misapprehension of the object of this bill and the specific relief sought by it. It ought to be observed here preliminarily, as matter of practice, that although an objection for want of proper parties may be taken at the hearing, yet the objection ought not to prevail upon the final hearing on appeal except in very strong cases, and when the court perceives that a necessary and indispensable party is wanting. The objection should be taken at an earlier stage in the proceedings, by which great delay and expense would be avoided.

§ 84. *Persons materially interested in the subject of the suit should be made parties.*

The general rule as to parties undoubtedly is, that when a bill is brought for relief, all persons materially interested in the subject of the suit ought to be made parties, either as plaintiffs or defendants, in order to prevent a multiplicity of suits, and that there may be a complete and final decree between all parties interested. But this is a rule established for the convenient administration of justice, and is subject to many exceptions; and is, more or less, a matter of discretion in the court, and ought to be restricted to parties whose interest is involved in the issue, and to be affected by the decree. The relief granted will always be so modified as not to affect the interest of others. 2 Mad. Ch., 180; 1 Johns. Ch., 350.

§ 85. *No one a necessary party against whom a decree could not be had.*

Where was the necessity or even propriety of making Lynn a party? No

relief is sought against him. The bill expressly alleges that he was perfectly willing to make the transfer; but permission was refused by the bank. There is no allegation in the bill upon which a decree could be made against Lynn; and it is a well settled rule that no one need be made a party, against whom, if brought to a hearing, the plaintiff can have no decree. 2 Mad. Ch., 184; 3 P. Will., 310, n. 1.

The contest with respect to the right to the stock is between the complainants and the bank, and it cannot be necessary to bring Lynn into the suit in order to determine that question. He claims no right to the stock, and if the bank has established its right to hold it for the payment of Lynn's debt, the complainants have no pretense for requiring the books of the bank to be opened, and to permit the transfer to be made, as prayed in the bill. The bank cannot compel the complainants to bring Lynn before the court, as a defendant, for the purpose of litigating questions between themselves with which the complainants have no concern. No objection to the decree can, therefore, be made for want of proper parties. The remaining inquiry is, whether the bank is entitled to hold this stock as security, or apply it in payment of Lynn's debt, either by virtue of its charter or under the agreement between him and the cashier.

§ 86. *Depositions; time of taking; order of court; cross-examining witness waives irregularities.*

An objection, however, has been made preliminarily to this court's noticing the deposition of Adam Lynn; because, as is alleged, it was taken after the cause was set down for hearing, and without any order of the court for that purpose. Admitting this to have been irregular, no objection appears to have been made in the court below to the reading of the deposition, and had it been made it ought not to have prevailed even there, because the defendants cross-examined the witness, which would be considered a waiver of the irregularity.

§ 87. *In admiralty and equity cases objections to depositions not made in lower court cannot be urged.*

But at all events the objection cannot be listened to here, according to the express rule of this court (February term, 1824), which declares, "That, in all cases of equity and admiralty jurisdiction, no objection shall be allowed to be taken to the admissibility of any deposition, deed, grant or other exhibit found in the record as evidence, unless objection was taken thereto in the court below, and entered of record; but the same shall otherwise be deemed to have been admitted by consent."

It is deemed unnecessary to enter into an examination of the proofs in the cause to show that, in point of fact, the stock in question was held by Lynn in trust for the complainants; and that this fact was known to the board of directors, when it was transferred to him by James Sanderson. The evidence establishes these points, beyond any reasonable ground of doubt; and the real question is, whether the bank, with full knowledge of the board of directors, that this stock was not the property of Lynn, but held by him in trust for the appellees, can assert a lien upon it for the private debt of Lynn, either under the charter or the agreement made with Chapin, and the transfer made by him to the bank.

§ 88. *Bank charter construed. Bank held to have no lien for debts of trustee on stock held in trust, when it had notice of the rights of the cestui que trust.*

The equity of the case must strike every one very forcibly, as being decidedly with the appellees. And unless the claims of the bank can be sustained

by the clear and positive provisions of its charter, the decree of the court below ought to be affirmed. This claim is asserted under the provisions of the third and twenty-first sections of the act of congress (2 Stats. at Large, 735), incorporating the bank. The third section, after providing for the opening the subscription for the stock, and pointing out the manner in which the excess shall be reduced, in case the subscription shall exceed the number of shares allowed to be subscribed, has this proviso: "Provided always, that it is hereby expressly understood that all the subscriptions and shares obtained in consequence thereof shall be deemed and held to be for the sole and exclusive use and benefit of the persons, copartnerships, or bodies politic, subscribing, or in whose behalf the subscriptions respectively shall be declared to be made at the time of making the same; and all bargains, contracts, promises, agreements, and engagements, in anywise contravening this provision, shall be void." The twenty-first section declares, "that the shares of the capital stock shall be transferable at any time, according to such rules as may be established by the president and directors; but no stock shall be transferred, the holder thereof being indebted to the bank, until such debt be satisfied; except the president and directors shall otherwise order it."

These sections, when taken together, have been supposed to require a construction, that the stock shall be deemed to belong to the person in whose name it stands upon the books of the bank; and that the bank is not bound to recognize the interest of any *cestui que trust*; and may refuse to permit the stock to be transferred whilst the nominal holder is indebted to the bank. This construction, however, in the opinion of the court, cannot be sustained. The third section must clearly be understood as applying to the first subscription for the stock; and was intended to prevent one person subscribing for stock in the name of another, for his own benefit.

The construction of the twenty-first section will depend upon the interpretation to be given to the word holder, as there used. This term is not necessarily restricted to the nominal holder. It will admit of a broader and more enlarged meaning; and may well be applied to the party really and beneficially interested in the stock. And there can be no good reasons why it should not be so applied when the bank is fully apprised of all circumstances in relation to the stock, and knows who is the real holder thereof.

This provision was intended to put into the hands of the bank additional security for debts due from stockholders. But when it is known that the person in whose name the stock stands has no interest in it, he will acquire no credit upon the strength of such stock; and that such was the understanding of the bank, in this case, is clearly shown by the evidence. For, when the transfer was made to Lynn, he asked to have the discount continued to him, which Sanderson, from whom he purchased, had upon the stock. But this was refused, on the ground that the stock did not belong to Lynn, but to Wise. There is no evidence in the cause to show that Lynn's debt was contracted with the bank after the stock was transferred to him; or that he has, in any manner, obtained credit with the bank on account thereof; but the contrary is fairly to be understood from the proofs. Nor does the bank allege the insolvency of Lynn; or that it has not a full and complete remedy against him, without having recourse to this stock.

§ 89. *Notice of a trust is equivalent to an express declaration thereof, as to persons chargeable with notice.*

To permit the bank, under such circumstances, to avail itself of this stock

to satisfy a debt contracted without any reference to it as security, and with full knowledge that Lynn held it in trust for the complainants, would be repugnant to the most obvious principles of justice and equity. Suppose the trust had been expressly declared upon the transfer book of the bank; would there be the least color for sustaining the claim now set up? And yet Lynn would be the legal holder of the stock, in such case, as much as in the one now before the court. Full notice of a trust draws after it all the consequences of an express declaration of the trust, as to all persons chargeable with such notice.

§ 90. *Persons who come into possession of trust property with notice of the trust are bound as trustees.*

It is a well settled rule in equity that all persons coming into possession of trust property, with notice of the trust, shall be considered as trustees, and bound, with respect to that special property, to the execution of the trust. 2 Mad. Ch., 125; 1 Sch. & Lef., 262.

§ 91. *Notice to agent notice to principal.*

Notice to an agent is notice to his principal. If it were held otherwise, it would cause great inconvenience; and notice would be avoided in every case, by employing agents. 2 Mad. Ch., 326.

§ 92. *Notice to the board of directors is notice to the corporation.*

Notice to the board of directors when this stock was transferred to Lynn, that he held it as trustee only, was notice to the bank; and no subsequent change of directors could require a new notice of this fact. So that, if the bank had sustained any injury by reason of a subsequent board not knowing that Lynn held the stock in trust, it would result from the negligence of its own agents, and could not be visited upon the complainants. But no such injury is pretended. From any thing that appears to the contrary, Lynn is fully able to pay his debt to the bank.

The case of the Union Bank of Georgetown v. Laird, 2 Wheat., 390, has been supposed to have a strong bearing upon the one now before the court. But the circumstances of the two cases are very dissimilar. In the former, Patton was the real as well as the nominal holder of the stock when he contracted his debt with the bank and when his acceptance fell due, and the lien of the bank, no doubt, attached upon the stock; and this was previous to the assignment of it to Laird; and the question there was, whether the bank had done any thing which ought to be considered a waiver of the lien. But, in the present case, Lynn never was the real owner of the stock, and the bank well understood that he held it as trustee, and no lien for Lynn's debt ever attached upon it. The appellants cannot, therefore, under any provisions in their charter, apply this stock to their own use, for the debt of Lynn, to the prejudice of the rights of the known *cestui que trusts*.

§ 93. *A party having notice that property is held in trust cannot acquire a clear title thereto from the trustee against the rights of the cestui que trust.*

Nor is there any ground upon which the claim of the bank can be sustained, under the agreement made between Lynn and Chapin, the cashier, and the transfer thereof, made by the latter to the bank. If the bank, as has already been shown, was chargeable with the knowledge that Lynn was a mere trustee, it could acquire no title from him, discharged of the trust; and, if necessary, might itself be compelled to execute the trust. Nor has the bank any title to this stock under the transfer made by Chapin. This was done without any legal authority, being several months after Lynn had revoked the power of

attorney under which the transfer was pretended to be made, and with full knowledge that Lynn was not the owner of the stock. But another and complete answer to the whole of this arrangement between Chapin and Lynn is, that it was made long after the bill in this case was filed; and it is a well-settled rule that the court is not bound to take notice of any interest acquired in the subject-matter of the suit pending the dispute. The decree of the court below must accordingly be affirmed with costs.

MERCANTILE TRUST COMPANY v. LAMOILLE VALLEY RAILROAD COMPANY.

(Circuit Court for Vermont: 16 Blatchford, 824-834. 1879.)

Opinion by WHEELER, J.

STATEMENT OF FACTS.—This is a bill in equity brought by the plaintiff, as owner and holder of \$100,000 of the first mortgage bonds of the railroad of the defendants, which are railroad corporations, in behalf of itself, and all other like owners and holders who are non-residents of the state of Vermont, and wish to join therein, for a foreclosure of the mortgage, and removal of the trustees, alleging that one of the trustees is the sole trustee in a claimed preference mortgage of the same property, which he is seeking to foreclose in the state court, in which proceeding the other trustee has been appointed a receiver of the property, and is now in possession, with another person as such receiver. Some other bondholders have become parties here with the plaintiff. Some of the defendants have demurred to the bill, and others have pleaded the pendency of those foreclosure proceedings, and a cross-bill filed therein by the trustees of the first mortgage for foreclosure, on the day after the filing this bill in this court, in which this plaintiff was named a defendant, and on whom process was served by an order of that court out of the state, before the service of the subpoena in this cause. The plaintiff set down the pleas for argument, and the cause has been heard upon the pleas and the demurrers.

§ 94. *A court of equity will not disown its jurisdiction.*

Before proceeding to the argument of the questions so raised, it was moved, in behalf of the defendants, that this court should stay these proceedings until those in the state court should be completed, and thereby compel the plaintiff to become a party there, if not already one, and to proceed there instead of here. But courts have not the right to disown their jurisdiction. It is their duty to hear and determine causes properly brought before them, and to determine whether they are properly so brought, if such question arises, and not to advise or compel the parties to go elsewhere for relief, even though it should appear that the relief might better be obtained elsewhere. In Magna Charta, ch. XXIX, it was declared by the king, for his courts: *Nulli vendemus, nulli negabimus, aut differemus, rectam, vel justitiam*. This is fundamental to the duties of courts. The duty cannot be fulfilled by sending parties elsewhere for what they have a right to here, nor by compelling them to wait until some other time for what they have a right to now. If the plaintiff has a right to prosecute this suit in this court, it has, also, the right to have it proceeded with according to the course of the court, and as question is made as to whether it has the right to so proceed, it has the right to have that question heard and determined, as may appear to be right, also. There was no proper course but to hear the parties upon the questions raised, and there is no proper way now but to pass upon them.

It is familiar learning, that, upon the demurrers, the bill is to be taken as

true, and that upon the pleas, the bill and pleas are all to be taken as true, unless inconsistent, in which case the allegations in the pleas prevail. These pleadings here raise two principal questions, both of which have been very thoroughly argued by counsel familiar with questions of this sort, and with these subjects. The first is, whether this court should proceed at all, or has jurisdiction to do so, while the property which is the subject of the controversy is in the custody of the state court, in the hands of its receivers. This question arises upon both the demurrers and the pleas, for the fact of the receivership is alleged in the bill as well as in the pleas.

§ 95. *Duty of federal court where its jurisdiction conflicts with that of state courts.*

That this court ought not to, and cannot lawfully go so far with the proceedings as to take the possession of the property from that court, or as to in any manner interfere with the possession of it by that court or its officers, is not disputable. Such a course would be contrary to the provisions of the statute of the United States (R. S., sec. 720), which prohibits the writ of injunction from being granted by any court of the United States, to stay proceedings in any court of a state, unless authorized by some law relating to bankruptcy. Although the possession might be trenched upon by some process or proceeding different from an injunction in form, still the effect would be the same as if the proceedings of the state court should be stayed, and the statute would be violated in spirit, if not in letter. And, if there were no such statute, as the jurisdiction of the two courts in this class of cases is concurrent, and not revisory, one of the other, the one first acquiring jurisdiction, by proceedings involving the possession of specific property, could not, upon common and well-settled principles, be disturbed in such possession by the other, while the proceedings involving the possession should be pending. The right to the possession of the property would be as exclusive as that to the rest of the proceedings. So, the debatable question here is, not whether this court will grant relief that will disturb the possession of the state court, for, surely, it will not do that, but whether it will hear and determine any question, or grant any relief, concerning the right to the property, and not extending to the possession, while that court has possession. There is nothing, either in the letter or the spirit of the statute, that prohibits a party having a question of right, or a claim to relief, that can be determined without meddling with the possession of any court, from having the question determined or the relief granted by any court of competent jurisdiction for the purpose. Neither is there anything in the nature of things which should prevent. There could be no conflict between courts or their officers, growing out of such proceedings, nor are there any apparent evils likely to follow. Neither do the authorities go to that length. In *Peck v. Jenness* (7 How., 612; *DE. AND CR.*, §§ 213-19), Mr. Justice Grier, in delivering the opinion of the court, said, that the court having the possession of the property should have the disposition of "every question which occurs in the case," not including in the statement every question concerning the property. The cases which have followed are consistent with that distinction, and, in view of it, *Watson v. Jones* (13 Wall., 679; *CHURCHES*, §§ 16-26), is not at variance with the others. The right of the state court to the possession of the property during the continuance of the litigation before that court involving the possession, was sedulously respected, and the relief granted was carefully shaped to the disposition of the possession by the state court. In that case,

Mr. Justice Miller, after stating the pleadings and proceedings, and that the bill contained a special prayer for relief that would interfere with the possession and disposition of the property by the state court, and that it contained a general prayer that would cover other relief, said: "Under this prayer for general relief, if there was any decree which the circuit court could render for the protection of the right of the plaintiffs, and which did not enjoin the defendants from taking possession of the church property, and which did not disturb the possession of the Louisville chancery, that court had a right to hear the case and grant that relief." The authority of that case has not been questioned by the court which decided it, and it is not open to question here. In this case, as in that, some of the relief which the bill might cover would interfere with the possession of the state court, and some of it would not. The execution of an order of sale, under the provisions of the mortgage, or of an order for the delivery of possession, under other provisions, would have that direct effect, and, perhaps, the general prayer for relief would cover either; but, as before mentioned, it is clear that the plaintiff cannot have such relief. None can be had except that which will not interfere with the present possession. A decree of foreclosure would not. It would only cut off the equity of redemption of the plaintiff's bonds, which the mortgagors now have, and would not affect the possession at all, but only the right. *Carpenter v. Millard*, 38 Vt., 9; *Shaw v. Chamberlin*, 45 Vt., 512; *Brooks v. Vt. Cent. R. Co.*, 14 Blatch., 463 (Conv., §§ 1410-14). A mortgagee, in Vermont, may have an action of assumpsit to recover his debt, an action of ejectment to recover possession of the mortgaged premises, and a suit in equity to foreclose the right to redeem, all going on at the same time, each in a different court from either of the others, and neither will interfere with the other, nor will the pendency of any of them abate either of them. The remedy in each case is distinct from that in the others. This was so at the common law.

The objection on account of the receivership cannot prevail to prevent proceeding in this cause, so far as it can go without interfering with the receivership; and a decree of foreclosure can be had, if the plaintiff is otherwise entitled to one, without involving such interference.

§ 96. *A party having property within a state submits it to the laws of the state.*

The other principal question is, whether the state court had the same parties before it, either actually or by representation, for the same relief, so that it had jurisdiction of the cause before the parties were brought before this court, so as to give jurisdiction. One branch of this question is, whether the service of the process of the state court upon the plaintiff here, as a defendant to the cross-bill there, out of the state, would be effectual. A party having property within a state submits it to the laws of the state and to such proceedings as they provide for, and, if they provide for proceedings against it without personal service, or even without any service, he must, probably, submit to them; but he cannot justly be compelled to submit to any process which the laws of the state do not provide for. The laws of the state of Vermont provide for service upon non-residents, in chancery cases, by publication in a particularly specified manner. Gen. Stats., 249, sec. 21. They also provide for constructive service upon non-resident defendants whose property is attached in actions at law (Gen. Stats., 296, sec. 48); and, also, for service in various modes upon non-resident defendants in divorce proceedings. But they nowhere provide for any order by the courts of chancery to serve their process out of the

state, nor for serving it out of the state in the manner in which this was served, or in any other manner. Such service has often been made, sometimes where the court required it, in order that actual notice might be given, as a matter of fairness, and sometimes as a substituted service. But whether it is operative at all as the only service has been much doubted; and that question was expressly avoided and left undecided by the supreme court of the state in *Cheever v. Birchard* (Pamphlet Opinion of Steele, J., 10). There is no known decision of the state court holding such service to be good or bad, but there are several that hold similar service in proceedings at law to be wholly void, even in suits concerning real property within the state. *Propagation Society v. Ballard*, 4 Vt., 119; *Skinner v. McDaniel*, 4 Vt., 418. The court has no jurisdiction or authority to act without the state, and it is not easy to see how it can affect any party by anything done by it, or under its order, without the state; nor how it can affect any right within the state belonging to parties without, otherwise than by proceedings under and according to the laws of the state. As viewed here, that service was not operative upon the plaintiff, nor such as it was bound to take any notice of.

But, if that service had been operative, a question whether the proceeding to which it would make the plaintiff a party was a proper one for obtaining the relief sought here, would still remain. It would have made the plaintiff a defendant to a cross-bill for the foreclosure of a mortgage securing its own debt, which might not be a very favorable position in which to obtain the affirmative relief of foreclosure in its own favor.

§ 97. *The bondholders of mortgaged property can foreclose without the trustees, but the trustees cannot without the bondholders.*

It is urged, however, that because the mortgage trustees are parties, they draw the plaintiff in and make it a party, by representation, whether it will or not. The trustees hold the legal title to the mortgaged estate, but not the mortgage debt. It is quite familiar doctrine that a mortgage is incident to the debt, which is always the principal thing. The default which would forfeit the estate would be to the bondholders owning the debt, not to the trustees holding the legal estate. The trustees could not foreclose the mortgage without the support of the bondholders, or some of them, in it. If they should undertake to do so, and no bondholder should come in and prove his bonds, they could have no complete decree. But bondholders may foreclose and have a full decree whether the trustees will or not. At the argument, counsel very familiar with these subjects were pressed to show a case where a bondholder had undertaken to foreclose and been denied that relief, but no such case was produced, and it was admitted there were none. The bondholders have control of the bonds and the trustees have not. This is what was meant in *Brooks v. Vt. Central R. R. Co.*, in stating that the trustees were not agents for the bondholders, and what was understood to be the effect of the authorities cited there in support of that proposition. It has been many times held, against the objection of the mortgagors, that all were not joined in a proceeding to foreclose, that all need not be joined, which seems to be very plain. It is equally plain that some must join, at some stage, in order to have a perfect decree. Suppose some do join and others do not, and a decree perfected to foreclose the right to redeem the bonds of those who do, and not of the rest. If the property should be redeemed from that decree, that would not pay the other bonds, nor cut off the owners of them from their right to foreclose. If it should not be redeemed, while the right of the mortgagors to it would be

extinguished, that of the holders of the bonds not foreclosed would not be, but would still remain as against those who did foreclose, and could be enforced. *Wright v. Parker*, 2 Aik., 212; *Langdon v. Keith*, 9 Vt., 299; *Belding v. Manly*, 21 Vt., 550; *Brooks v. Vt. Central R. R. Co.*, 14 Blatch., 463 (Conv., §§ 1410-14). This shows that, when the trustees foreclose, the bondholders who join are the real parties, and foreclose in behalf of their own rights, through the trustees, and that the trustees do not represent the rights of any who do not join. In an action of ejectment, depending upon the strict legal title, it would be different. There the trustees could prevail alone, without the bondholders, but the bondholders could do nothing without the trustees. But, in equity, the real owner is regarded and the nominal owner is not. And, as this case is situated, the trustees may not represent all the rights of the bondholders as well as they would in ordinary cases. Poland, one of the trustees in the first mortgage, is sole trustee in another mortgage, claimed to have preference. The state court has the trustees of both parties to the proceedings there. With the trustees as parties alone, the only decree there could be would be, either that he should be foreclosed unless he should pay himself and the other so much by such a time, or that both should be foreclosed unless they should pay him so much by such a time. In either case he could redeem by paying himself, which would not accomplish anything. It would all be within himself. He cannot represent the plaintiffs and their opponents at the same time. Bondholders of each mortgage are made parties, it is true, and such as may fairly represent the interests common to each class, but, if so, they do not represent in fact all others of the same classes. They can only act for themselves. Whether those proceedings shall abate this suit, depends as well upon its being for the same relief in full as upon being between the same parties, and the relief available there might fall far short of an effective foreclosure, as is sought here. This is not the fault of the trustees, but of the position in which they have been placed by those who have made them trustees.

It is said, in behalf of one demurring party, that the bill does not show any request from the plaintiff to the trustees to foreclose, and that they are not entitled to proceed in their own behalf without such request and a refusal or failure to comply. It is true that no such request is alleged, so far as has been observed, but it is also true, for the reasons just stated, that none would be of any avail. The trustees are not so situated that they can foreclose alone.

It is also objected that this court cannot proceed to a decree of foreclosure in behalf of the plaintiff, because such a decree cannot be perfected without ascertaining the sum due in equity, and that this court cannot settle the accounts of the receivers, to ascertain how much there is in their hands to apply on the mortgage debt, because it has no jurisdiction over them. It is true that this court cannot settle their accounts. It is also true that they were not appointed in a suit to which the plaintiff was a party; if the plaintiff had been a party there, it could not maintain this suit here; they were appointed in a suit between others and the mortgagors. The sum due in equity is to be ascertained by fixing the amount lawfully due after deducting payments. The source from which the mortgagors derive means of payment, or what means they might derive if they could have their property, or how much it would pay if the plaintiff had it, or the avails of it, is of no consequence, unless the plaintiff has had it. It was the duty of the mortgagors to make payment, and that their property got into litigation is no lawful excuse for not making it. All payments which they make or procure to be made before

the accounting will apply as payment to keep down the sum due, and all made afterwards, and before the expiration of the time of redemption, will help them redeem. If they would have their property in the custody of a court apply in either way, they must relieve it from the custody so it can be applied the same as if it had been attached or taken in execution in some suit against them. This may be unfortunate, but, if so, it is due to the insolvency of the mortgagors, not to the fault of the plaintiff.

Many books and cases have been cited in behalf of the defendants, in support of their objections, in many of which there are rulings and *dicta* which would be strongly in their favor if the questions had arisen in the same way, and the proceedings had been to the same purpose and effect as these; more than time and space admit of specific reference to. What is said in some of them is with reference to the effect of citizenship of actual parties upon the question of jurisdiction of the federal courts; what is said in some others is in respect to foreclosure under laws which require sale of the property and division of the avails, and not concerning a foreclosure to merely bar the equity of redemption; and in none of them, so far as observation has extended, has anything been held upon questions precisely like these, contrary to what is here held or said, which, however applicable there, would be so here.

The pleas, although not to the whole bill, are to the relief by foreclosure, and as such cannot stand; neither can the demurrers. However desirable it might be that this cause should be before a court where all interested in the property could be made parties, and all rights to it be adjusted, still, as the plaintiffs have the right to come into this court for such relief as they can have here, and they can have some relief here, the court must entertain their cause in respect to that relief. The pleas and demurrers are overruled.

DADE v. IRWIN.

(2 Howard, 888-891. 1844.)

Opinion by MR. JUSTICE STORY.

STATEMENT OF FACTS.—This is an appeal from the circuit court of the District of Columbia, sitting in Alexandria.

In the year 1824, the appellant, Jane Dade, became indebted to Thomas Irwin, the testator, and executed two deeds of trust for the security of the debt. At the November term of the circuit court of Alexandria county, 1830, Irwin, the executor, filed his bill to obtain a decree of the sale of the estate so conveyed in trust; and a decree was made without objection for the sale, the appellant admitting the justice of the claim; and the original trustee having become insane, William L. Hodgson was appointed trustee to make the sale. After sundry delays, the trustee advertised the estate for sale on the 28th of November, 1834; and on the day preceding the intended sale the present bill was filed by the appellant for an injunction against the sale. The bill made no objection to the original debt or decree, but simply set up a claim, by way of set-off or discount, of a totally distinct nature, and unconnected with the original debt, as due by the testator to her, and for which she alleged in her bill that she ought to receive a credit to which in equity and strict justice she was entitled. The claim thus set up had its origin in this manner. In May, 1821, James Irwin gave his note for \$826.63 to John Adam or order, for Mrs. Dade, for money borrowed of her, which note was indorsed by Adam, and on the same day James Irwin, as collateral security

therefor, assigned to Adam a debt due to him by Alexander Henderson for cordage sold him by Thomas Irwin (the testator) as his agent, and for which the assignment alleged Thomas Irwin was liable, having received Henderson's note without the consent of James Irwin. Upon the back of this assignment there now purports to be the following indorsement: "If the within debt cannot be recovered from Alexander Henderson, I am liable for the same, provided full time be allowed for the prosecution of the suit." The supposed note, referred to in the assignment, was dated in January, 1804, and was for the payment of \$901.83 to the order of Thomas Irwin, and was signed by Alexander Henderson & Co. This note the bill alleged to include the debt due to James Irwin. Judgment was obtained upon this note in 1805. Afterwards Henderson, in 1806, became insolvent, and in 1816 a bill in equity was filed for the satisfaction of the judgment out of supposed effects in the hands of certain garnishees, which suit was not finally disposed of until October, 1835, and was then abated by Henderson's death.

The answer to the present bill by Thomas Irwin, the executor, denied the whole equity thereof. It denied that James Irwin ever executed the supposed assignment. But he admitted the origin of the debt due by Henderson & Co., and that the note taken by the testator, included it; but that Henderson, having become insolvent, he was not liable for that amount, and charged it in his accounts against James Irwin & Co. He also denied the supposed indorsement on the assignment to be genuine, but alleged the same to be a sheer fabrication.

§ 98. *Equity will not enjoin a sale of real estate to be made upon a decree under a deed of trust to secure a debt, on the ground of a set-off of an independent debt, unconnected with the deed.*

The injunction prayed for by the bill was granted, and afterwards the court directed an issue to be tried by a jury to ascertain whether the testator's signature to the indorsement was genuine or not. That issue was tried by a jury, who were unable to agree upon a verdict. The order for an issue was then rescinded, and the cause came on for a final hearing in 1839, when the bill was dismissed with costs. There is a great deal of evidence on both sides as to the genuineness of the signature of the testator, and also as to the appearance of the ink of the indorsement being that of recent writing. It is also remarkable that in the long interval between the time when the deed of trust was given in 1824, and the time when the sale was advertised and the bill filed, no demand was ever suggested by or on behalf of Mrs. Dade for the present supposed debt due her as a set-off or otherwise. On the contrary, although repeated and earnest applications were made for delay of the sale, from the time of the decree in 1830 until the advertisement in 1834, and some correspondence took place on the subject, no allusion whatsoever was made to any such supposed claim or set-off; but an entire silence existed on the subject. It is also somewhat singular, that when the bill upon the trust deed was filed, and the decree therein obtained, no suggestion was made by Mrs. Dade in answer thereto of this supposed claim, nor any postponement of the decree of sale asked upon this account.

§ 99. *What necessary to move equity to act in a case of set-off.*

Now, upon this posture of the case, several objections arise as to the maintenance of the suit. In the first place, the present bill is of an entirely novel character. It is not a bill of review, or in the nature of a bill of review, founded upon any mistake of facts, or the discovery of any new evidence.

It admits in the most unambiguous terms that the decree was right. Then, it sets up merely a cross-claim or set-off of a debt arising under wholly independent and unconnected transactions. Now it is clear that courts of equity do not act upon the subject of set-off in respect to distinct and unconnected debts, unless some other peculiar equity has intervened, calling for relief; as, for example, in cases where there has been a mutual credit given by each upon the footing of the debt of the other, so that a just presumption arises that the one is understood by the parties to go in liquidation or set-off of the other. See 2 Story, Eq. Juris., §§ 1435, 1436. In the next place, the remedy for Mrs. Dade, if any such debt as she has alleged exists, is at law against the executor; and there is no suggestion that the estate of the testator is insolvent, and that his assets cannot be reached at law. So that the bill steers aside of the assertion of any equity upon the foundation of which it can rest for its support.

§ 100. — *will not interfere in favor of a set-off which is stale and suspicious.*

In the next place, the nature and character of the claim itself — now for the first time made, long after the decease of both the Irwins, and thirteen years at least after its supposed origin. To put the case in the least unfavorable light, it is a matter of grave doubt whether the indorsement of the testator's name on the assignment is genuine or not. That very doubt would be sufficient to justify this court in affirming the decree of the court below, and leaving Mrs. Dade to her remedy at law, if any she have. But connecting this with such a protracted silence for thirteen years, without presenting or making any application for the recognition or allowance of the claim to the testator or his executor, it is impossible not to feel that the merits of the claim at such a distance of time, can scarcely be made out in favor of the appellant. It is stale, and clouded with presumptions unfavorable to its original foundation or present validity. Besides, in cases of this sort, in the examination and weighing of matters of fact, a court of equity performs the like functions as a jury; and we should not incline, as an appellate court, to review the decision to which the court below arrived, unless under circumstances of a peculiar and urgent nature. The decree of the circuit court is, therefore, affirmed with costs.

WILLIAMS v. HAGOOD.

(8 Otto, 72-75. 1878.)

APPEAL from U. S. Circuit Court, District of South Carolina.

Opinion by MR. JUSTICE STRONG.

STATEMENT OF FACTS.— This is a bill in equity against the comptroller-general of the state of South Carolina, the county treasurer of Charleston county, in said state, and the assignees in bankruptcy of the Blue Ridge Railroad Company, in which the relief sought is an injunction commanding the comptroller “to cease from refusing to levy a tax for retiring” certain certificates of the state indebtedness, and commanding the county treasurer “to cease from refusing to receive the same for taxes and dues to the state, except to pay interest on the public debt.”

The facts of the case, so far as they are exhibited by the bill, and so far as they are material for present consideration, are as follows: By an act of the legislature of the state, enacted March 2, 1872, reciting in its preamble that in pursuance of a former act the guaranty of the faith and credit of the state

had been indorsed on four millions of dollars of bonds issued by the Blue Ridge Railroad Company, and that it was desired to recover and destroy the bonds thus issued and relieve the state from the liability incurred by its indorsement and guaranty thereof, the state treasurer was directed, with the written consent of the railroad company, to require the financial agent of the state to deliver to him for cancellation all the bonds of the company, indorsed and guarantied as aforesaid, then in the agent's possession, and held by him as collateral security for advances.

The second section of the act enacted that upon the surrender by the company to the state treasury of the balance of the said four millions of dollars of bonds thus guarantied by the state, the state treasurer should be authorized and required to deliver to the president of the railroad company treasury certificates of indebtedness (styled revenue-bond scrip) to the amount of \$1,800,000, executed in a manner directed afterwards in the act. And if the company should not be able to deliver all of said bonds at one time, the act required the treasurer to deliver to the said president such amount of the treasury certificates as should be proportioned to the amount of bonds delivered.

The third section made it the duty of the state treasurer, in order to carry out the purposes of the act, to have treasury certificates of indebtedness prepared, to be known and designated as "revenue-bond scrip of the state of South Carolina," which should be signed by the treasurer, and which should express that the sum mentioned therein is due by the state of South Carolina to the bearer thereof, and that the same would be received in payment of taxes and all other dues to the state, except special tax levied to pay interest on the public debt.

The fourth section pledged the faith and funds of the state for the ultimate redemption of the scrip, and required county treasurers to receive it in payment of all taxes levied by the state, except in payment of special tax levied to pay interest on the public debt. It also required the state treasurer and all other public officers to receive the same in payment of all dues to the state; and, still further to provide for its redemption, the section levied an annual tax of three mills on the dollar in addition to all other taxes on the assessed value of all taxable property in the state, to be collected in the same manner and at the same time as might be provided by law for the levy and collection of the regular annual taxes of the state. And the state treasurer was required to retire, at the end of each year from their date, one-fourth of the amount of the treasury scrip authorized to be issued, and to apply to such purpose exclusively the taxes by the act required to be levied.

The sixth section required the guarantied bonds to be canceled and destroyed on their delivery to the treasurer.

In obedience to this act, the revenue-bond scrip was prepared and signed by the state treasurer. When this was done, a large part of the four millions of dollars of bonds of the railroad company, indorsed and guarantied by the state, had been sold, or were pledged as securities for money borrowed by the company. The complainant was a purchaser for value of \$417,000 thereof, and he was the *bona fide* owner and holder of them when the act of March 2, 1872, was passed. Relying upon the faith of the state as pledged in the said act of its legislature, and in the said certificates of indebtedness, he consented to exchange the bonds, amounting to \$417,000, for said treasury certificates, amounting to \$166,000; and the exchange was made. His bonds, guarantied as above stated, were delivered to the state treasurer, and they have been can-

celed. The railroad company and the state have thus been discharged from all obligation to pay the bonds, and the complainant holds in lieu thereof only the certificates of indebtedness to the extent of \$166,000.

§ 101. *A court of equity will not solve abstract questions, where the bill sets up no equity.*

After this exchange had been effected, the bill charges, and it appears, that the state, in various ways, legislated in such a manner as practically to deny the obligation apparently assumed in the certificates of indebtedness, or revenue-bond scrip. By an act approved October 22, 1873, the legislature repealed the fourth section of the act of March 2, 1872, by which a tax was levied for the redemption of the scrip, and forbade the comptroller-general to levy any tax, for any purpose, unless expressly thereafter authorized therefor. By another act, approved December 22, 1873, the county auditors and county treasurers of the state were forbidden to collect, or cause to be collected, any tax other than such as were levied by that act, unless expressly authorized thereafter so to do. This legislation was manifestly inconsistent with the undertaking of the state expressed in the act of March 2, 1872, and in the revenue-bond scrip issued thereunder, and its constitutionality and obligatory force would be a legitimate subject for consideration if the complainant had placed himself in a position to invoke our judgment. But he has not. His bill does not aver that he has been injured, or will be injured, by this legislation, or by any act or neglect of the comptroller-general or the county treasurer. It does not aver that the comptroller-general has neglected or refused to perform every duty imposed upon him by the statute under which the revenue-bond scrip was issued, nor even that he threatens such neglect or refusal. It does not aver that the county treasurer has refused, or even threatened to refuse, receiving the complainant's scrip, or any scrip, in payment of taxes or dues to the state, other than taxes levied to pay the interest on the state debt. It does not aver any demand from the state treasury, or any tender to the county treasurer. Its object is plainly to obtain from this court a declaration that the legislative acts of October 22, and December 22, 1873, are unconstitutional, because impairing the obligation of the contract made by the act of 1872, and the certificates thereby authorized and thereunder issued, and this without any averment that the complainant will be injured by them. The question presented to the court is, therefore, merely an abstract one; such a one as no court can be called upon to decide, and the bill shows no equity in the complainant. Hence it was properly dismissed in the court below, and it must be dismissed here, but without prejudice to the complainant's right to bring and prosecute another suit, when he shall be in a condition to exhibit any equity in himself.

SWAN v. BANK OF THE UNITED STATES.

(Circuit Court for Virginia: 2 Marshall, 298-298. 1837.)

Opinion by MARSHALL, C. J.

STATEMENT OF FACTS.—Blake B. Woodson had obtained a loan from the Bank of the United States on his note, with John T. Swan, the plaintiff, as his indorser. After some time an additional indorser was required by the bank, whereupon Walthal Holcombe agreed to add his name to that of Swan, upon which the accommodation was continued. In October, 1818, Blake B. Woodson executed a deed conveying a tract of land in the county of Cumber-

land to Benoni Overstreet, in trust, that "if the said Walthal Holcombe shall be likely to suffer on account of the undertaking of the said Walthal Holcombe, for the said Blake B. Woodson, at the bank aforesaid, in the opinion of the said Benoni Overstreet, or in the case the note in the said bank now or hereafter, with the name of the said Walthal Holcombe as indorser thereon for the said Blake B. Woodson, shall be protested, whereby the said Walthal Holcombe, his heirs, etc., shall, in the opinion of the said Benoni Overstreet, be likely to suffer for the amount of any such protest, costs and charges, or any part thereof, the said Benoni Overstreet, at the request of the said Walthal Holcombe, shall," on thirty days' notice, proceed to sell the trust premises. Blake B. Woodson executed other deeds of trust on the same land for the security of other creditors, and, among others, for the security of Samuel W. Venable, under whose deed the land was sold, and the said Venable became the purchaser thereof.

The deed to Benoni Overstreet, for the benefit of Holcombe, was not recorded, but full notice of it was given to Samuel W. Venable. At and before the sale it was shown to him by Benoni Overstreet, the trustee. After he had read it the said Overstreet observed that it was not recorded, on which Venable admitted its validity as to him. Before the deed to secure Venable was executed, he had a conversation with Edward Bedford respecting the affairs of Blake B. Woodson, in which Bedford informed him of the several liens on Woodson's land, including that for the security of Holcombe, on which Venable made a calculation of their amount, and said that the land would be sufficient to discharge those liens and pay the debts due to him. The deed for his benefit was executed soon afterwards. When the conversation took place between Venable and Overstreet at the sale, they again made a calculation of the liens which were found to amount, including the debt due to the bank, to about \$9,000. The land was sold for the payment of the debt due to Venable, subject to the prior liens, among which, the debt due to the bank was mentioned, and Venable bid the amount of his own debt, and being the highest bidder, the land was struck out to him. A higher price had been offered for the land and rejected by Blake B. Woodson. This offer was repeated during the bidding, and again rejected, about which time the land was struck out to Samuel W. Venable.

The accommodation to Blake B. Woodson, with John T. Swan, and W. Holcombe as indorsers, was continued by the bank, and before any change took place in the debt, Samuel W. Venable died, leaving N. E. Venable and A. W. Venable his executors. They proposed to the bank to pay the debt, provided the bank would put the note in suit against John T. Swan, for their benefit. This proposition was acceded to, and a judgment obtained in the name of the bank against John T. Swan. Swan filed his bill, stating the foregoing circumstances, alleging his ignorance of these transactions until after the judgment was rendered, and praying an injunction. The defendants, the executors of Samuel W. Venable, admit their liability to W. Holcombe, but insist that the lien of Holcombe, as he has not been compelled to pay anything, and is now discharged from all responsibility, cannot be set up by the plaintiff.

§ 102. *The purchaser of land subject to a deed of trust made to protect a surety does not, by paying the debt, become subrogated to the surety's rights against a co-surety.*

It is perfectly clear, that Holcombe, as a subsequent indorser, having made no arrangement whatever with Swan, the previous indorser, which connected

them in any manner with each other, would not have been responsible to Swan, for any portion of the debt paid by that indorser, but would have had recourse against Swan, to be indemnified for any sum he might be compelled to pay. It must be admitted, that the deed of trust was intended solely as an indemnity to Holcombe, and was not executed for the benefit of Swan. If Swan can now avail himself of it, his right to do so grows out of subsequent transactions.

In considering this case, the first inquiry that presents itself to the mind is, could Swan, in the event of being compelled to pay the debt to the bank, before the sale of the trust property, have resorted to that property for indemnity? By force of the mere terms of the deed, he undoubtedly could not; but would a court of equity have given its aid?

The property, after Holcombe was discharged from his indorsement, would have reverted to Woodson, and the trustees would have been seized in trust for him. Consequently, any creditor might have pursued it; and a court of equity would, if necessary, at least have removed the trust out of the way. But when the land became charged with subsequent deeds of trust, the creditors for whose benefit those deeds were made, would not be postponed to that made for Holcombe, farther than was necessary to satisfy the terms of that deed. Consequently, Swan, had he in that state of things been compelled to pay the debt to the bank, could have had no pretext for claiming the aid of Holcombe's deed against the holder of any subsequent deed, or against any purchaser at a sale made in pursuance of such deed. If his case is mended, it is by the facts attending the sale, and the discharge of the note in bank as disclosed by the testimony.

It is proved, that when Mr. Venable obtained the deed of trust, he valued the property at a sum sufficient to discharge the debt due to himself, after discharging all prior incumbrances, including that of Holcombe. It is also proved, that this computation was again made at the sale, and that the land was at that time thought a good purchase, supposing it to be charged, not contingently, but positively, with the debt to the bank. These facts show, that in the mind of Mr. Venable himself, the debt due to the bank constituted a part of the purchase-money; and would probably have afforded strong inducements to any creditor, acting solely under the influence of his own feelings, and with the single desire of obtaining his debt, to press Mr. Holcombe, who was secured, rather than Mr. Swan, who could revert to no fund for reimbursement. Had the creditor pursued this course, the land purchased by Mr. Venable would have been subjected to the debt, and it will not be alleged that he could have had any recourse, in law or equity, against Mr. Swan as the prior indorser. Had the land still retained the value at which it was estimated when sold, all will admit that that is the course which, in right and justice, the affair ought to take.

But, although the fact is not alleged in the record, the reduced price of property, real as well as personal, is a matter of general notoriety, and will certainly justify the defendants in avoiding the payment of this debt, if the law will enable them to do so. Had the bank, without their interposition, proceeded of itself to coerce payment from Mr. Swan, he could not, perhaps, have obtained the aid of a court of equity. Had the representatives of Mr. Venable remained passive spectators of the procedure, it is probable that the circumstances attending the purchase made by their testator, would not have affected the estate. But they have not remained passive spectators. The bank has acted

at their instigation, and by their procurement. They have been the means of inducing the bank to proceed against a surety having no indemnity, rather than against one holding an indemnity from the original debtor. Although this might have been perfectly justifiable in a court of equity, if disconnected from the circumstances attending the taking of the trust deed, and the sale of the property under that deed, it cannot be sustained when viewed in connection with those circumstances.

An additional argument, which has been suggested by my brother judge, is entitled to great weight. It is, that if Mr. Venable may coerce the payment of this money from Swan by using the name of the bank, he gives Swan an action against Woodson, and thus renders Woodson liable for the money which his land was intended to secure. The injunction is made perpetual.

BATEMAN *v.* FARGASON.

(Circuit Court for Tennessee: 2 Flippin, 660-663. 1880.)

Opinion by HAMMOND, J.

STATEMENT OF FACTS.—This is a bill to reopen the settlement of an account on the ground of usury, undue influence, and violated confidence, amounting to an alleged fraudulent imposition by the defendant upon the plaintiff. It appears by the bill that the plaintiff and defendant were joint owners of a plantation, the plaintiff managing the property in the business of growing cotton, which was sent to the defendant for sale, he being a commission merchant; the supplies to furnish the plantation being supplied by the defendant from his stock of merchandise, or otherwise, and charged to the joint account. The account also contains items of money advanced to the plaintiff to pay for his share of the purchase money of the plantation. The parties had a settlement, and the plaintiff appeared to be indebted to the defendant in the sum of \$20,000. To secure this the plaintiff executed a mortgage on his share of the land, and subsequently an absolute deed in full payment; his wife joining in the conveyance for the purpose of releasing her dower and homestead rights.

§ 103. *Meaning of the maxim "A party must come into equity with clean hands."*

The plaintiff alleges that he procured this acquiescence of his wife by coercion, setting forth in detail his angry denunciations of her for her remonstrances, and his threats to have defendant, whom she greatly disliked, appointed guardian for her children, and such other like conduct as procured her signature to the deeds. The bill is demurred to because of this allegation of coercion and confession of fraud upon his wife, and the maxim is invoked that "He who comes into equity must do so with clean hands." The principle indicated by the maxim only applies to the conduct of the party in respect to the particular transaction under consideration, for the court will not go outside of the case for the purpose of examining the conduct of the plaintiff in other matters, or questioning his general character for fair dealing. Bisph., Eq., 61. It does not mean a general depravity, it must have an immediate and necessary relation to the equity sued for, it must be depravity in a *legal* as well as moral sense. *Deering v. Winchelsea*, 1 Cox, Ch., 318; *Nichols v. Cabe*, 3 Head, 92; *Sharp v. Caldwell*, 7 Humph., 415; *Mulloy v. Young*, 10 Humph., 298; *Kelton v. Millikin*, 2 Coldw., 410; *Lewis' Appeal*, 67 Penn. St., 153, 166.

If it be conceded that the coercion of the wife is evidence of moral turpitude — and certainly no court can, at this day, do less than severely reprehend

such conduct — still, the plaintiff will not be repelled unless the iniquity complained of in him is connected with and a part of the very transaction as to which he seeks relief. It seems to me plain that, while the coercion of the wife was a method of perfecting the defendant's title to the land, and in that sense connected with the transaction, it is not a part of it. The subject of controversy is the usury in the account, and the other alleged false and fraudulent items as to which there is said to have been an unfair settlement.

§ 104. — *plaintiff's coercion of his wife to sign a mortgage does not debar him from setting up in equity fraud practiced upon him and usury exacted of him in accounts connected with that mortgage.*

The land was given in payment, and the deeds made to effectuate the payment are recited in the bill; the relief asked being to correct the settlement, and to hold it as payment only for so much as is actually due, charging the defendant as trustee for the balance. The case stands as if money had been paid in settlement of defendant's account, and we should be asked to repel the plaintiff because it appeared that he procured the money from some third party — his wife, for example — by questionable and, it may be, fraudulent practices. I do not see that such a case falls within the maxim or rule of equity invoked by the demurrer.

The object of the bill is to surcharge and falsify the merchandise account, and no relief is asked because of the allegation of coercion of the wife. It might afford her a ground for relief, and she is made a defendant, as are her children; for what purpose it does not appear, unless to enable them to file a cross-bill to recover their alleged dower and homestead rights. But no relief is asked against them; they have not appeared, and no process has brought them here. The case must, therefore, be determined alone as between the plaintiff and the defendant, Fargason.

Mr. Spence, in treating of this and the kindred maxim that "He who asks equity must *do* equity," gives some curious illustrations of its application in ancient times, when the chancellor, as a condition precedent to giving the plaintiff relief, would require him to ask pardon of the defendant, to withdraw slanderous words, to be dutiful to his parent or uncle, and in one case to publicly on his knees ask forgiveness of the defendant; all required because of some depraved conduct by the plaintiff. But even in these cases the wrong redressed was to the defendant and not a third party, and Mr. Spence says they are cited, not as precedents, but curiosities of the law. 1 Spence, Eq. Jur., 424, and note.

The cases cited by the learned counsel for the defendant all show that the plaintiff was seeking advantage of, or relief from, the bad conduct with which he was himself charged. *Creath v. Sims*, 5 How., 192 (§§ 2031–34, *infra*); *Wheeler v. Sage*, 1 Wall., 527; *Bleakley's Appeal*, 66 Pa. St., 191. The case of *Wheeler v. Sage*, *supra*, so much relied on in argument, was a case where the plaintiffs had been disappointed in expected profits of a fraudulent transaction by the desertion of their confederate, whose greed induced him to take the whole for himself. Relief was refused, so far as the doctrine now under consideration was applied, because to have given them relief would have been to sanction the nefarious transaction in the court. No such result will ensue in this case. Demurrer overruled.

CITY BANK OF NEW YORK v. SKELTON.

(Circuit Court for New York: 2 Blatchford, 14-19. 1846.)

STATEMENT OF FACTS.—Clark, Burritt and Benedict (the latter acting for Yonge) deposited with the City Bank of New York certain bonds, money and a promissory note, to be held in trust until some conflicting claims should be settled. The deposit was made upon condition that the funds should not be withdrawn before the 1st of September then next ensuing without the request in writing of Burritt to Yonge, or his attorney. Part of the funds were withdrawn in August, and suit was brought by Skelton and Frazer against the bank in the chancery court of New York, and afterwards Yonge brought two suits in this court in trover and *assumpsit* against the bank. All these suits were pending when this bill was filed against all concerned, asking that they be required to interplead and that the bank be allowed to pay the fund into court, etc.

Opinion by BERRIS, J.

Two questions have been discussed on this motion: (1) Whether the facts establish a case for a decree of interpleader; (2) Whether this court has jurisdiction to make such a decree.

The strong objection taken to the right of interpleader in this case is, that the plaintiffs received the deposit as bailees of Yonge, and became absolutely bound to him to return it at his call; and that the qualification in the deposit, that the written concurrence of Burritt should be necessary to a withdrawal of the deposit, operated only for a limited period, and ceased to have any effect after the 1st of September, 1844.

§ 105. *A bank may by bill of interpleader have relief against separate and adversary claimants.*

Eminent judges speak of the doctrines respecting bills of interpleader as perplexing and not well defined. 2 Story's Eq. Jur., § 814, and notes. The fundamental principle upon which relief by bill of interpleader is founded is, that two or more persons are claiming the same thing by different or separate interests, of a person who does not claim any interest therein himself, and does not know to whom he ought of right to surrender it, and that one or both have brought, or threaten to bring, actions against him. In such case, he may appeal to a court of equity to protect him from the vexation attending such suits, and also from being compelled to respond to several parties for the same thing. 2 Story's Eq. Jur., § 806; 2 Kent's Comm., 567, 568; Jeremy's Eq., 347; Eden on Inj., 1st Am. ed., 242; Crawshay v. Thornton, 2 Mylne & Craig, 1; Atkinson v. Manks, 1 Cowen, 691. The defendant Yonge insists that the rule does not apply to bailees or to bankers, but that they are bound by the general principles of law to restore to the bailor the deposit made with them. 2 Story's Eq. Jur., §§ 816, 817; Story on Bailments, § 110. But the cases which seemingly support that objection are counterbalanced by a weightier array of authorities, both English and American, to the contrary. 2 Kent's Comm., 566-568; Atkinson v. Manks, 1 Cowen, 691; Schuyler v. Pelissier, 3 Edw. Ch. R. 191; Birch v. Corbin, 1 Cox's Ch. Cases, 144; Jeremy's Eq., 348. The rule has been directly sanctioned in the cases of funds deposited in a bank (Birch v. Corbin, 1 Cox's Ch. Cases, 144), and with a stakeholder (id., 145); and it has been applied in behalf of a captain of a vessel, against whom there were adverse claims upon bills of lading. Lowe v. Richardson, 3 Madd., 277. Each of these cases is strong in analogy to the present one, and I should feel

no difficulty in declaring, upon the general principles of equity jurisprudence, that a bank may be entitled to relief by bill of interpleader against separate and adversary parties who claim title to moneys therein deposited.

§ 106. — *powers of a United States circuit court over parties, suitors in a state court. Extent of such powers.*

But there is an impediment to the enforcement of that principle by this court in the case now before it. One of the suits pending, against which the plaintiffs ask relief, is prosecuted in the state court of chancery, and this court is clothed with no power to restrain or interfere with a suit so situated. A court of the United States, in executing a jurisdiction vested in it, may undoubtedly act upon parties who are suitors in a state court in relation to the same subject matter, so far at least as to compel their submission to such judgment as the United States court may render in a case of which it has cognizance. But, even then, it cannot interdict their prosecuting their suit in the state court, much less control any action pending in such court. It is understood that the state courts uniformly adopt the same doctrine in respect to courts of the United States. Here it is to be assumed that the state court is competently possessed of the case before it, and a decree of this court compelling the plaintiffs and one of the defendants in that court to interplead here would be an exercise of that authority and control over the state court itself which can only be allowed to a tribunal of general jurisdiction under the same government.

§ 107. *Measure and mode of relief granted to a bailee or depositary against adverse claimants.*

But the plaintiffs have made out a case of the most stringent equity against allowing Yonge to proceed in his suits in this court against them, while the suit brought by Skelton and Frazer is pending in the state court for the same subject matter, and to which he is a party defendant. The conflicting rights of these two prosecuting parties are directly at issue in the suit in the state court, and that forum has full capacity to, decide the right between them. There the controversy should be continued so far as these plaintiffs are to be affected, and, with the determination of that case, they should legally know to whom they can rightfully deliver over the funds in their possession.

I think the cases of *Mallow v. Hinde*, 12 Wheat., 193, and *Dunn v. Clarke*, 8 Peters, 1, furnish a guide to the order proper to be made in this case. The former was a case similarly circumstanced to the present one, and is an authority that this court may, in its discretion, restrain the prosecution of the suits brought by Yonge, until he has had an opportunity to settle his controversy with Skelton and Frazer in the suit in the state court of chancery. I shall accordingly order an injunction to that effect, giving to the parties the option to consent, by stipulation, to interplead in this court on the subject matter, and thus place it wholly under the control of this court.

TUFTS v. TUFTS.

(Circuit Court for Massachusetts: 8 Woodbury & Minot, 456-518. 1847.)

STATEMENT OF FACTS.—In 1827, Peter Tufts died at Cambridge, insolvent. His estate was sold by his widow (his executrix), and was purchased by Cutter and Cummings. There was an agreement between these persons and Mrs. Tufts that she should continue in possession of the land, and when she should be able to repay to them the purchase money and interest, they would convey the

property back to her. In 1834, Cutter held the title to the property, and wishing to sell it, Mrs. Tufts induced her step-son, Charles Tufts, to buy it, and, as she alleges in her bill, hold it on the same understanding which she had had with Cutter and Cummings. The land improved greatly in value—from about \$3,500 in 1827 to \$40,000 in 1842. About this time Mrs. Tufts offered to repay to Charles Tufts the purchase money and interest, but he refused to convey to her, and disavowed all obligation to do so. In 1844 he sold part of the land to Wheeler, who, as she alleges, had notice of her claim, and of the agreement between her and Charles Tufts. This bill was filed by her against Charles Tufts and Wheeler, praying an account, an injunction against further sales, and a conveyance of the property to her. The answers of Charles Tufts and Wheeler denied in effect the equity of the bill—the former, that he ever agreed to let Mrs. Tufts have the land, except within a limited period, which had expired; the latter, that he bought without any notice of Mrs. Tufts' claim.

Opinion by WOODBURY, J.

This case has been argued very elaborately on both sides, and requires a full and detailed examination. The allegations in the bill are claimed to make out a case for the complainant to recover on several distinct grounds. One is on an agreement, and virtually asks for a specific performance of it, as if it was founded on a proper consideration, and was otherwise valid, and as if everything previously required on the part of the plaintiff had been done. Another is on what amounts to a mortgage, and seeks, in substance, to be allowed to redeem it on the payment of all which is equitably due. Another is on a constructive trust, growing out of the agreement, which is considered binding on the respondent, but is alleged never to have been performed by him. Another still is on a resulting trust, which is contended to arise in favor of the complainant, on the supposed fact that she advanced all the consideration for the deed from Cutter to the respondent, Charles Tufts, the latter acting merely as her agent.

The bill in terms sets up none of these grounds for a recovery, except the agreement first mentioned. But in argument, they all have been urged, and it may be just to sustain the bill if either of them come within the facts duly alleged and duly proved. Either of these grounds, also, if well supported under the objections taken against them, would certainly be sufficient to give jurisdiction to this court on its equity side, and hence might justify a decree in favor of the complainant after amendment, even if the grounds be not now sufficiently described.

Before examining, however, each of these positions separately and in detail, it may be observed, that there are two general exceptions which are made, and which apply to most of them. They are, first, that the consideration connected here with any agreement, a mortgage or trust is not a good one, while it should in each be legal, or it cannot have the assistance of a court of chancery to enforce it. And secondly, that none of them are proved in writing, though when an agreement, mortgage or ordinary trust relate to an interest in land, they must, by the express requirement of the statute of frauds, be proved by some "writing signed by the party to be made liable." These two general exceptions I shall examine last, as they apply to several of the grounds relied on for a recovery, and as the separate objections to each ground can be best weighed in the first instance and by themselves.

§ 108. *A resulting trust not within the statute of frauds.*

The claim set up by the plaintiff, that the transaction between her and

Charles Tufts created a resulting trust in her, or amounted to a mortgage of these premises by her to him, which she should now be allowed to redeem, is a very important one for her to make out, if practicable, because such a trust would not be affected probably by the statute of frauds. Resulting trusts are expressly excepted from the operation of such statutes generally, and mortgages, where an absolute deed exists, may be shown in chancery by proving by *parol*, the relation of debtor and creditor between the parties, or the recognition in other ways that the transaction was a mere security for a loan. See cases in *Hunter v. Marlboro'*, 2 Woodb. & M., 168, and *Bentley v. Phelps*, 3 Woodb. & M., 403. It is still more important for her to make out either of these, as the consideration connected with them, if it exists, was one between her and Charles Tufts alone, and not between her and the original purchasers, Cummings and Cutter, and hence probably it would not be tainted by any illegal arrangement with them, if one existed between them and her.

§ 109. *To raise a resulting trust the alleged trustee must have used the money or credit of the cestui que trust.*

Is there, then, as insisted by the plaintiff, proved against the respondent anything which raises as against him a peculiar trust merely by operation of law, such as is termed a resulting trust, and which by statute need not be evidenced in writing, or anything which amounts in equity to a mortgage in which the complainant has all the rights of a mortgagor, and the respondent should perform all the duties of a mortgagee? The test fact as to a resulting trust is this. If the respondent, Charles Tufts, used his own money and credit, there is nothing in or from her to raise a resulting trust to her. 4 Burr, 2255; 4 East, 577; 2 Atk., 74; 5 John., Ch., 1; 2 Paige's Ch., 238; 3 Sugden on Vendors, 260.

While, on the contrary, if he acted then merely in the capacity of her agent, and used her money, and not his, to buy the land with, a resulting trust would arise in her favor in law, not supposed to be prohibited by the statute of frauds, and independent of its provisions. See cases in *Hunter v. Marlboro'*, 2 Woodb. & M., 168; 1 Russ. & Mylne, 53; 11 Bligh, 397, 418; *Hill on Trustees*, 55; *Lewin on Trusts*, 168; 2 Story, Eq. Jur., §§ 1201-6. So if she borrowed the money of him, and he took her note for the amount, and then had the deed from Cutter and Perkins made out to him, rather than the plaintiff, wrongfully and contrary to agreement, a resulting trust would arise to her.

The independent facts separate from the face of the deed are, in such cases, provable by *parol*, notwithstanding the statute of frauds, sometimes under an express exception in the statute, and sometimes in order to prevent fraud. *Lewin on Trusts*, 155; 1 Spence, Eq. Jur., 571; 2 Vent., 390; 1 P. Wms., 322. But it is apparent, on a little scrutiny of this transaction, that neither a resulting trust nor a mortgage was intended to be the case in form.

I apprehend that the other facts show, also, that neither of them was intended, in substance, because the respondent became liable to Cutter and Perkins for the whole consideration, and paid part in money and gave his own mortgage for the rest, and did not charge to her the amount in his books (*Hill on Trusts*, 92), or charge it in any account rendered to her which is produced and proved, though one of her sons swears it was charged in some account he had at some time seen, yet none such is produced. Nor did he take any note of her for the consideration paid, or any mortgage, though the deed running to himself from Cutter and Perkins would perhaps furnish him with a strong security, if

he really had made an absolute loan to his step-mother, and if this course was intended as mere security for it.

But against either of these parties having intended such a loan is the further fact that by the agreement as proved, both originally and with the respondent, she was under no obligation to pay the consideration and take the farm, but merely had liberty or permission to do this, if she pleased, and should ever become able to do it. Consequently she could not then mean to pay for it by an agent and by a loan. Nor is it pretended in the bill, or proved that the respondent promised to take the deed in her name, and to treat her as at once the debtor for the consideration, and to advance the money and credit as hers, which is the usual mode of raising a resulting trust, and which is raised on such facts only, and then in order to prevent a breach of faith operating injuriously and fraudulently. 1 Spence, Eq. Jur., 451, and Lloyd v. Spillet, 2 Atk., 150; Ambler, 150.

But there is neither any such breach of faith and breach of contract at that time averred in the bill, nor any such attempted to be shown by evidence. There was, likewise, a paramount reason why she should not make any such agreement, or wish to have any such deed at the time of her arrangement with Charles. She appears to have been embarrassed by debts, and did not like to have any interest she possessed in these premises taken to satisfy her debts. Hence she would not desire to have any deeds executed to herself, or any property so situated that the title would be vested in her by resulting trust or mortgage, and be liable to be seized and sold to the extent of her interest.

This in some degree, likewise, reconciles her disclaimers to several persons of her having any interest in these premises, because she had intended to have it so situated, that she might in future obtain an interest, if she afterwards pleased, but not have any *in presenti* to be exposed to satisfy her debts. On the contrary, no circumstances existed there which would be likely to prevent the respondent from buying at that price and being willing to retain the land himself, if not soon wanted by her, when it was worth more than the consideration, or from taking the deed in his own name, being out of debt, or from paying with his own money in part, as he had money and she had not, or from getting credit for himself for the rent, as he had credit, or from holding it sometime as his own to benefit and oblige her, if she became able and willing to pay for it, as he was young and disposed by kindred and residence with her to accommodate her. Nor was there, on the evidence, a single circumstance to show that in this he had violated, or was for years accused of violating, any promise or duty to her so as to cause a resulting trust or mortgage.

§ 110. *The test of a mortgage in equity is the existence of a debt between the parties.*

In the next place, is there sufficient proof to show a mortgage between them? The test as to that in equity, there being no pretense here of a mortgage in law, is the existence of a debt between these parties for the consideration paid to Cutter, and which the deed to the respondent was executed to secure. See cases in Bentley and Wife v. Phelps, 2 Woodb. & M., 426, and Almy v. Wilbur, 2 id., 371; 1 Vern., 262; 1 John. Ch., 370; Taylor v. Luther, 2 Sumn., 228, and Flagg v. Mann, 2 Sumn., 487; 4 John. Ch., 189; Coote on Mort., 24; Greenl., Ev., 288.

There may be mortgages to secure bail, covenants, etc., and not debts. But there is no claim here that this was a mortgage to secure anything except a

debt. Nor is it shown that Charles Tufts was a lender of money generally at that time, or that any note was taken for this as a debt, or any charge made of it to her. And the whole current of the evidence, though with some exceptions, is that she was not bound at all then to buy the land, unless she afterwards chose to do it and advance the money, rather than that she had thus bought it, and virtually mortgaged it for payment of the consideration.

§ 111. *Distinction between an ordinary trust and a resulting trust or a mortgage.*

All the reasons, too, existed against her being a mortgagor of this land, which existed against her having a resulting trust, on account of her indebtedness to others, and telling them, as she did, that she had no interest in these premises to pay them with. Opposed to a mortgage, as well as a resulting trust, it also seems very likely that all her interest then rested in mere contract, and was so meant to rest. It was conditional, and depended on her option and pleasure afterwards, whether it should ever become a vested interest of any kind or to any extent.

It rested on a special agreement or ordinary trust growing out of it — not a mortgage or resulting trust, on an agreement, to be sure, not very technical nor business-like in its terms, but one which, if executed, would operate kindly among relations, and which, if executory in its terms or conditions, and not able to be enforced on account of objections interposed, either legal or equitable, was an agreement, not in my opinion, as the respondent's counsel argued, so unusual or irrational as to be disbelieved under all the evidence and circumstances of this case. Even the bill does not purport to proceed on the ground of a resulting trust, or a mortgage, which she wishes to be opened for redemption. It avers no loan from Charles Tufts to her, nor any mortgage. It proceeds rather on facts connected with the idea, either of a common trust in the original and subsequent purchase of this farm in her behalf, which has not been fulfilled, or an ordinary but valid agreement made in relation to the land in her behalf, which is set out in terms, as is a non-performance by the respondent.

And though a trust not being alleged in the bill is not to be presumed or implied unless necessary and clear (3 Swanst., 591; 1 Spence, Eq. Jur., 496), yet both a common trust resting on an agreement, an agreement to some extent express rather than implied, are, in my view, quite clearly shown by the evidence, as before explained. Yet both a common trust resting on an agreement and an agreement of a certain character are perhaps sufficiently shown by the evidence. The next inquiry, then, is, what was that agreement or trust arising from it, and what are the objections, if any, which should oppose and defeat the execution of it, independent of the statute of frauds, and of the consideration of the agreement or trust, which will both be examined separately before closing.

§ 112. *Quære: Is an answer responsive to the bill evidence, or is it a quasi bar until rebutted by evidence?*

I pass by many subordinate points in the case, it being almost a Proteus in the shapes it has assumed, and do not go into the inconsistencies between different parts of the answer, or the want of credibility in that and several of the witnesses, or whether an answer is evidence or not, when responsive to the bill. That it is, see *Russell v. Clark*, 7 Cranch, 70 (CONTRACTS, §§ 272-77), and *Gould v. Gould*, 3 Story, 540; *Morgan v. Tipton*, 3 McLean, 348. That it is not, but is a *quasi* bar till overcome by evidence, see 6 Clark & Fin., 295; 2

Daniell's Eq. Pr., §26; 1 Mad. R., 1; 1 Younge & Col., 59. But I hasten to the trust or agreement to see what are their true terms and the objections to them, as on these the merits of the case in controversy must finally be disposed of.

When the evidence was examined which the complainant offered in order to prove the terms of the original agreement that she had alleged in her bill to have been made about the conveyance of this farm to her by Cutter and Cummings, it became clear, in the first place, that though it may have been finally settled when the deed was executed, yet it was arranged before and at the sale, and was then acted on.

This is positively sworn to by one of the parties to it. It is also testified to that the property was in fact knocked off to them at the auction sale of it by her, as executrix, at \$1,000 less than others were then and there willing to give the same day. This was another strong feature or incident of it. The original purchasers also bought with a sole view to aid her by this agreement, both being engaged in other business, and one of them being her cousin and desirous to assist her. This was another element in it, and no consideration whatever was advanced by her individually, in order to cause the agreement, but the reconveyance was promised to her in consequence of this arrangement and sale to them, in order that she might have the benefit of it. This was the moving cause, this her only privilege, except that she was to remain on the premises by paying only the interest and taxes as rent, and take her own time for paying the principal, and asking a conveyance.

But it was left entirely optional with her to buy or not, as her means might happen to permit, or the land become in time more valuable or not. After some years Cutter, in whom all the farm had become vested, being in need of money, and she being unable to raise it, her step-son, the present respondent, who had boarded with her since his father's death, and rendered some aid in paying the rent, and had acquired some property, was induced to come forward and take the land and agreement off Cutter's hands. She had like confidence in him as in Cutter, and he was therefore substituted for Cutter. He was to stand, as a witness swears, "*in Cutter's shoes*." I do not think it was an independent purchase, or new and different agreement in its terms and consideration, though it has been strenuously insisted by her counsel that this arrangement with the respondent was an independent transaction, and that the old trust was entirely executed. In that view he urges it as a new trust or agreement created in the respondent, unaffected and uncontaminated by anything wrong in the first sale.

But I think the balance of the evidence and circumstances is the other way, and at the same time is against the position taken by the respondent, that he did not promise or become liable to do all which Cutter was bound to do. The question, as one of fact, is difficult, and I wish a jury had passed on it rather than the court. Yet the weight of facts and circumstances seems to me to indicate that the deed to the respondent, and his agreement and trust in conformity to it, were not made without full reference to the former agreement and trust to reconvey in a certain event and without full reliance placed on it. But it was at the same time very far from being meant as the total execution of the old trust and the creation of an entirely new one, or one of a different character. On the contrary, it was a mere continuance of the old one in new hands, the respondent knowing and promising to comply with the old one, and she asking that and that alone. And whether he promised to do it

or not, in all respects, which is questioned some in Charles Tufts' answer and the argument of his counsel, he is still liable to do it if he took the land merely knowing, as he doubtless did, all the previous trust attached to it. He took it *cum onere*. 2 Drury & Warren, 31; 2 Ball & Beattie, 304, 416; 1 Sch. & Lef., 262; 1 Ves. Sen., 498; 2 Vern., 271, 447; Lewin on Trusts, 205; 20 John., 421; 1 John. Ch., 305.

From all the circumstances, that, and nothing either beyond or short of it, must manifestly have been the intention of both parties. He merely assumed the obligations and confidence which existed in Cutter & Co. for the same object and consideration and with like designs, and she merely desired that. Indeed, in the bill itself, it is alleged that Charles Tufts took the land under the same agreement as Cutter and Cummings, "under the agreement aforesaid," — "holding said premises under such agreement as aforesaid."

It is not set out, to be sure, as it is proved, in respect to the *time* the agreement was first made, but in other respects it is substantially the same. Indeed, though some parts of the written argument of the plaintiff contend that the old trust was executed and a new trust formed, yet other parts make it a point that both were the same. Thus, "fifthly," after insisting that the trust had been executed, it is added: "Charles Tufts took the conveyance with knowledge of and subject to *that* trust, and therefore takes subject to it, or stands in a like situation," as Cutter, the first trustee, swears.

Charles Tufts "was to hold the estate on the same understanding and agreement as C. had done," and Smith testifies "the agreement was that he (Charles Tufts) should step into Mr. Cutter's shoes." In short, a new promisor was merely agreed to be substituted for the old one, but to the same obligation, or a new trustee as to the same trust, or, in other words, the old agreement and trust were only assigned to Charles Tufts, he agreeing to do all which the assignor had been engaged to do, and the promisee in the agreement assenting to this assignment. It was as if a new tenant under a lease should attorn to the landlord and be accepted, instead of the old tenant, for the same rent or consideration.

Afterwards the respondent showed a disposition, not unnatural, to limit to ten years from her sale, or five years from Cutter's, the continuance of any right in her to have a conveyance of the premises on paying the original consideration and interest. The evidence, however, is, in my view, decidedly in her favor, that there was no such limitation, and though this gave her a great advantage, it was not a very unusual advantage, under all the circumstances of indigence and relationship on one side, and prosperity, if not wealth, on the other.

In Welsh mortgages no time of payment or redemption is fixed. 3 Pow., Mort., 947-8; 3 Atk., 518. But then the mortgagee enters and takes the profits. 1 Pow. on Mort., 373. And here the indulgence has some limit to it, probably, if the party chooses to resort to chancery and have the time for redemption or payment restricted to some reasonable period. She is entitled, then, to all the benefits of the agreement or trust, as it stood originally in Cutter and Cummings' hands, and is subjected to all the disadvantages or imperfections of it as originally made. These, in my view, are its terms, its privileges and defects.

Among the defects which have been deemed most prominent, its exposure to the plea of the statute of frauds, on the ground that the agreement or trust was not in writing, and next, that illegality existed in the consideration

for either of them. Beside these the agreement and trust, deeming them as I do throughout, to be the same in their terms, conditions, object and consideration, are open to some other exceptions as to their conditions which it may be well to advert to before proceeding to the two most prominent. One of these others is, that the terms of the agreement and trust were, on the part of the plaintiff, not imperative, but resting only in her pleasure were optional, and hence were not valid. To this effect, certainly as a matter of fact, is the balance of the testimony, though not the whole of it. This conclusion is, likewise, fortified by her own declarations frequently made, that she had no interest in the land, and hence everything must have been voluntary or optional with her in order to justify, in any true view, such declarations.

§ 113. *Where a trust is not mutual it cannot generally be enforced. Cases cited.*

Conceding, then, that it was optional in the plaintiff to pay the original money or not, the trust or agreement could not, as a general principle in such case, be enforced for the want of mutuality. *Cooke v. Oxley*, 3 D. & E., 653; *Routledge v. Grant*, 4 Bingh., 660. It will at once occur to every lawyer that unless a party is bound to pay money to another, the latter is not bound to convey in cases like these. That there must be a duty or obligation usually on both sides, see 6 Paige, 288; 1 Cowen, 733; 4 John. Ch., 497; *Bunbury*, 111; *Newland on Con.*, 152; 1 Sch. & Lef., 13; 2 Story, Eq. Jur., p. 96; 2 Vern., 415; 12 Ves., 46; 3 Bro. Ch., 12; 1 Ves. Jr., 50; 18 Ves., 99; 6 Ves., 662; 5 Ves., 818; *Hamilton v. Grant*, 3 Dow's P. C., 33, and 1 Bligh, N. S., 594; 2 A. K. Marsh., 346; 2 Story, Eq. Jur., §§ 750, 769; 16 Maine, 92; 1 John. Ch., 282, 370; 6 Wheat., 528, 539; 16 Ves., 406; 7 Bro. P. C., 279; 4 Ves., 66; *Walton v. Coulson*, 1 McLean, 129; 1 Jacob & W., 465; 2 Freeman, 35.

§ 114. *Distinction as to mutuality between executed and executory trusts.*

There may be exceptions to this rule, which it is not necessary here to enter into. So there are various discriminations as to what does and does not constitute mutuality. Thus it may not be necessary to have mutuality, as it is argued, in an executed trust, that is, one whose conditions are performed, and not one merely executory. 1 Hare, 34; 1 Craig & Phillips, 63. But this trust is not considered by me as in this sense executed, and this very bill is brought to compel it to be executed. As already shown, a new trustee was substituted for an old one, but nothing more. So if the mutuality on one side consisted merely of a conveyance of land to the other, that, if done, might be sufficient to sustain an agreement to reconvey on the other side. But unfortunately that is not the whole of this case. The conveyance on the one side here was the mutuality for the consideration which was paid on the other side, and divided among the creditors of her husband's estate.

§ 115. *Illegality of a contract.*

But for the promise to reconvey on her paying a certain sum, there was no mutuality in any promise by her absolutely to pay such sum at any time and take the land. Nor was there any other consideration for the promise to reconvey, except the illegal one originally existing for them to buy for her benefit, and thus buying at a price quite \$1,000 less than persons the same day offered to give. I do not, however, propose to decide the case on either of those points, but merely to call attention to the difficulties attending them.

§ 116. *Time, whether of the essence of a contract.*

Nor do I decide whether time here was of the essence of the agreement or not, another question much argued and strongly insisted on by the respondent,

though the inclination of my mind is it was not. See cases where time is material. 2 Story, Eq. Jur., § 776; 1 Sugd., 410-3; 8 Cranch, 471; 5 Cranch, 262; 4 Bro. Ch. C., 469, note; 7 Ves., 273; 16 Maine, 92; 1 How., 14; 5 Ves., 818; 6 Paige, 288; Tamlyn R., 381; 5 Ves., 720, note; 2 Story, Eq. Jur., §§ 771, 776; 13 Ves., 228; 2 Sim. & Stuart, 29; 6 Wheat., 528; 1 Fonbl., Eq. B. 1, ch. 6; 1 Ball & Beatty, 69.

If property has altered in value, and the complainant has been dilatory or negligent (*Walton v. Coulson*, 1 McL., 129; *Longworth v. Taylor*, id., 395; *Garnett v. Macon*, 2 Brock., 207), time is often material, and affects the question of enforcing performance. In that view the great delay here is unfavorable to the plaintiff. Though it may alter the case some as to delay, considering that she was in possession of the estate, and hence did not tender nor bring her bill so speedily as otherwise would have been likely, if not proper. Coote on Mort., 22. But, in short, how could time be deemed a material element in a contract when that contract, in my view, had no time whatever fixed within which it was to be performed, and when the other party never had resorted to chancery and obtained a limitation as to time?

§ 117. *Necessity, in asking a specific performance, of showing a compliance with the terms of the contract.*

Nor do I decide whether the interest was payable quarterly or not, though the weight of the evidence and the character of the transaction both indicate that it was. If it was not, the respondent might be without interest or principal for years. But if payable quarterly, it might be in equity that a failure to pay at the day would be relieved against in a mortgage or trust as properly as would a failure to pay the principal at an agreed day. But in a suit at law on the agreement this objection might be fatal. And in equity, seeking a specific performance of the agreement, rather than the execution of a trust, it would be very difficult for the plaintiff to succeed without showing she had complied with the stipulation as to quarterly payment of interest, if such in truth was the agreement. 3 Mad., 392; 2 Sumn., 316; 3 Atk., 133; 5 Russ., 42; Story's Eq. Pl., § 333.

Without this obligation to pay interest quarterly, the argument would be a strong one, that if the plaintiff was neither obliged to pay the principal within a given time, nor pay the interest quarterly, without forfeiting her rights, she might live there her whole life and pay nothing. She might, in this way, also have all the advantage of a large rise in the value of the property, and risk nothing. It would be difficult in equity to tolerate this. *Sanborn v. Stetson*, 2 Story, 484-5. The only answer to the inequitable if not illegal aspect of such an agreement would be, that the respondent in chancery might perhaps compel her in a reasonable time to pay the principal and interest, or have his land exonerated from the trust and claims of any kind to it. See *Almy v. Wilbur*, 2 Woodb. & M., 371; *Skillern's Ex'rs v. May's Ex'rs*, 4 Cranch, 137.

§ 118. *Variance, when fatal. Rule as to amendments.*

So, if the contract proved varied essentially from that set out in the bill, that is fatal. 2 Ball & Beatty, 369; 5 Ves., 452; 2 Ves. Sen., 299; 2 Ves. Jun., 243; 2 Sch. & Lef., 10; 1 Ball & Beatty, 404; 5 Wend., 644. But the testimony is contradictory as to this, and if stronger for the respondent, an amendment would be allowed to the plaintiff, if she appear otherwise to have merits. It is sometimes allowed after an opinion delivered. 2 Collier, 389; 1 Craig & Phil., 62; 2 Sch. & Lef., 347; 1 Dowl., Pr., 520; 3 McLean, 348; *Almy v. Wilbur*, 2 Woodb. & M., 371.

The practice in chancery has long been very liberal as to amendments. As early as 9 Edward IV, Chancellor Stillington said: "In the chancery a man shall not be prejudiced by mispleader or for default of form, but according to the verity of the matter." 1 Spence's Eq. Jur., 375. They have by acts of congress expressly prohibited objections of form in the courts of the United States from barring justice, whether in law or equity. If at any time before judgment is entered up an amendment is necessary, it is usually allowed, even in England, of late years, in an improved spirit to reach and enforce what is substance. 1 Spence's Eq. Jur., 253; Stephen on Plead., 81. Indeed some amendments are made there after judgment, and writs of error are brought to reverse them. See *United States v. Jarvis*, Maine Dist., October Term, 1847; 3 McLean, 348.

§ 119. *Rule as to pleading the statute of frauds.*

Having gone over most of the special exceptions to the agreement, and to any constructive trust, I shall next proceed to the two general exceptions, and firstly, that of the statute of frauds. The mode of pleading this is objected to by the plaintiff. The plea refers to the "revised" statute of frauds, when the transaction occurred under the old one. But this seems much overcome by the circumstance that in this respect the two statutes are alike. 5 Metcalf, 168; 22 Pick., 430. Nor would it generally answer in chancery, if the statute of frauds is pleaded to hold the plea bad, and admit evidence under it, not competent by either statute, merely because in the reference to the statute it is recited as the "*revised*," rather than the old statute.

If necessary to have an amendment in such case, it would usually be allowed without much terms for reasons just stated in respect to amendments, where the evidence varies from the averments in the bill. Besides that, the pleading of such a statute and the relying on it are not to be discountenanced, because the law now not only imperatively requires written evidence as to important matters on grave public principles to prevent frauds and perjuries, but it is a reasonable mode of preventing them (Roberts on Frauds, 157), and was required centuries before by the civil law, even as early as the days of Constantine. 1 Spence, Eq. Jur., 160. Several eminent jurists have lamented that the strict construction of the statute was ever departed from.

§ 120. *The creation of trusts in lands is within the prohibitions of the statute of frauds.*

Looking, then, to the subject matter of this agreement, I have no doubt that it was one made in relation to the title of lands, or to the creation of a trust in real estate, so as in either view to come under the prohibitions of the statute of frauds. The prohibitions of that statute extend to declarations or "creations of trusts" in land, as well as contracts concerning an interest in lands. 1 Spence, Eq. Jur., 496. Though they reach only to the *proof* of such trusts, requiring it to be in writing and signed, rather than requiring the *creation* of them to be in writing. *Forster v. Hale*, 3 Ves., 707, and *Randall v. Morgan*, 12 Ves., 74.

§ 121. *Difference between the English statute of frauds (29 Charles II, ch. 3, and that of Massachusetts.*

Thus by the statute of 29 Charles II, ch. 3, the clause creating trusts says they "shall be manifested and proved by some writing signed by the party," etc. See Roberts on Frauds, 91. While the clause as to a contract or agreement creating an interest in land is differently expressed, and may be thought

to require more matter as to the terms of the contract to be in writing (Roberts on Frauds, 104), it is that "*some memorandum or note thereof must be in writing, signed by the party,*" etc.

The Revised Statutes of Massachusetts, p. 472, ch. 74, are the same as the English one in respect to contracts, except it is expressly provided that the consideration need not be stated in writing. It had been so held before in 17 Mass., 123. And as to trusts (p. 408, ch. 59), the Massachusetts provision is like the English one, and has no statutory exemption as to the consideration. But in England it has been held that the writing to prove a trust must contain the terms of the agreement. *Seagood v. Meale*, Prec. in Ch., 560; Rob. on Frauds, 106; 1 Atk., 12; 6 Bro. P. C., 45; 3 Atk., 503; 3 Br. Ch., 318; 1 Ves. Jun., 330; 2 B. & P., 238; *Cooke v. Tombs*, Anstr., 420. So must the writing to prove a contract. 10 Bingh., 383; 2 Barn. & Cres., 627; Story on Sales, § 269. And one of the terms of the agreement is held to be the consideration, according to 5 East, 10; 8 John., 29; Rob. on Frauds, 119; 2 N. H., 414; 3 John., 210; 4 Barn. & Ald., 595; 3 Brod. & Bing., 14.

But the correctness of this view has been drawn in question in other states than in Massachusetts, holding the writing sufficient, if showing the promise or terms of it, and not the consideration. 6 Cowen, 90; 14 Ves. Jun., 189; 15 Ves., 287; *Smith v. Ide*, 3 Vt., 290. Whether, then, this case be regarded as an agreement to reconvey on certain terms a tract of land, or to fulfil a common trust concerning them, which grows out of that agreement, and is identical with it in its terms, it must be proved by some writing signed by the party to be bound (2 B. & P., 238; 1 Ves. Sen., 82), and the paper or writing must contain the terms of the contract, and if it be a trust, the writing may, even in Massachusetts, be required to show the consideration, though otherwise if a mere contract.

But I do not decide this last point concerning the *consideration*, whether necessary to be expressed in writing or not. Suppose it is not in Massachusetts, how would the matter then stand in the present case. The only writings attempted to be shown in relation to it here are the accounts and books of Charles Tufts, under his signature, and hence sufficiently signed perhaps to prove legally all they contain. But what do they contain? Not the original agreement itself, or any of its terms. They show charges of interest and rent to the plaintiff by the defendant, and show sums paid by the latter for this estate, and gravel and trees sold by her, and matters of like character.

But they do not make any charge against the plaintiff, as if he had bought the farm on her account as an agent, and loaned to her the money on credit; or contain any statement conforming to the terms of the agreement as set up in the bill to convey the farm to her on receiving the consideration he had advanced with interest thereon. Nor do they disclose the fact that though buying it nominally on his own account, and opening a separate head with it as "the Cambridge Estate," he held it under a trust, the specific terms of which are detailed and can be ascertained without parol evidence and without some of that danger of fraud and perjury which the statute of frauds and perjuries was made to guard against.

It is true, however, that they contain charges against her of interest paid in several instances, which, from the amounts, were probably the interest on the consideration advanced and secured by him for this farm. But as she occupied the farm with and under him, and the legal title being in him, this interest and

the taxes might be charged as rent, as in some subsequent years after 1839, the item was charged *eo nomine* to "rent." These written charges against her do not, therefore, show with so much certainty that there was a contract such as she now sets up, because they are consistent with the idea of a lease to her with very liberal indulgences towards a mother-in-law, or if accompanied by some special agreement or corresponding trust, not under one very clearly of the exact tenor now claimed. But certain independent or collateral facts are next proved, which are supposed to remedy this defect in the written evidence as to the terms of the agreement, and even to be sufficient to prove the contract or trust under the statute, independent of the writing.

§ 122. *Operation of the principle of part performance taking a case out of the statute of frauds.*

There is first her continued occupation of these premises ever since the death of her husband, and as fully after the first sale in 1828 down to 1842, as before. This, however, is impaired some by his residence with her till his marriage in 1840. There is next her improvements made in the buildings which, though disputable in their value, have clearly been considerable. There is her seeding the ground, planting trees, selling much gravel, assenting to and being consulted as to sales of some of the land, making leases of it, and trying to raise money on it to pay Cutter and Perkins, without resorting to the direct parol testimony of Cutter in favor of the trust and agreement in the form now set up, as well as that of numerous other witnesses concerning confessions and acts of some of the parties to such a trust and agreement.

All these combined raise a very strong presumption that a trust or agreement of some kind existed in her favor, and probably much like what is now set up. And some of the acts indicate a part performance of such a possession so long a time and exercising so many acts of ownership. 3 Swanston, 593; 2 Story's Eq. Jur., §§ 759, 761; Newland on Contracts, 181-7; 3 Ridgeway, 518-9; 1 Sugden on Vendors, 201. But if these acts can otherwise be accounted for, they do not prove a sale. Roberts on Frauds, 155; 3 Ves., 713.

Some cases hold, also, that these acts of part performance, in order to avail, must be such as to injure the plaintiff if the contract is not carried into effect. 15 Mass., 93; 18 Ves., 323; 1 Sch. & Lef., 41; 1 Ves., 297; 14 Ves., 386; 7 Ves., 341. Some hold that it must tend to defraud him, or else the statute must operate. But in this way all the evidence as to a part performance, when combined together, is quite strong to show a trust existing such as is before stated, and it is defective only in making out all its terms, except by parol. That is the great hiatus in this part of the evidence. On what is a part performance, and sufficient to take a case out of the statute, the authorities are numerous. See 14 Ves., 386, 488; 3 Ves., 378; 1 Sch. & Lef., 41, 123; 7 Ves., 341; 2 Story, Eq. Jur., §§ 750, 763, 764; 1 Sugden on Vendors, 200; 6 Ves., 467; 1 John. Ch., 283, 284.

Coupled with the admissions in the answer as to parts of the trust and agreement, the legal proof might be sufficient to show that some trust existed. Yet it would, as thus admitted, be a trust like the agreement, optional with the plaintiff; a favor, too, rather than a right, as not mutual, and limited in time, and for the same consideration with that existing between her and Cutter. Nor is the other evidence strong enough to vary what the respondent admits, except as to the length of time the privilege was to be enjoyed. But whether the admission, if taken at all to eke out the other testimony, must not be taken as a whole in the whole answer, is another difficulty (Gresley on Ev. in Ch.,

304); and one which it is not necessary to attempt now to solve, for reasons which will be hereafter stated.

§ 123. — *when money paid in part is not a part performance.*

In respect to the money paid here, it is objected that money paid in part is not deemed a part performance, because it can be recovered back if the sale is not executed, and thus no fraud or injury be necessarily inflicted. Rob. on Frauds, 134; Hollis v. Edwards, 1 Vern., 159. This course of reasoning, showing no injury or fraud by this result, will in some degree obviate the effects of other improvements or acts being considered as part performance or part payment, if compensation can be made for them, and I am inclined to think if the case was not taken out of the statute, she can be compensated in some way, and should be, if anything be due. Rob. on Frauds, 134, 154; 3 Ves., 713.

When forced out of possession she would in most states be entitled to compensation for any improvements made by her under a supposed interest or title, being called betterments. See laws in Maine, N. H. and Vt., as to betterments, and in Ohio, Kentucky, etc., as to occupying claimants. See the civil law on this, and Withington v. Corey, 2 N. H., 115; 20 Martin, 609. So it is held in Bryan v. Banks, 4 Barn. & Ald., 410, if the tenant is led by the course of the landlord to make improvements, he may get his pay in equity. Usually one must not make improvements without a supposed title or interest in lands. 5 Johns., 272; Green v. Biddle, 8 Wheat., 1 (Constr., §§ 191-206); Bartle v. Nutt, 4 Pet., 186 (CONTRACTS, § 548). So one must not wilfully mix his goods or labor with another's, or he will lose it.

In some cases when the owners look on and expressly or impliedly assent to such improvements, an action lies for money paid and expended on their account. Roberts on Frauds, 134, 154; Beers v. Houghton, 1 McLean, 226, 528; 3 Ves., 713. Where one bought and entered and was then evicted for a fraud in the deed to his grantor, a bill for the improvement made was sustained against the legal owner. Utterbach v. Binns, 1 McLean, 244. Special laws, like those just referred to, exist in many states, authorizing commissioners to appraise such improvements made under a supposed title, and making the owners pay for them. Parsons v. Bedford, 3 Pet., 457.

So a jury may do this in New Hampshire and Maine. 2 Gallison, 105. See Webster v. Cooper, Mass. Dist., October, 1847; Parsons v. Bedford, 3 Pet., 457. Or let them be deducted from mesne profits received. 2 John. Ch., 441; 2 Kent's Com., 334 to 339, and note; 4 Pet., 480. And in this state, Massachusetts, there was such a law passed March 2, 1808, under which have occurred various decisions. See 2 Metcalf's Laws, p. 178, ch. 74; 17 Mass., 350; 6 Mass., 303; 15 Pick., 141, etc.

The occupying claimant law of Kentucky is similar in character, and the jurisdiction of chancery over the matter is maintained by averring mistake or accident in making the improvements or a trust arising in him to pay for them who has been benefited by them. The occupying claimant law in Ohio, under which commissioners appraise the value of improvements by tenants, has been held to be constitutional so far as regards our own citizens. 2 Pet., 525; Baldw., 222. The betterment laws are constitutional for future cases as to our own citizens. Society for Propagation of Gospel v. Wheeler, 2 Gall., 105 (CITIZENS, §§ 194-204).

In another view, also, there may be a remedy, as where a specific performance of a contract is defeated by a plea of the statute of frauds, any money

advanced must be refunded. *Johnston v. Glancy*, 4 Blackf., 99; 1 Sugden on Vend., 145, note; 2 Hovenden on Frauds, 4; 1 Sch. & Lef., 129; 1 Vern., 159. In *Fay v. Valentine*, 12 Pick., 44, it was held that if one promises not to redeem, though the promise is not enforceable, he will not be allowed in equity to recover against it; if there be not good faith and justice in the plaintiff, he must not expect aid of a court of equity to sanction a violation of his engagement.

It is to be conceded, however, that some of the proof of these acts relied on as part performance, is in writing, such as those before named of the sale of gravel and trees credited in the respondent's books, and that others are rendered probable by several independent facts and acts looking like part performance; and I entertain little doubt, therefore, that some such agreement as is contended for by the complainant existed originally, and that it was renewed by the respondent, though it is certain that some of the counter evidence as to her declarations denying the possession of any interest or property to pay her debts is strong, and many of the favors and indulgences to her by her stepson are susceptible of being considered kindnesses rather than the result of an agreement or trust which the parties deemed binding in justice and honor if not in law.

I shall not, therefore, dispose of the case on this ground. See *Jenkins v. Eldredge*, 1 Woodb. & M., 61. See cases showing how much of the trust or agreement must appear in the writing. 9 Ves., 253; 3 Merivale, 53; 4 Taunt., 209; 3 Atk., 503; 1 P. Wms., 770, and note; 2 Vern., 288; 2 P. Wms., 412; 1 How., 118; 3 Ves., 686; 1 Sugden on Vendors, 166; 1 Atk., 449. If the substance does not, the danger of fraud and falsehood is not renewed. Without going farther into this difficulty now, the following cases show to what extent it may be relieved by parol evidence. 1 Ves. Sen., 76; *Barnardiston*, 30; 4 Bro. Ch., 62, 472; *Coote on Mort.*, 26; *Hill on Trustees*, 522; 2 Atk., 71; *Sugden on Vend.*, ch. 20.

The case, then, stands thus under the first leading objection interposed of the statute of frauds, that there may be enough proved by writing, by occupation and improvements on the land, and admissions in the answer (to recapitulate nothing more), to be satisfactory that some special agreement and consequent trust existed on the part of the original purchasers, as well as of the respondent, to reconvey the premises on some terms and conditions, but, there being doubts as to the exact character or extent of those terms and conditions, without a resort to parol evidence, I leave this point unsettled, and I do this the more readily, as the next and last objection is, in my view, fatal to the bill. And I shall therefore proceed to it without saying more either on this or some other kindred position advanced in the arguments.

§ 124. *Where, under an agreement with the executrix, parties purchase the land of the testator, sold to pay debts, below its real value, and hold it on an understanding with her that she may purchase from them at the same rate, such a contract is illegal, against public policy, and voidable if not void.*

The other fatal objection, just referred to, is the consideration in which or for which the transaction originated, the shade cast over the transaction and over the claim made here by the illegality of that consideration. The law in relation to this is really not so much in dispute as the facts. For one side argues here from the idea of a consideration connected only with an executed trust, and contends the respondent's agreement and trust to be new, and the old trust to be executed, and if so, its consideration not to be material. For

this is cited: 4 Hare, 74; Hill on Trustees, 83; 1 Hare, 474, and various other cases. While the other side, and as before shown, correctly in my view, treat this case of the collateral undertaking to be as it stood originally, and hence to be an executory trust in respect to its conditions founded on a like consideration.

Again, one side argues that the original transaction of the sale was only voidable, and that in a particular way or form, and by particular persons, while the other side, somewhat contrary to my views, hold it void and hence assailable by any person and under any form. Again, one side regards the objection now urged against enforcing the collateral agreement as setting aside the original sale, while the court regards it as leaving that sale untouched and merely declining to interfere to help execute a collateral and improper agreement or trust connected with that sale.

Much of the reasoning and many of the cases cited on both sides relating to this point in the inquiry rest, therefore, on principles or facts different from those on which rest the conclusions of the court, but are very sound reasoning and very pertinent cases, looking to the principles and facts on which the counsel for the complainant argue. I shall go at greater length into this point of the consideration, as it has been most mooted at the bar and requires careful discriminations between much which seems on the face not very unlike it, nor particularly different.

Observe that in this view it is not the want of *any* consideration which is here interposed against enforcing the executory promise or trust, as the deed of the land at a price below its value may have been some consideration, not a mere *nudum pactum*. But it was that this inducement, this difference, was a consideration which belonged to heirs and creditors, and which the executrix had no legal right to use for her private benefit. It originated in an act forbidden by public policy and illegal, and this constitutes the strong objection to aid the plaintiff to enforce it. In this case the plaintiff, being an executrix, undertook to obtain an interest in the estate as an individual, which she was selling as a trustee for the benefit of the creditors and heirs.

It turns out in evidence that she did this by a previous agreement with the purchasers, and that the estate was thus in fact bid off for less than others present were willing to give, and was held under this trust or parol agreement on this consideration, and no other, to be reconveyed to her in her private capacity, whenever advancing the purchase money and interest. But no advantage is taken of this in answer, as it is not set out in the bill as made before the sale, nor since it was disclosed in evidence has any supplemental answer or cross-bill been put in, making use of it to defeat the plaintiff from enforcing such a trust or agreement, though there has been a motion to put one in, if necessary. Now were this bill founded on the deed or sale, which has been executed and carried into effect, and this objection was to avoid that, such a conveyance could probably not be avoided, except by heirs or creditors, under appropriate pleadings. Of this more hereafter.

§ 125. *A distinction between "void" and "voidable."*

I do not decide this point, as not necessarily arising, but throw out this impression because, though such conduct by an executrix is unfaithfulness to her trusts, and dangerous as a matter of public policy to be upheld or enforced, yet it is perhaps only voidable, and not void after it is executed. Van Epps v. Van Epps, 9 Paige, 242; 13 Pick., 159; 4 Kent's Com., 438; 4 Cowen, 717; 2 Cowen, 196; Veazie v. Williams, 3 Story, 625; 2 Burge's Col. & For. Laws, 459.

The material distinction for this case between *void* and *voidable* is this. An act is void which when done was bad or against law in respect to the whole community, and nobody is bound by it. But it is voidable, if only bad as to a particular person, who may or may not avoid it. Bac. Ab., "Void and Voidable." So when void, it may be so treated after by any person, and without a special plea or motion, but when voidable, it is otherwise generally if it has been executed. If the present collateral agreement was, therefore, void, it would make no difference whether it has been executed or not, for in either event it could not be upheld probably, even as the pleadings now stand.

But it probably is not void in this sense of the term. A thing is void in this sense and with this fatal effect when the consideration or purpose or act was *malum in se*, as murder, for instance, or *malum prohibitum*, as an offense, because both are prohibited on account of the community at large. Every moral man is, in some points of view, as much bound to avoid what is *malum prohibitum* as *malum in se*. 2 Bingh. N. C., 646; 2 Bos. & P., 370; 7 Greenl., 113; 1 Emerigon, 210, 542; 7 Wend., 276.

Beside what has already been referred to in respect to the distinction between what is void and what is only voidable, it may be necessary to look at other illustrations in some detail, in order to settle which of the two the present collateral contract and its consideration were. Because if they were void, technically the objection against the bill might prevail, even if they related to an executed agreement or trust, and on the present state of the pleadings. Thus, on the principle already stated, that some acts may be void as to some persons and purposes, but not others. Such acts are regarded as usually only voidable. Thus, if some of the parties are *femes covert* or infants, and others are not, it is good as to the others. So a fraudulent gift is good against the donor, though not against creditors. Cro. Eliz., 445.

Hence one conveying to defraud creditors cannot enforce the trust on the grantee (20 Pick., 247), nor set it up in any way, unless it has been executed. Then he may. *Flagg v. Mann*, 2 Sumn., 487; *Hunter v. Marlboro'*, 2 Woodb. & M., 168. But such conduct as the complainant's is against public policy, and is certainly not to be upheld as a general principle, whether it be called void or voidable. 1 Sugden on Vend., 226, 237; Lewin on Trusts, 376; Dana, 138; 11 La., 48; 11 Martin, 297; 8 Wheat., 441; 1 Paige, 397; 13 Pick., 28, 276; 1 N. H., 186; *McLean v. Lafayette Bank*, 3 McLean, 588; 2 John. Ch., 252; 3 Bing., 254; 4 Binney, 43; 5 Har. & John., 147; 2 Mad., 338; 10 Ves. 292; *Michoud v. Girod*, 4 How., 503; 3 John. Ch., 29; 13 John., 112; 2 Ves. Sen., 238; 5 John., 194; 8 John., 144; 2 Caines' Cases, 183.

Though the title passes by the deed, it is subject to be divested in such an event. 11 Ves., 165; 13 Ves., 581; *Newland on Contracts*, 6, 471; 1 Ves. Sen., 9; 2 Sch. & Lef., 661; *Hawley v. Cramer*, 4 Cow., 718; 1 Spence's Eq. Jur., 512 and note. The Case of *McIntosh*, 1 Bingh., 50, cited against this general principle, is where the sale was made to one of the trustees who had before renounced the trust, and hence stood in no fiduciary capacity at the time of the sale.

The language in the books as to what is void or only voidable, is not always purely technical. Sales like the present have, therefore, been at times called void, as in *Michoud v. Girod*, 4 How., 503, yet they are not considered as preventing a ratification by heirs or *cestui que trusts*, if sold for consideration enough, and they should prefer the consideration to the land itself. The words "void" and "voidable" are often indiscriminately used for the last; meaning

in both instances, that which may be deemed a nullity by proper persons and in proper modes. And sometimes the substitution of another sham purchaser, *per interpositam personam*, is regarded as strong evidence of real fraud, and hence the sale in such case is at times deemed actually void. See cases cited in the above case in 4 How., and 1 Ves. Sen., 9; 2 Sch. & Lef., 661; 4 Cowen, 718.

Then the maxim may apply, "He that hath committed iniquity, shall not have equity." Francis' Max., 2. This means *iniquity*, not merely moral, nor necessarily what is against sound morals, but anything illegal. 7 Ves., 473; 1 Hovenden on Frauds, 163; 1 Spence's Eq. Jur., 422; Jones v. Randall, Cowp., 38; 1 Bos. & P., 296. But whether the act is utterly void or only voidable here, remains to be settled on sound principle.

§ 126. *Trustees cannot buy trust property.*

None standing in a fiduciary relation, like executors and agents, are, without special license, permitted to buy the trust property, either at public or private sale made by themselves, because it opens a door to fraud and injury to the rights of the principals, and gives to the agents an undue advantage, and the law, therefore, prohibits it in order to remove temptation and prevent probable usury. Indeed the agreement or trust, if of any advantage, and it is difficult to see why it is created if of no advantage, is manifestly obtained, not by the trustee's own private funds, but by the property of others, the *cestui que trusts*. The transaction, in such a view, then, is clearly immoral when the consideration to be received for the *cestui que trusts* is less than the true value of the property, because the difference, belonging to others, creditors and heirs, is pocketed by the executor or agent in his private capacity, without paying anything for that difference from his own funds.

Nor is such a sale legal if the consideration was ample, though it would then not be plainly immoral or fraudulent. For public considerations it is forbidden, and is wrong absolutely, though the party likely to be injured by it may waive objection and confirm it. It is still wrong, and will continue to be wrong, till the principal clearly ratify it, knowing the injury attempted, if one was attempted, and overlooking it. 4 Kent's Com., 438, and cases cited there; Story on Agency, §§ 11, 200. So is the civil law. But it can hardly be said, speaking technically, that the conduct of the plaintiff, unless selling for too small a consideration, would be evil in itself, *malum in se*, or be prohibited by statute, *malum prohibitum*, though it would be against public policy.

§ 127. *Contracts against public policy, when void. Cases cited.*

And contracts merely against public policy have frequently been pronounced void, and not only voidable. Thus it is said "there can be no doubt that any contract made in fraud of the law or against public policy is void" (Piatt v. Oliver, 1 McLean, 300), and will ever be set aside as a matter of course. 2 id., 267-9, 313; 1 Story, Eq., § 318; 2 John. Ch., 252; 8 Wheat., 421; 1 Paige, 147; 4 Cowen, 682; 3 John. C., 29; 6 John., 194; 13 John., 112; 4 Cowen, 732; 4 John. Ch., 254; 1 Story, Eq. Jur., 290-3; 6 Ves., 625; Cowp., 395; 3 McLean, C. C., 588. "Arguments drawn from considerations of public policy have and ought to have great weight, both in equity and at law." Parsons, Ch. J., in Boynton v. Hubbard, 7 Mass., 118. Thus marriage brokerage bonds, though not fraudulent, have a bad tendency, and hence are "void" and "relieved against as a public mischief for the sake of the public." Id.

So bargains to procure offices, so *post obit* bonds and measures affecting legacies. Courts in their decisions respect the public policy of the realm, whatever it may be, on any subject. 1 Chitty on Commerce and Manufactures.

So, again, "there are numerous cases in the books where an action on a contract has failed because either the consideration for the promise or the act to be done was *illegal*, as being against the express provisions of the law, or contrary to justice, morality or *sound policy*." *Wetherell v. Jones*, 3 Barn. & Ad., 225.

"It is a fundamental rule that all contracts which have for their object anything repugnant to the *general policy of the law*, or contrary to the provisions of a statute, are void" (Ch. J. Spencer in *Thalimer v. Brinkerhoff*, 20 John., 397), or in conflict with the settled policy of a state. The Bank of Augusta v. Earle, 13 Pet., 519 (Corp., §§ 1123-35). So if the act done is illegal, though not immoral, still other cases than what have been cited consider it void. See *ante*, and 2 Pet., 527; *Bartle v. Nutt*, 4 Pet., 184 (CONTRACTS, § 548).

"A thing is void which was done against law at the very time of the doing it." 7 Bac. Ab., "Void and Voidable." 13 Peters, 157; *Steers v. Lashley*, 6 D. & E., 61; 12 Wheat., 264, 275. And it is added that "no person is bound by such an act." "Every stranger may take advantage" of it. 2 Levinz, 218; 7 Bac. Ab., "Void and Voidable," F. But this last must perhaps be with some allowances. Instances of void acts are not only obligations to do what is *malum in se* and *malum prohibitum*, but "bonds to oblige persons to neglect their duty to the king and kingdom are absolutely void." *Id.*, "B." Even a vendor of secret medicines cannot have an injunction against others for imitating and using his marks. *Fowle v. Spear*, Law Rep., July, 1848, p. 134; *Pidding v. How*, 8 Simons, 477.

It follows, then, that though the sale and agreement in this case were both illegal and against public policy, as will soon be shown more fully, and though for either of these causes a contract is often held to be void, yet it may be, this is one of those cases where either the sale or agreement, if executed—that is, carried into effect—cannot be avoided except by particular persons who may have been injured by it. *Whelpdale's Case*, 5 Coke, 119; Bac. Ab., "Void and Voidable," E.

Beside the cases already cited, it has often been held that an executed contract cannot be avoided unless the illegality was set up technically as a defense in some of the pleadings or answers. 15 Pick., 23; 6 Pick., 452; 13 id., 272; 14 id., 345; 7 id., 8; 10 id., 111. And unless it was set up by the party or person on whose account it is made voidable, and not by others as to whom the transaction may be valid. See above and 2 John. Ch., 254; 5 Ves., 682; 12 Ves., 477; 3 Ves., 740; 6 Ves., 627; *Jacob*, 418; 3 Pet., 364; 1 Paige, 147; 5 Pick., 519; 6 Halst., 385.

The cases of annuity bonds may be *sui generis* and avoided, if contrary to statute, whether asked by a party doing wrong or not, but this is under express statutory provisions. 13 Ves., 587, note; 9 Ves., 13, 292; 1 Ves., 50; 4 Ves., 129; 5 Ves., 235. And such may be some cases of gaming. 1 Spence's Eq. Jur., 626, note; *Story's Eq. Jur.*, § 304; 2 Freeman, 221; 1 Salk., 343; 2 Burr. 1077.

Supposing, then, the sale here and the agreement to have been only voidable, and both executed, neither could probably be annulled on the present pleadings. Thus, in *Kerr v. Dungannon*, 1 Connor & Lawson, 335, where an estate had been bequeathed to A. for trusts to several, and then demised to A. for too low a rent, and the lessee sold, it was held to be void on proper pleadings, as the trustee was gaining by the transaction, and the purchaser knew it, though without such pleadings it was not permitted. The lord

chancellor said: "But I hold it to be a settled principle that if a man has an equitable interest, and comes into court in support of that interest, if the defendant has a strong case to show that no such equitable interest *ought to have been granted*, as in the present case, that no such lease ought to have been executed, in general the defendant may file a cross-bill, and then the case comes regularly before the court. If the case come thus before the court, I am inclined to think it would give the plaintiff great embarrassment." *Id.*, 359.

He was not at liberty to let a person come into court to set up such a title. It is fraudulent, and must dismiss the bill. In that case the agreement was held to be voidable in strong terms, and being executed was on a cross-bill by a proper party avoided. So as before suggested, a sale to defraud creditors is good against the grantor, and good in hands of a second *bona fide* purchaser without notice of fraud, and good in the hands of the original grantee till avoided. The possession is legal till then, but the sale may, by proper pleadings, be set aside. *Bean v. Smith*, 2 Mason, 278; 9 Martin, 649; 20 Pick., 247. But see 1 Day, 527, note; 3 John. Ch., 371.

It must be avoided in Louisiana before a sheriff can seize the property by a bill in chancery or a suit *reverterim*. *Yocum v. Bullitt*, 6 Martin (N. S.), 324. By the civil law, also, an executed contract was avoided by "the party complaining," "by a rescissory action." 1 Spence's Eq. Jur., 323; Dig., xxi., 1, 2. Indeed, in some states, as for instance Louisiana, a fraudulent sale of land accompanied by possession cannot by express law be avoided in any collateral proceeding, but must be done by a separate suit or bill in chancery. *Bean v. Smith*, 2 Mason, 252. And if a sheriff seize the property as still belonging to the fraudulent grantor, he will be enjoined till the title is avoided in a distinct proceeding instituted for that purpose. See Code of Practice, art. 303; *Ford v. Douglas*, 5 How., 143; *Yocum v. Bullitt*, 6 Martin (N. S.), 325.

In other states the sale may be avoided collaterally, though a judicial sale under a license from a court of probate. *Rhoades v. Selin*, 4 Wash., 720-2. And if a trustee sell by license, and the trustee become interested, the *cestui que trusts* may have it set aside and new sale ordered (*Davoue v. Fanning*, 2 John. Ch., 252), and it makes no difference if done at public auction, and a fair price be obtained, and a third person bought for the benefit of the wife of the deceased, as here. *Id.*, and *Hendricks v. Robinson*, *id.*, 311. No matter whether actual fraud existed or not (*Lewin on Trusts*, 266, 377-8; 10 Ves., 385), though even chancery regarded every breach of trust as a fraud. 1 Spence's Eq. Jur., 621, note.

For reasons like these it has, therefore, been suggested in the progress of this case, that if the sale was voidable, or even void in the milder sense some use the term, it having been executed, stands good until avoided by the proper person, and in a proper manner, as by a supplemental answer, or cross-bill, or amendment of the original answer setting up the illegality, and in behalf of a creditor or heir. Often in such cases the illegality must be spread on the record in chancery (though at law under the *general issue* the question may arise), in order to show the grounds of decision, and that what is only *voidable* is to be avoided by a proper person, if it has been executed.

Unless, then, the proper parties object, and object probably on the record, and not on the hearing merely, when the record shows nothing illegal or by way of exception, it is doubtful whether the court can regularly interpose and

dismiss the case of an executed contract, on the ground that such a sale was voidable. Though the defendant is one heir and one creditor here, it may be that alone he could not object, but that it must be done by all or a majority, and by a bill or otherwise (1 Jones & Latouche, 120, and Connor & Lawson, 457), after notice in the probate court for them to unite or disagree.

It is said here, also, that some attempt was made by some of the creditors to avoid the proceedings of the sale when the plaintiff's account was settled, and that the account has been so long settled it could not be reopened. But where fraud has occurred, a sale may usually be avoided at any time, on its discovery, and in a case like this the property be sold again. *Bean v. Smith*, 2 Mason, 278; *Michoud v. Girod*, 4 How., 503. This last was a case of this character, and avoided after the lapse of near a quarter of a century.

I am not aware that under the laws of Massachusetts the rule is at all different from that adopted in *Michoud v. Girod*. This depends on the views and wishes of the creditors or heirs. Such a purchase may be permitted beforehand by the court sometimes in certain cases, and on certain terms. *Lewin on Trusts*, 381. The heirs and creditors may not be injured by it, if the sale was for a full consideration, and the land has since fallen in value, and hence they may not wish to have it avoided. 2 N. H., 221-5; *Brackett v. Tillotson*, 4 N. H., 208; *The Tilton*, 5 Mason, 479, and cases cited there. They have their election.

It will be sold, then, after such a discovery, under order of the court of probate, if necessary to pay creditors, and the excess of consideration obtained will go to their benefit, or if not needed to pay debts, will go to the heirs. 4 How., 503; 20 Pick., 510; 7 Pick., 1; 14 Pick., 405. To be sure, there must not be manifest laches or neglect by the creditors or heirs to avoid the sale, or time will impair their rights. *Lewin on Trusts*, 390; 15 Mass., 264; 6 Pick., 330; 20 Pick., 510, and cases. But time cannot begin to run till they know the facts and know their rights at law or in equity to get rid of the sale. 9 La. R., 855; *Fonblanque on Eq.*, 509, 519; *Michoud v. Girod*, 4 How., 503; *Story on Contracts*, § 227.

For reasons like these the sale itself of the land having been executed, or the conveyance completed, I should not feel satisfied to avoid that sale, whether regarded as void or voidable, without proper pleadings and by proper persons, such as creditors or heirs. Nor is it necessary to grant the motion which has been made in the argument for the respondent, as a creditor and heir, to file a supplemental answer, asking that the sale be avoided as illegal and against public policy. For there is another question back of this which disposes of the case, and which is well raised probably without such a bill.

It is not whether the sale itself is here or can here be annulled, as the pleadings now stand, or as they may be amended. But on the contrary, it is whether the agreement or trust collateral to the sale, and connected with it, was not founded on an illegal consideration, and if so, whether, when not executed, as it has not been, they can be enforced if objected to, as the case now is, leaving the sale itself untouched and unavoided, by this bill and this defense.

The respondent, so far as a creditor and heir, cannot really desire here to avoid the original sale to Cutter and Cummings, and theirs to him under full notice of the facts, because that would injure him as a purchaser more than he would gain as creditor or heir. But his object must be to avoid or prevent the execution of the agreement, collateral to the sale and not yet executed, or carried into effect in its material conditions. Whether he can do this without

first avoiding the sale, and whether he can do it on the present pleadings, is next to be considered.

§ 128. *Executed and executory contracts.*

I am inclined to think that much less is required to defeat the execution or fulfillment of an executory contract which is illegal and only voidable, than to avoid such a contract after executed. When I speak of executory and executed agreements or trusts in this case, I do not mean agreements or trusts promised to be formed or created, and those actually formed or created, but those formed or created and not yet fulfilled, if executory, but fulfilled if described as executed. And that a court may, on very general principles, and without much formality in pleading, decline to be a party to, or give aid to execute a voidable sale or a trust and agreement connected with it and against public policy and sound principle, and not voidable on a mere personal exemption or privilege. 2 Story, Eq. Jur., § 769; 1 N. H., 184; 2 Vern., 470; Fuller v. Dame, 18 Pick., 472; 11 La., 48; 14 La., 114; 11 Martin, 297; Collins v. Blantern, 2 Wils., 341; 2 Bing., 247; Flowers v. Sproule, 2 A. K. Marsh., 57; 1 Hill's Ch., 293; 4 Bibb, 70; Mills v. Goodsell, 5 Conn., 475; Saltmarsh v. Beene, 4 Port., 283; 5 Wend., 579; 3 Cowen, 299; 3 Paige, 154-8; 2 Caines' Cases in Er., 183; 2 Chan. C., 196; 1 Eq. C. Ab., 228; Evans v. Richardson, 3 Merivale, 469; Whitby v. Parken, Turn. & Russ., 366; Jacob, 418; 1 Bell's Com., 292.

Why should the court shut its eyes to the illegality of the claim? Because the sale itself may not have been avoided by the heirs or creditors. Why in the mean time aid a party to do another thing about a collateral contract which is against public policy? 2 Story, Eq. Jur., § 769; 7 Ves., 470; 10 Ves., 292; Broom's Max., 350; 7 Scott, N. R., 499; 2 Ch. Ca., 196; 1 Eq. C. A., 228. Nor is it against one of those kinds of public policy which is questionable in its character (2 Bingh., 247), but it is a clear policy reprobating such transactions in almost every age and country where jurisprudence is a science, and especially when, as here, the consideration obtained was less than the true value, and thus, if designed, a benefit was sought to be secured immorally by the agent in his individual capacity, at the expense and loss of his principal.

But even when no immorality *de facto* appears, the transaction is so dangerous, so corrupting in its tendency, so open to alarm, so much against public policy, courts will set it aside (Downes v. Grazebrook, 3 Meriv., 209; Twining v. Morrice, 2 Br. Ch., 331), if executed, on a proper application, or if executory and objected to, will refuse to enforce it. It is considered by Spence on Equitable Jurisdiction, pt. 1, p. 437, that to annul contracts because against public policy is one of the peculiar provisions of a court of chancery. And he considers this very case as one of them, and cites it among the cases thus to be annulled (and if annulled after executed, certainly not to be enforced before executed), and assigns reasons for it, and not merely cases *mala in se*, but "on the ground that from the circumstances, under which the parties stood as regards each other, or for other reasons of a general nature affecting not only the particular cases, but all others of a like nature, if such transactions were permitted to stand, it might afford an inlet to fraud or unfair or improper practices without the means of their being detected, or might enable one of the parties to obtain an advantage even unknowingly, which he ought not to be permitted to retain."

He goes to the avoidance of an executed contract in such case, if against public policy, though then perhaps under different pleadings. And occasions

often arise to avoid executed, as well as executory contracts and trusts, as may be seen in *Michoud v. Girod*. But the course proposed here is not so strong as to annul; the court merely refuses to aid a person violating public policy in a contract to carry it into effect when not yet fulfilled.

It is mere inaction in the court, when asked to move in favor of illegality, and is not taking any forward step to annul it. "The court simply refuses" to use its extraordinary powers, and to enforce the specific performance of such a contract, but leaves the party to his remedy at law. In *Vigers v. Pike*, 8 CL & Fin., 645-6. This is very different from refusing to enforce equities founded on an executed contract. *Ibid.* This is the exercise of a fair discretion on the facts, and must be a judicious exercise of it on the general pleadings, putting in issue, as they do, whether such performances or such facts ought to be enforced or not.

All the facts are pertinent to that question, and that question is not the avoidance of the original sale, either because void and voidable, executory or executed, but relates merely as to the specific performance of a collateral agreement connected with it, illegal in character and not yet executed, and the decision on that is that the court does not feel bound to assist such a party in such a case on such facts with that particular remedy. This puts a different aspect on the case — the object of it — the effect of it — and the forms proper to accomplish it.

An executory contract is defined to be where something remains yet to be done under it, and not a contract not yet made or created. Story on Sales, § 232. That is the very case, and this suit is for the very object of having this something executed, that is, fulfilled or done. All this appears in the evidence, and in the plaintiff's own evidence, without any special pleadings or any apparent necessity for them in order to defeat the bill.

In *Craig v. State of Missouri*, 4 Pet., 426 (Constr., §§ 521-38), it is held that under the general issue in *assumpsit* you may give want of consideration or badness of it — in short, everything which disaffirms the contract. So probably in a bill in equity in a general answer you can show and insist on everything directly impugning the propriety of affording the particular remedy or relief sought. It is laid down as an elementary principle, also, that if "the plaintiff himself alleges fraud and proves it as a part of his own case, there is no rule of law which prevents the defendant from taking all the benefit." *Broom's Max.*, 322; 2 Inst., 713; 2 Doug., 472; 4 Scott's N. R., 165.

But here, though the plaintiff fails to allege this in respect to one fact, the time when the agreement was made, yet he alleges it in all other respects, and proves it in this, and must fail for a material variance as to time unless amending and stating the time correctly, or considering the time now to be as proved. If so considering, or if he so amend, then he both alleges and proves his own wrong. So whichever way the matter is left, the defendant must be saved on this objection. Again, it has been held in *Tobey v. Bristol*, 3 Story, 800 (ARBITRATION, §§ 63-71), that a court of equity will not lend its aid to enforce specific performance if useless or unjust.

§ 129. Rule as to specific performance.

A specific performance is not a right of a party, but an appeal to the discretion of the court. *Tobey v. Bristol*, 3 Story, 800, 821. Hence on the discovery of a consideration existing, and tainted with illegality on the part of the plaintiff, whatever may be the pleadings, it is competent for the court in

its discretion not to assist to compel a specific performance of the contract or the defendant's trust.

It may be useful to illustrate this subject a little further as to what is sufficient illegality to vitiate the plaintiff's application. Fraud is, of course, enough, or anything clearly void, but less than this suffices in case of an executory contract. Illegality of almost any kind is enough. Indeed, we have before shown that being against policy is enough to avoid even an executed contract. How much more then should it, on principle, prevent the fulfillment of one yet executory. Here it has been held, as to a contract, that if against the policy of a law, or against public policy, courts will not enforce it, though it be not against morality. 5 Halst., 89; 2 Southard, 756, 763; 3 Halst., 54.

"Considerations against the policy of the common law, or against the provisions of a statute, or *against the policy* of justice, or the rules and claims of decency, or the dictates of morality, are void in law and equity." 1 Fonblanque, Eq., 122; 4 Yeates, 84. Where an insurance was of neutral property, though in fact belligerent, it was illegal and against public policy, and hence void, and the insured was not aided by the court to recover back the premium. *Schwartz v. United States Ins. Co.*, 3 Wash., 173. See other cases. And this, though *ex æquo et bono*, the defendant has no right to retain it (*id.*), and could not sue to recover it, if not paid. Cowp., 793; 2 Bing., 250; 8 D. & E., 575; 4 Taunt., 165. See like cases.

The court will not interfere to aid either, from public considerations, and hence the possession is left undisturbed, and not because his course was justifiable. *In pari delicto potior est conditio possidentis*. Broom's Max., 325. The only exceptions to this are believed to be those before named, where by express statute a recovery back is sometimes allowed in cases of gaming, etc., from motives, however, of greater hostility to the act than of favor to the *particeps criminis*.

So if to uphold a sale would be mischievous, courts will not enforce it, though it is not by any law declared to be void. Ryan & Moody, 386; 7 Mass., 112; 5 Barn. & Cres., 406; 4 Bingham, 84; 2 Car. & P., 544; 12 Moore, 266; 3 Car. & P., 128; 3 Taunt., 6; 9 Vt., 23, 310; 7 Greenl., 113. Indeed, in this view of the matter, the plaintiff asking virtually a specific performance of what is against public policy and injurious to creditors, it is settled that a court of equity will not carry into effect an executory contract by decreeing a specific performance, even if it was not illegal, but was hard merely, and inequitable. *King v. Hamilton*, 4 Pet., 327; 1 Vt., 480. Or if there has been only negligence with the complainant. 1 McLean, C. C., 492. Under this position the neglect to pay interest so long or any principal is important. 2 Jac. & Walk., 428; *Skillern's Ex'rs v. May's Ex'rs*, 4 Cranch, 140.

Much less will courts aid to enforce an executory contract, if the consideration was either fraudulent or illegal, or against public policy. *Scudder v. Andrews*, 2 McL., 464. This was a sale of land belonging to the United States by A., never owning it, but trying to recover the price. No man shall take advantage of his own wrong. It need not be fraud, but anything "*de injuria sua propria*." Co. Litt., 148, b. By pursuing this course a court neither confirms nor annuls a voidable contract, because the parties interested in it may never choose to do it. But they say, if the contract appears to be one against public policy, the court will leave the parties to their remedies at

law to enforce or annul it, and decline to use its own extraordinary modes of relief in cases of that culpable or at least equivocal character. 3 Story, 821; 2 Mason, 157, 409.

Thus, under the civil law, in case of an *executory* contract, "if there was a want of complete *bona fides*, the *jus honorarium*, furnished a good defense to any attempt to enforce it at law." 1 Spence's Eq. Jur., 323; Dig., 19, 1, 11. So if a contract be immoral, though made abroad, courts here have held that they should not enforce it here. Story's Conflict of Laws, §§ 244, 254, note, 257; 8 Martin, 95; Wetherell v. Jones, 3 Barn. & Ad., 221. This is not avoiding a sale or contract executed, but merely as to one still executory, and asked to be fulfilled, saying in reply we do not feel bound to enforce contracts "which offend public morals or violate the public faith." Le Roy v. Crowninshield, 2 Mason, 157. *Ex turpi causa non oritur actio*. Broom's Max., 350-2; Holman v. Johnson, Cowp., 341.

The objection to enforcing an executory contract may be much slighter than what is required to avoid an executed one. It may not be a fraud or *malum in se*, or *malum prohibitum*, but if illegal or against public policy, it is the duty of the court to halt in the exercise of its extraordinary powers to enforce a specific performance. United States v. La Jeune Eugenie, 2 Mason, 409; The St. Jago de Cuba, 9 Wheat., 409; Doug., 250; Armstrong v. Toler, 11 Wheat., 258 (CONTRACTS, §§ 581-86); Story's Conflict of Laws, § 245; 1 Maule & Selw., 751; 4 Wash., 297; Mather's Case, 3 Ves., 373; 15 Pet. (App.); 3 Story's Com. on Constitution, p. 245, § 1374; Smith v. Barstow, 10 Law Rep., 513.

Where the contract "is expressly or by implication forbidden by the statute or common law, no court will lend its assistance to give it effect." Pennington v. Townsend, 7 Wend., 276; Sharp v. Teese, 4 Halst., 352; 11 East, 502; 3 Barn. & Ad., 221; Forster v. Taylor, 5 Barn. & Ad., 887; 2 Cowp., 790. Thus a court will not enforce a contract selling the command of an India ship (8 D. & E., 89). They will not enforce it, though the parties may not have meant to violate the law, but mistook it. 1 Pet., C. C., 410. So the agreement, though not immoral, will not be enforced if made in fraud of an act of congress (Hannway v. Eve, 3 Cranch, 242, and Armstrong v. Toler, 11 Wheat., 258), or if growing out of an illegal or immoral act; "a court of equity cannot decree a specific execution of a contract made in violation of law or against the policy of the law." Longworth v. Taylor, 1 McLean, 517.

When a trust or agreement is desired to be enforced in chancery, under its extraordinary powers over trusts and specific performances, it is a settled principle that it is to be done only in favor of those who have themselves acted legally, if not equitably, in respect to the subject. The complainant must come into court as a wronged and innocent party, not alleging his own turpitude, nor even showing it mingled with the grounds for a recovery. Bolt v. Rogers, 3 Paige, 154; 4 Paige, 229, 248; 1 Esp. Ca., 153; 3 Esp. Ca., 253; 1 Maule & Selw., 594; Comyn's Dig., "Chancery" (3 F, 4); 1 Vern., 53; 2 Vern., 602.

The party stands ill in court. *Allegans suam turpitudinem non est audientus*. Gould v. Gould, 3 Story, 541. "The law will not sanction dishonest views and practices by enabling an individual to acquire through the medium of his deception any right or interest." Broom's Max., p. 320. In Creath v. Sims, 5 How., 192 (§§ 2031-34, *infra*), it is said that one coming into court to ask relief by an injunction against a judgment, must not only come with clean

hands, but must first offer to do equity in respect to the subject matter. Indeed, it is a settled rule that whoever asks equity must first do or offer to do equity. 1 Spence's Eq. Jur., 422; 2 Swanst., 156.

Once chancery required moral duties first to be performed as to the subject matter, *e. g.*, to recall slanderous words, etc. But now the plaintiff must, at least, not stand as acting illegally, and ask aid to enforce illegality. 1 Spence's Eq. Jur., 423, note. It is laid down as an elementary principle, that "a party to the fraud shall not be relieved." See last cases cited. So the complainant must be diligent himself, as well as pure. 1 McLean, C. C., 395, 400. One delinquent cannot maintain an action against another. *Booth v. Hodgson*, 6 D. & E., 409; *Warburton v. Aken*, 1 McLean, 460; 3 East, 222. Nor will the trustee even be assisted in carrying such a sale into effect. *Davoue v. Fanning*, 2 Johns., Ch., 267; *Munro v. Allaire*, 2 Caines' Cases, 183. Courts will in some cases refuse to set aside a sale which has been confirmed by a trustee, but will never assist to *effectuate a purchase* (of this kind), either by having the thing purchased decreed to him specifically, or by having the *means* decreed to him whereby he may recover at law." *Id.*, 194.

Again, "a court of equity ought never to aid a party to have the *bargain enforced or perfected*, with intent that any profit or advantage should be taken by it." *Id.*, p. 193. A further illustration of this distinction is, that where usurious interest had not been paid, a court of equity would not aid to get it, but if already paid it would not order it paid back. Nor will the court compel a performance of a contract which works a breach of trust. That is very nearly the present case. *Roberts v. Tunstall*, 4 Hare, 257.

The executrix, if refusing to give the deed in this case, could not have been compelled in equity to give it, because it would have been a breach of trust. *Wood v. Richardson*, 4 Beav., 176; 5 Mad., 438; *Thompson v. Blackstone*, 6 Beav., 472. Then how could she compel the purchaser to carry it into effect, so far as regards the collateral agreement, and to fulfil that which was illegal to be done? A case is in point that she could not in 6 Beavan, 472. But if an illegal contract be once carried into effect, that is, after made or created, if it be executed, a court, as before explained, may require more form and notice and particularity in the proceedings to avoid what has been executed and what is not void, but merely voidable. *Fieri non debet, sed factum valet*. 5 Coke, 38; 9 M. & W., 636.

Much of the argument and many of the cases connected with this point of the impropriety of aiding to enforce any illegal contract, relate to what in this sense I consider executed rather than executory agreements, and to the avoiding or rescinding of them, rather than to the enforcement of what is yet executory. The distinction, however, is strong in principle between these and runs through all the books. See cases before and others in *Broom's Max.*, 325. Considering this trust or agreement as yet executory, I can, therefore, come to no other conclusion on the whole evidence and nature of the transaction, than that the cases and principles all harmonize against the policy of sustaining this bill.

The complainant comes into this court to enforce a trust or agreement which has no consideration whatever, except an act forbidden by law, hostile to sound policy, and voidable when executed, not only in equity, but now in most of the courts of law in the United States. It is illegal, then, and against public policy, and not to be aided in our discretion to enforce specific performances, though if it had been fulfilled or executed, it might not

be annulled, except by creditors and heirs. But it is still, in and of itself, illegal; one not to be aided, assisted, or encouraged before it is done.

A trust, or agreement, to be valid and to be enforced, rests on a like foundation, and must have a good consideration. 2 Story, Eq. Jur., §§ 787, 793, 973; 2 Hawks, 302; 6 Paige, 288; 1 Ves. Jun., 55; 3 Atk., 399; 18 Ves., 149; Comyn's Dig., "Chancery" (2 C, 8); Winthrop v. Lane, 3 Des., 341. It is otherwise a *nudum pactum*. And *ex nudo pacto non oritur actio*. Broom's Max., 336. This doctrine applies to a common trust, as well as a contract, because almost every contract is in one view but a trust to pay on one side, and to convey on the other. Lewin on Trusts, 76. Without a good consideration the contract or trust resting on it is voluntary, which the volunteer may carry into effect or not, at his pleasure, and which chancery will not lend assistance to enforce. Minturn v. Seymour, 4 John., Ch., 497; Fraser v. M'Pherson, 3 Dessaus., 398; Colyear v. Countess of Mulgrave, 2 Keen, 88.

The doing an act forbidden by law is manifestly not a good consideration for either a trust or agreement, and for the enforcement of their specific performance. The executrix in this case had no equities or law on which to ground a trust or contract, except an unlawful act. It is not enough to say that a consideration is not necessary for an executed trust. Hill on Trustees, 53. This was an executory trust in the sense before explained. Before the trust, all she did was in her capacity of trustee for the creditors, to let the purchasers have the land at less than others would have given, and this under a promise to reconvey to her for that reduced sum, which was in truth a fraud on the creditors to the extent of the difference, and was forbidden by law, and which she is in this bill attempting to enforce.

It is virtually conceded now, that the first consideration and the original agreement were illegal, but it is contended that there were new and good ones when the land was assigned or transferred to the respondent. But we have already shown that they were the same, except a new trustee. And it has been well said, "the same principle applies not only to contracts growing immediately out of and connected with an illegal transaction, but also to new contracts, if they are in part connected with the illegal transaction, and grow immediately out of it." Story's Conflict of Laws, § 247; 11 Wheat., 281; 3 Barn. & Ald., 179; 4 Wash., 297; 5 Barn. & Ald., 335.

The money advanced to Cutter & Co. was not advanced by her, nor that paid by the respondent since. Nothing legal was done by her at any time to lay the foundation as a good consideration for either a trust or agreement. Before this trust or agreement, *both the last and first*, she had owned no part of the land in her own right—she had sold nothing in her own right, paid nothing, suffered nothing—done nothing to raise an equity. Chancery will not interfere, and parties will be left in such a state of things to their legal rights in the courts of law. 4 Peters, 327.

The case of voluntary settlements has been referred to as not needing a consideration to enforce them, whether regarded as trusts or agreements. But those are usually created by deeds and wills, sealed instruments, and hence imply a good consideration, and are by means of a writing by deed taken out of the statute of frauds. So love and affection is a good consideration for them, and in most cases of that kind exist.

And when the contest is with the trustee, as are many of these precedents, he has already received the property, which constitutes another good consideration for him to go on and fulfil his duty, and according to the terms of the

deed, and not as here against the deed and its legal operations on its face. The consideration there, too, which does exist, or is presumed, is a good one, and not as here illegal and against public policy.

I am aware of another class of cases, some of which have been cited as applicable here, where a party may be proceeded against in chancery to enforce an obligation which would have been performed by another, except for fraud interposed by the respondent. But that is not this case on the facts. Here the defendant, looking to public policy and the rights of the creditors and heirs, interposes no fraud. He tries to defeat only what is illegal. While there, he tries to defeat what is legal, and interposes fraud or falsehood to accomplish his object, and hence a court of equity will sometimes make such a party answerable for a legacy or devise which he has defeated by falsehood. 1 P. Wms., 288; 2 Vern., 700; 3 Atk., 539; 1 Atk., 448, note; 3 Ves., 39; 1 Story, Eq. Jur., §§ 252, 254; 1 Vent., 318; 2 Ves., 627; 14 Ves., 290; 11 Ves., 638; 2 Story, Eq. Jur., § 1265; Story's Equity Pleadings, § 768.

So if a failure to fulfil a promise will work a fraud, it will sometimes be enforced when the promise is lawful. 1 Hovenden on Frauds, 274-5, 495; *Morris v. Nixon*, 1 Howard, 115; 6 Watts & Sergeant, 97; 1 Paige, 147; Coote on Mortgages, 24; 1 Madd., Ch. P., 418; 4 Ves., 16; 18 Ves., 475; 13 Ves., 580; 1 Ves. Sen., 123; Vin., Ab., "Contract, H.," pl. 31; 1 Atk., 449; 1 Wils., 227; Newland on Contracts, 111, 179, 181; Jeremy on Equity Jurisdiction, 499; 2 Atk., 254; Beames' Equity Pleadings, 183; 1 Eq. Ca. Ab., 20; 1 Dick., 44; Gresley on Evidence, 208. But in this case the failure to enforce this executory agreement defeats rather than works a fraud looking to the public and to the interests of heirs and creditors, and it advances what is legal and what is sound public policy.

If it defeats anything, throws obstacles in the way of anything, it is of an executory, illegal contract between parties, neither of whom can properly or conscientiously invoke any aid from a court of equity. In the case of *Jenkins v. Eldredge*, in this court, in 3 Story, 183, there was a parol promise to give written evidence or a written declaration of a trust, and which promise there was a failure through fraud to fulfil. But there was nothing illegal or against public policy in doing what was promised, as would be the case here, but directly the reverse. Here it may be added, as a distinguishing feature of the present case, that the only ground for the trust or agreement by Cutter and Cummings, in favor of the plaintiff, was the illegal act by the plaintiff, in a public capacity, professing to sell the land as an executrix, and obtain the highest price practicable for the benefit of the creditors and heirs, and in reality letting others buy it at a reduced price for her individual advantage and gain.

Afterwards, to be sure, after the sale and before this bill, some expenditures were made by her on the buildings and land of a durable character, and beneficial to the purchasers and their grantees. But these did not lead to the trust set up, and were not its cause or foundation. And as to these, she has sold gravel enough and had rent enough to remunerate her, probably, or if not, must have her redress or relief in some other independent form. See the cases on part performances.

If one enters as if donee of land and makes improvements, he will be allowed their value out of land before sold under a decree in chancery to pay debts. *King's Heirs v. Thompson*, 9 Pet., 204 (§§ 132-137, *infra*). But by *Carver v. Jackson*, 4 Pet., 101, it was held that one could not be remunerated

for money expended on land against the wish of the owner. 8 Wheat., 1. I have no doubt that sympathies for a relative and widow in poverty, and with a large family, induced Cutter to enter into this arrangement, and while the heirs were minors, and to be brought up by her, it probably looked to their benefit rather than injury, and was disadvantageous chiefly to the creditors.

But we are required to refrain from proceeding further, not that our sympathies or regard for the condition of the complainant is less than for that of the respondent; they both have, in several respects, exhibited excellent traits of character towards a destitute family, but in others have attempted, in aid of them, what the law does not tolerate to the injury of creditors or heirs, often very helpless and destitute. In some things we do not respect her motives less, but the law more. And while that law requires us to leave the respondent in possession, it is quite clear that the creditors first, and next the heirs, should have the benefit of the rise in value of this property from extraneous causes, or at least its real value in 1833, beyond what it was then sold for. On the contrary, had the complainant recovered, it ought to have been for the benefit of the same class of persons.

Indeed, a widow in possession of property with her children is at times presumed to be in for them, and her acts inure to their benefit, rather than her own. *Atherton v. Johnson*, 2 N. H., 34; 1 John., 163; 5 John., 66; 7 John., 157; 1 Johns., Cases, 219; 3 Wils., 516. It is certain here, that unless the heirs or creditors are allowed to have the benefit of this agreement or trust, but the widow has it in her private right, she gets it at their cost and expense or loss. She has paid for it only by their property or what she sold on their account.

And though the complainant here, as before remarked, was undoubtedly influenced more by affection for her children than any hope of personal gain, still in several cases the idea of any moral fraud on either side has been fully rebutted, and yet the sale held to be improper and invalid. Commendable as may have been the motives in some respects, the act was, therefore, one of bad policy as to creditors and heirs, was dangerous and illegal as to general principle, and not to be assisted or enforced at her request, by a court of conscience which lends its extraordinary aid only to those who are blameless in the matter in dispute.

This conclusion is strengthened in its legal force by the long neglect of the plaintiff to pay even interest at all, instead of quarterly; by never having offered to pay any principal, except as parts of the land were sold, and the money received by the respondent, rather than by her; by never tendering anything till a great change in value had occurred by the rise in value of real estate (2 Story, 484), and by the general rule to let parties resort to law for redress on their contracts, rather than ask a specific performance in equity, an extraordinary power for only the clearest cases, unless appearing there without negligence or breach of duty, or without a request to aid what is against public policy. See cases *ante*; *King v. Hamilton*, 4 Peters, 328-9.

If there be an inadequate price, or improper conduct, equity will not enforce specific performance, but leave a party to his remedy at law. *Seymour v. De Lancey*, 6 John., Ch., 222. The discretion over this is not arbitrary, but what is sound policy, reasonable *secundum arbitrium boni judicis*. 2 Story's Eq. Jur., § 693. It may be well to notice, also, that we came to these conclusions, not because the respondent stands here irreproachable in his title. The consideration as to Charles Tufts rested on the same basis as the former, looking to the whole essence of the case.

It was the old trust and agreement, as we have before seen, transferred to him, and for like reasons and like consideration. He was in truth the mere assignee of Cutter and Cummings, with a probable knowledge and acquiescence in all that had happened. He was her relative, her confidant, and if her betrayer under an illegal undertaking, this court must leave the parties to such an undertaking to adjust it at law or among themselves without resort to law. But he holds the land by a very precarious title, if the creditors or heirs choose to interpose, unless they are barred by lapse of time. And I see no reason why the plaintiff or all parties cannot after this obtain redress at law in their own state courts after we decline to give relief by a specific performance, if she or they ever had any legal rights which have been violated.

The conclusions as to Charles Tufts, the principal respondent, render it unnecessary to decide whether in any other aspect of the case the possession by the plaintiff was not sufficient notice to the other respondent, Wheeler, so as to bind him in relation to her rights and claims. To show that it is, we have been referred to 16 Ves., 249; 2 Swanston, 281; 2 Sch. & Lef., 595; 2 Ball & Beatty, 301; 5 Price, 306; 1 Merivale, 252; 13 Ves., 121; 1 Collyer, 203; 1 Jacob & Walker, 181; 2 Sumner, 555-6. For some exceptions, see *Leland v. The Medora*, 2 Woodb. & M., 92; 5 Barn. & Ald., 145; 2 Rus. & Mylne, 626; 1 John., Ch., 566; 14 Serg. & Rawle, 333. It is in most of the states, if it be a *new* possession. 13 Ohio, 408, 413; 4 Blackf., 96; 4 Whart., 259; 10 Gill & John., 316; 4 Mass., 67; 2 Rand., 101; 2 Paige, 300; 3 Paige, 424; 9 Conn., 286; 3 Conn., 146; 24 Pick., 222.

But several of these cases rest on a peculiar state of facts; and mere occupation in towns and villages, where so many tenements are leased, and where the registry laws govern as to titles, is a very uncertain indication or presumption of anything beyond a leasehold estate. Independent of this, public policy certainly requires that a purchase without notice should not be injured by a secret trust. 1 Spence's Eq. Jur., 445, note.

And that a possession, not only new like this, but with a frequent disclaimer of title, and where Charles, also, receives possession with a deed recorded, and occasionally exercising as strong acts of ownership as herself, should hardly be deemed conclusive notice as to title of real estate being probably in her rather than him. Much has been said, also, of the validity of the sale to Cutter and Cummings, and by them to Charles Tufts.

But without intending to decide absolutely any questions not necessary to be decided for the proper disposal of the case, I would add to the remarks already made on this point, that if Cutter and Cummings purchased the land under an improper arrangement with Mrs. Tufts, I see no reason why the creditors or heirs should not be allowed to avoid that sale, and if their assignee or grantee, Charles Tufts, bought with a full knowledge of that arrangement, and with a view to carry it into effect, why the sale should not be avoidable also in his hands by the heirs or creditors. That is the usual state of things and the usual controversy in cases in this category. But as before remarked, the question here is not about the deed to Cutter and Cummings and its avoidance. It is about the enforcement of a collateral agreement which has never yet been fulfilled or executed.

In conclusion, there is one other aspect of the difficulties in this case, which, fertile as have been the objections raised, has escaped much attention of counsel, but seems to me deserving of some weight. It is a want of power to do what has been attempted here. It is the inability of any executor selling

lands to pay debts, whether under a general clause in a will or a license, to create a trust estate for himself, or any other person, not paid for separately and additionally. His duty is to sell, to sell the whole title, and to get pay for the whole, to sell a fee if a fee exist, a freehold if a freehold exist, and be paid for them. He seems to have no authority to carve out different estates or interests, and sell some and reserve some, or give some away for nothing. Suppose it is done by deed and not by parol, as here, it is still an apparent departure from his power or authority, though it might then escape any objection from the statute of frauds, it being then an express trust created, as well as *evidenced*, by writing. 1 Spence's Eq. Jur., 496.

But such express trusts are defined to be those "created by the act of some party having the *dominion* over property with a view to the creation of a trust." 1 Spence's Eq. Jur., 495. An executor in such case would seem to possess no such "dominion." Much less can we imply or presume he has, from his position and duty, when the policy of the law, as already shown, is hostile to such a course, and enables the persons suffering from it to avoid such sales, even after they are executed.

This is a question in the aspect of naked power, and not one of policy independent of that, and which policy may uphold such a sale if executed, and if ratified by those interested, but not without a ratification express or implied. Here, likewise, the complainant herself was a trustee under the will, selling the land to pay debts (Taylor v. Savage, 1 How., 282 [APPEALS, §§ 20-22]; Lewin on Trusts, 65; 1 Spence's Eq. Jur., 508) and yet not in reality selling the whole title, but a trust estate merely, reserving rights of reconveyance to herself as an individual, and for her private benefit, which have never been paid for to the estate or accounted for, and which she had no legal authority to reserve.

It is an attempt to sell property as a trustee and for which she never paid anything in her own right in such way as to give her a private benefit at the expense of others, the *cestui que trusts*. It is virtually an attempt to secure a private advantage with the funds or means of others rather than her own, and which she seems to have had no power whatever to do; and which attempt common honesty, as well as equity and law, must unite in discountenancing rather than in aiding.

Nor does this reasoning rest on the idea that such a sale or agreement, after executed, may not be confirmed afterwards by creditors and heirs, if knowing it long and not avoiding it; but until so confirmed its validity looks, on principle, very questionable. I should come to this conclusion with more reluctance, saying that these parties should be left to settle their rights at law, if it was not apparent that they both *really* belong to this commonwealth, live in the same town, and may yet, for aught known by me, try and settle their rights before the state tribunals if they please to resort to them. Let the bill be dismissed.

SMITH v. ORTON.

(21 Howard, 241-244. 1858.)

APPEAL from U. S. District Court for Wisconsin.

Opinion by MR. JUSTICE CATRON.

STATEMENT OF FACTS.—The bill was demurred to, and the demurrer sustained below, and the facts appear only on the face of the bill. Davis held the legal title to the two lots (Nos. 7 and 8) in dispute, lying in or near the

city of Milwaukee, in the state of Wisconsin. Davis held the legal title as trustee for Otis Hubbard. In June, 1851, Hubbard, for a good and valuable consideration, conveyed the premises to Joachim Gruenhagin, by a deed in fee, by which the grantee became seized of the entire interest of Hubbard. In December, 1852, Gruenhagin, for a good and valid consideration, conveyed the premises to James S. Brown; and in January, 1853, Brown, for a valuable consideration, conveyed to the complainant, Smith. The complainant afterwards also got deeds from Davis and Knab.

Hubbard had sold two other lots in Milwaukee to one Schram, the title to which was outstanding in the names of persons residing beyond the state of Wisconsin. Schram required security for the title from Hubbard. Butler, a relation of Hubbard, got Knab to give a bond for title, binding himself jointly with Butler, as security to Schram. To secure himself against loss for his undertaking to Schram, Knab required of Hubbard security to indemnify him, should Hubbard be unable to make a title to the lots sold to Schram; and Hubbard got Davis, who held the legal title to the lots, to convey them to Knab as security, and for no other consideration.

On the same day (22d of July, 1848) that the title bond to Schram was made, Knab executed to Butler a bond covenanting that if Butler would procure the deed from the trustees of Hubbard, and comply with the bond to Schram, he (Knab) would convey the lots to Butler, for which he held Davis' deed; Butler failed to procure the deed, and Hubbard did so himself. In March, 1851, Butler assigned Knab's bond to Orton, the respondent.

§ 130. *Equitable owner may sustain bill for title.*

Hubbard never received any consideration whatever for the lots thus transferred; and it is alleged that the bond from Knab to Butler was a secret and fraudulent contrivance on the part of Butler, to cheat Hubbard and obtain his property, and that he was defrauded thereby. Smith obtained a deed for the lots from Davis, and also one from Knab; but as Davis had no interest, having long previously conveyed to Knab, nothing passed by his deed, unless, as is assumed by the bill, an equity of redemption resulted to Davis.

And, as Orton had filed a bill in a state court against Knab, which was pending when Smith took his deed from Knab, and as Knab was not allowed to disavow his own bond, Orton got a decree against Knab for a conveyance of the legal title (which conveyance was regularly made), and therefore the deed from Knab to Smith was of no value. Having been made whilst the suit was pending, it could only have any usual effect on the contingency of Knab's successful defense. Orton having succeeded, his decree related to the commencement of the suit, and gave him the elder and better legal title, Smith's deed being "subservient to the rights of the parties in litigation." 1 Story's Com. Eq., § 406.

Orton has the legal title, beyond dispute. Smith is asserting Hubbard's equity and Davis' right of redemption; and prays by his bill, among other things, "that Orton be decreed to release to him (Smith) all claim or interest in said lots." Neither party has, or ever had, actual possession of the premises; nor is this of any consequence, as the contest is for the legal title. Butler certainly had neither a legal nor equitable interest in the property when he sold to Orton. He held Knab's title bond, with full knowledge that Knab held as trustee for Hubbard. And this bond was assigned to Orton, who, according to the allegations of the bill, took it with Hubbard's equity inhering to it.

What effect Orton's decree against Knab may have to protect Orton under the legal title, on a plea of *bona fide* purchaser of an equity, we decline to decide; nor will we discuss the question, as this cause may again come before this court, and involve that question. The remaining question for consideration is, whether Smith can be heard in a court of equity, being an assignee of an equitable interest in contestation.

§ 131. *Equitable owner not precluded by legal proceeding inter alios.*

Gruenhagin purchased and took a deed for Hubbard's equity, and was clothed with his interest before any litigation was instituted affecting the title. And as neither Gruenhagin, Brown nor Smith were parties to the suit of Orton against Knab, the decree against Knab did not in anywise impair the equity obtained from Hubbard, who likewise was no party to that suit, and who had conveyed to Gruenhagin before it was commenced. Hubbard's equitable title being distinct from the legal title in controversy between Orton and Knab, no reason existed why it should not be the subject of a *bona fide* sale, and transfer by deed, in like manner that a mortgagor's equity may be sold and conveyed. After a mortgage debt is discharged, the mortgagor or his assignee may compel the mortgagee or his assignee to surrender the legal title. And that is substantially the case the bill makes; for after Hubbard satisfied Schram's bond, made for title by Knab and Butler, Knab held the naked legal title, with an undoubted right in Hubbard to call for its surrender. And his assignee stands on the same footing. 4 Kent's Com., 157. And so the statutes of Wisconsin in effect provide. Revised Statutes of 1849, ch. 59, sec. 7; ch. 77, secs. 6 and 7.

We are of the opinion that the court below erred in sustaining the demurrer to the bill, and order the decree to be reversed, and remand the cause, with directions that the district court proceed in it according to the thirty-fourth rule of this court, governing chancery proceedings.

KING'S HEIRS v. THOMPSON.

(9 Peters, 204-222. 1835.)

Opinion by MR. JUSTICE McLEAN.

STATEMENT OF FACTS.—This is an appeal from the decree of the circuit court for the District of Columbia.

The defendants here, who were the complainants in the circuit court, filed their bill, stating that in the year 1812 they were married, and that the wife of the complainant is the daughter of George King, who at that time lived in Georgetown, and was extensively engaged in a profitable mercantile business. That his credit was high, and complainants believe he was possessed of a large active capital; and in addition had a large real estate, consisting of houses and lots in Georgetown. That it was universally believed he would have a large surplus property after paying his debts, which would enable him to provide handsomely for his children.

That a few days after the marriage, George King proposed to grant to the complainant, Thompson, a house and lot on Cecil Alley, in Georgetown, which was very much out of repair, and almost untenable, provided he would repair the same, so as to make it a comfortable residence; and that the said King at the same time stated he intended the property for the wife of the complainant. The complainant accepted the property, and expended upwards of \$4,000 in making repairs of the house and other improvements on the lot.

That he occupied it as a residence about four years, and then removed to the western country. Before his removal, a correspondence took place between him and the said King in relation to the title; and the complainant made King his agent to collect the rents, etc.

The complainant further states that the said King died intestate; leaving, in addition to the wife of the complainant, certain children who are made defendants; and a decree for a legal title is prayed, or, if that cannot be decreed, that the property may stand charged to the amount of the repairs and improvements. George King died in the year 1820, insolvent. His debts amounted to \$36,000, and his whole estate, both real and personal, when sold, did not pay more than thirty-nine per cent. of his just debts. The property claimed by the complainant was sold for \$1,660, by a trustee, under a decree of chancery, obtained by the creditors of George King, but the sale has not been ratified.

Raphael Semmes, the trustee of George King's creditors, and Charles King, one of the principal creditors, filed their answers to the bill of the complainant, in which they deny that the improvements were made on the property as set forth in the bill, and insist that George King, at the time of the intended gift, was embarrassed and unable to pay his debts; and they insist that the right set up by the complainants is fraudulent and void as against creditors.

There are some irregularities in the record which it is not material to notice, as these statements show the points to which the evidence applies. The first inquiry is, whether a contract was made between the complainant and George King for the property in question. It is insisted, by the complainant's counsel, that the correspondence between the parties, which is contained in the record, establishes the contract.

The first is a letter from George King to the complainant, dated 17th April, 1816. In this letter, King says: "That in order to remove any suspense in regard to the property on which the complainant then lived, that he held himself bound to give a deed to a trustee, who shall hold it in trust for the complainant and his wife during their lives," etc. This letter is answered by the complainant, 26th April, 1816, in which he declines the terms proposed, and suggests the following: 1. Let the property be valued at the time it was put into his possession, and that he would pay the amount over to King, etc. 2. That the improvements should be estimated, and King, on paying the amount, should receive a relinquishment of all the right of the complainant. 3. That a deed should be executed for the property to the wife of the complainant.

On the 29th of April, 1816, King replies: "I make no hesitation in complying with your first proposal, for it is just what I proposed in my first to you, and I will do it another way, giving you your choice, viz.: I will deed the dwelling-house and all above it to you, and about twenty feet below it; and then, all below that I will deed to Betsey," the wife of the complainant, "provided she will never deed it, or dispose of it, except by will, which she shall always be at liberty to make, when and how she pleases."

On the 14th of August, 1819, King writes to the complainant, "Mr. Kennedy has left your house since the 1st of July last, and I have not been able to get a tenant since. Houses are very dull here now; rents have fallen very much," etc. And on the 23d of March, 1831, George King (son, it is presumed, of George King, deceased) writes to complainant, "I am sorry to inform you that Mr. Jacob Payne has laid an attachment on your property in Georgetown," etc., referring to the property in controversy. This is all the

evidence to show a contract, except what might be presumed from the occupancy and improvement of the house and lot.

Specific propositions were made by each party, in regard to the title of the property, but it does not satisfactorily appear that either was finally accepted. The complainant in the first place objects to the conveyance of the property to a trustee, for the benefit of his wife; and he proposes to pay to King the value of the property at the time it was put into his possession, which sum, at the pleasure of the donor, might be vested for the benefit of complainant's wife. To this, King replies that he has no hesitation in accepting the proposal, but he accompanies this acceptance with a proposition to deed the dwelling-house, with a certain part of the lot, to the complainant, and the residue of the lot to his wife. Whether this last proposition, or the one made by the complainant, and assented to by King, formed the contract, is uncertain, or indeed whether any definite agreement was finally made.

§ 132. *A decree of specific performance will not be entered where several propositions were passed, but none definitely accepted.*

From the occupancy of the property and the amount of money expended in improving it, there can be no doubt that there was an understanding between the parties that the property, in some manner, should be possessed and owned by the complainant. The evidence, however, shows that King did not intend to vest the property absolutely in the complainant; but that the value of it, before the improvements, should in some form be secured to the complainant's wife. This court are now called on to decree a specific execution of this contract: and what are its terms? Shall the title be vested in fee in the complainant, without condition; or shall a part of the property be vested in trust for the benefit of his wife? Or shall the title be vested in the complainant, on his paying into the hands of trustees, for the benefit of his wife, the value of the property when he first received it?

The evidence does not afford a satisfactory answer to any one of these inquiries. It is impossible, therefore, for the court to decree a title as prayed for in the bill, as the evidence fails to establish the specific terms of the contract. But it is insisted that this arrangement or contract, if proved, was void as against the heirs of King, and especially as against his creditors; on account of the indebtedment of King at the time of his subsequent insolvency.

§ 133. *How an equitable lien may be created.*

Although a contract is not proved with sufficient certainty, as to its conditions, to authorize a specific execution of it, yet there can be no doubt there was an agreement between the parties, which induced the complainant to enter into the possession of the property, and to expend large sums of money upon it, as if it were his own; and when he left it and removed to the western country, it was rented as his property; and George King acted as the agent of the complainant. And the property seems to have been considered as belonging to the complainant, by the heirs of George King. Whatever uncertainty may exist, as to the terms of the contract, there can be no question that the complainant acted under it, in taking possession of the property, and expending a large sum of money in its improvement.

§ 134. *What will be a sufficient consideration for a conveyance.*

In no point of view could such a contract be considered voluntary. There was not only a good consideration, that of natural affection, but a valuable one. To constitute a valuable consideration, it is not necessary that money should be paid; but if, as in this case, it be expended on the property, on the

faith of the contract, it constitutes a valuable consideration. The debts of George King, for the years 1812, 1813, and 1814, amounted to about \$13,000 or \$14,000, of which \$11,000 were due to the Bank of Columbia. And the average amount of his debts, from 1812 until his death, was about the sum of \$13,000.

In 1812, and for some years afterwards, George King was supposed to be rich. For his house on High street he refused \$12,800. The whole amount of his property was estimated at \$60,000 or more. He was indorser on accommodation notes for about \$20,000, at the above period. At this time the property claimed by the complainant was not worth more than \$2,000 or \$2,500. Its value was increased three or four times the sum by the improvements.

In 1827, it appears, by an exhibit of the debts due by the estate of George King, including interest, that they amounted to the sum of \$36,418.10. But many of these debts seem to have been contracted subsequent to the time that the property in question was placed in the possession of the complainant. It appears, also, the property of which King died possessed, did not pay forty per cent. of the debts due by the estate. And that he retained the greater part, if not the whole, of his real estate, except the lot claimed by the complainant, until his decease. But it seems, from the prices fixed upon this property in 1813, and those for which it was sold, that there must have been a great deterioration in the value of it. Under the above circumstances, it is insisted by the appellants, that the contract with the complainant, by George King, for the above property, was fraudulent.

It has already been observed, that the money expended in the improvement of this property constituted a valuable consideration. The contract, therefore, if proved, so as to entitle the complainant to a decree for a specific execution, could not be avoided, on the ground that there was no consideration. At the time this property was received by the complainant, King was supposed to be rich. His property was estimated at \$60,000; his debts did not exceed \$13,000 or \$14,000, and his indorsements were about \$20,000. That his credit stood high is shown by his indorsements, and the standing accommodation given to him in the banks. So high did he stand as a man of property and business, that it was deemed a valuable object to obtain his services as director in one of the Georgetown banks. There seems to have been no diminution of his credit or means for several years after the transaction with the complainant.

§ 135. *The donor's financial condition at the time of making a gift governs its validity.*

In testing the validity of that transaction, the subsequent fall of property, or failure of King, cannot be taken into view. The inquiry must be limited to his circumstances at the time. Was King, when this property was received by the complainant, in a failing or embarrassed condition?

§ 136. *Rule as to indorsements in questions of fraud.*

It is not shown, that at this time, the persons for whom he was bound as indorser, were unable to pay the respective sums for which he was responsible; and it would be improper to consider these sums as debts due by King. He was responsible for their payment on certain contingencies; but the fact that his credit remained unimpaired for several years after the contract with the complainant, shows that neither his credit nor the credit of those for whom he was indorser was considered doubtful. In this state of facts, he surely was in a condition to dispose of a house and lot, not worth more than \$2,500, on the terms stated in the bill.

There appears to have been no fraudulent intent in the case; no disposition to defeat the claims of present creditors, or to cover the property from future demands. It seems to have been a *bona fide* transaction, and one which neither a court of law nor equity could refuse to sanction. And if the terms of the contract were established, so that this court could decree a specific execution of it, they would pronounce such a decree. But as a specific performance cannot be decreed, the inquiry remains, whether the complainant has a lien on the property for the money he expended in improving it. The counsel for the appellant do not controvert the right of the complainant to a just remuneration for the valuable improvements he made; but they insist that he must exhibit his claim as a general creditor of the estate of George King; and that from such claim there should be deducted a reasonable rent for the time the property was in his possession.

§ 137. *When improvements on property will create a lien.*

This claim for improvements by the complainant is founded upon the most equitable considerations. At the instance of George King, his father-in-law, the complainant entered into the possession of this property; and under a full belief that it would be secured to him as his own, he was induced to expend a large sum of money in making permanent and valuable improvements. These improvements, some of the witnesses say, have increased the value of this property to three times the amount which it was worth before they were made. From this, it appears, the money was not injudiciously expended; and the question arises whether this expenditure, under the circumstances of this case, does not create a lien upon the property. If King were living, he could not object to this lien. Can his creditors object to it? By enforcing it, can their interests be injuriously affected?

It may be said that the deterioration of property in Georgetown has been such as to reduce the value of this property to a less sum than was expended in making the improvements. This cannot change the principle that must govern the case. If the money has been judiciously expended, under such circumstances as to entitle the complainant to a lien, the court must give effect to it. It is an equitable mortgage, and in a court of chancery is as binding on the parties as if a mortgage in form had been duly executed.

Suppose George King, for the purpose of improving this property, had borrowed from the complainant \$4,000, and had executed a mortgage on the same property, to secure the payment of the money. Could the creditors of King complain of the lien of the mortgage? It is clear they could not. And is it not equally clear, that they have no ground to complain of the equitable mortgage? If there be any difference in the force of the liens thus created, it must be in favor of the equitable lien. In the first case supposed, the money was loaned at a fixed rate of interest, and the property was looked to as securing the payment. But in the second case, the money was expended under a belief that the property belonged to the individual, and that the amount expended increased so much the value of his estate; and, in many cases, a failure to obtain the property, under such circumstances, would cause an injury which a return of the money expended would not repair.

It would be most unjust to leave the complainant, as a creditor, to receive a dividend on the distribution of the estate of King. Ought the complainant to be held accountable for rents, while he occupied the premises; or which he may have subsequently received from his tenants? The rents received by the complainant after his removal to the west, independent of other facts in the

case, go to show that he was not considered as the tenant of King. Indeed, there can be no doubt that the complainant considered the property as his own; and it was so treated by George King, for he collected the rents as the agent of the complainant, and accounted to him for them. It would therefore be unjust now to compel him to pay rents which, with the concurrence of all parties, were paid to him at the time they accrued, as his own. And in addition to this, the interest on the money expended, would, perhaps, be equal to the whole amount of the rents.

As the circuit court decreed a conveyance of this property to the complainant, that decree must be reversed, and the cause remanded to that court, with instructions to cause the property to be sold, after due notice, on such terms as they shall deem most advantageous to the estate of George King; and the proceeds of the sale, first, to be applied to the payment of the money expended by the complainant in making improvements on the property, and the balance, if any, to be paid over for the benefit of the creditors of the estate of King.

HINDE v. VATTIER.

(Circuit Court for Ohio: 1 McLean, 110-120. 1880.)

Opinion of the COURT.

STATEMENT OF FACTS.—This bill was filed to obtain a title to lot 86, in the city of Cincinnati.

All the parties claim under Abraham Garrison, who, it is alleged, sold and conveyed the lot to William and Michael Jones. The sale and payment of the consideration are shown by the following receipt, signed by Garrison: "Received, Cincinnati, 10th September, 1790, of William and Michael Jones, fifty pounds, thirteen shillings and three pence, in part of a lot opposite Mr. Conn's in Cincinnati, for two hundred and fifty dollars, which I will make them a warranty deed for, on or before the 20th day of this instant."

The deed, it is stated, was executed in pursuance of this agreement, but was afterwards lost. And on the 26th March, 1800, William Jones, acting for himself and Michael Jones, conveyed the lot to Thomas Doyle, Jr., then an infant, whose father, Thomas Doyle, took possession of the lot in his son's name, and retained the possession until his death. Thomas Doyle, Jr., having survived both his parents, died under age in the year 1811, leaving Belinda, a sister by the mother's side, his heir at law. Thomas S. Hinde married Belinda, who deceased, leaving several children, in whose behalf he prosecutes this suit. In 1814 Hinde alleges he took possession of the lot, placed a tenant upon it, and in the year 1819 obtained a deed of confirmation from Michael Jones. And the bill charges that James Findlay, Charles Vattier and others, having full knowledge of the complainant's title, but discovering that Garrison's deed was lost, procured another deed, or some one of them, from Garrison for the same lot, and have turned the complainant's tenant out of possession.

Findlay, in his answer, states that having obtained a judgment for a large sum against Charles Vattier, he received in satisfaction thereof a conveyance of lot No. 86, with other property, and he took possession of the lot. In 1815, being informed that Garrison had a claim to the lot, and as he could find no deed on record, he purchased it from him for \$700, and a conveyance was executed. Before this he had heard of the sale of the lot by the sheriff, as the property of Doyle, and that Vattier purchased it.

Vattier states he purchased the lot for \$20 at sheriff's sale, as the property of Thomas Doyle; but neither the return of the sale nor the deed of the sheriff can be found. He held the lot until he conveyed it to Findlay, and afterwards, in 1818, Findlay reconveyed it to him, and some time after this he conveyed it to William Lytle.

Lytle, in his answer, states that in 1818, he purchased a part of lot 86 from Vattier for \$15,400. He knew nothing of the claim of Thomas Doyle, Jr., but before his purchase he heard that Hinde had taken possession.

The defendant Ritchey purchased the part of the lot which James Findlay had conveyed to Abraham Garrison, Jr.

A supplemental bill was filed, and also a bill of *revivor*, which represented the death of Belinda, wife of Hinde, whereby he acquired a life estate as tenant by the courtesy, and also making Garrison a party. It also represented that James Bradford, Thomas Doyle and John Bradshaw were brother officers in the army; that Bradshaw executed a voluntary bond to Thomas Doyle, Jr., the son of Thomas Doyle, binding himself to convey to him two hundred and fifty acres of land, part of a larger tract that was valuable.

This bond was delivered to Doyle, the father, for the benefit of the son, who afterwards sold the land to Samuel C. Vance, for a considerable sum of money, which was paid. To indemnify his son for this sum of money which the father received, he procured lot 86 to be conveyed to him, which was stated publicly when the conveyance was executed. The father was then indebted, but not insolvent. After the execution of the bond to Thomas Doyle, Jr., Bradshaw died, leaving his whole estate to Thomas Doyle, the father. The estate of the father on his decease descended to his son, and on his death to his half-sister Belinda. The sale to Vance was confirmed by Hinde, after he became interested in the estate.

It is stated that this lot was never sold on execution as the property of Doyle, but it remained open and unoccupied until 1814, when Hinde took possession by placing a tenant upon it. And the supplemental bill further states that Vattier must have become acquainted with the state of the title, as the deed from Jones which recites the deed from Garrison to the Joneses was on record. And Vattier took depositions to prove that the consideration on which the conveyance was made to the son was paid by the father. The conveyance of Vattier to Findlay is then stated, the deed from Garrison to Findlay, and also the reconveyance from Findlay to Vattier.

In his answer, Garrison admits the sale and conveyance to William and Michael Jones, and the payment of the purchase money. He disclaims all interest in the controversy, and prays to be dismissed, he being a citizen of the state of Illinois. In his answer to the supplemental bill, Vattier sets up fraud and denies the material facts, and says that the lot was sold on execution, but that a mistake being made in the deed of conveyance, the mistake was never corrected.

Afterwards Vattier, on leave, filed a supplemental answer, stating that when the original bill was filed on the 5th October, 1814, Hinde and wife executed a deed to Alexander Cummins, conveying a lot in *fee simple*, which deed was duly recorded and a copy of it is made a part of the answer.

The complainants, in their replication, admit the execution of the deed to Cummins, and aver that it was intended to vest the right to the lot in the said Cummins in trust for the said Hinde, to be held by him in trust for the heirs of his wife. And that the said Cummins did, on the same day, the 5th Octo-

ber, 1814, convey the lot to Hinde. To this replication the defendants have filed a rejoinder.

From the pleadings it is evident that neither Findlay nor Lytle has any interest in the case. The conveyance to Lytle by Vattier having been rescinded on finding that the latter had no title under the sheriff's deed, and the bill, therefore, as to these defendants may be dismissed. And as there is no proof in the case which shows a notice to Ritchey, who purchased from Abraham Garrison, Jr., the bill must stand dismissed as to him.

The first question which is raised in the argument is, whether the court can take jurisdiction of the case, as Abraham Garrison is a citizen of Illinois. Some years ago this case was brought to a hearing in this court, and a decree was rendered, Garrison not being a party. This decree, on being appealed to the supreme court, was reversed on this ground, and the cause was sent down for further proceeding. It was under these circumstances that Garrison was made a party; and if this shall deprive the court of jurisdiction, it is clear from the decision of the supreme court that the court can take no jurisdiction in the case.

Garrison was held to be a necessary party, as the equity set up by the complainants is claimed under him; and it is proper for the court to see that, in making a final decree, his interest shall receive no prejudice. It is said that he should be a party, as he might controvert the instrument signed by him or deny the payment of the consideration. Now, it is evident no decree is prayed against Garrison, and it is difficult to see, as he has actually conveyed the lot to Findlay, how his rights could be injured by a final decree. Had the conveyance to the Joneses been proved, it will not be pretended that Garrison would be a necessary party, and it is difficult to distinguish, as it regards his interest in the case, between a conveyance to the Joneses and to Findlay. In either case, he is estopped by his deed to set up any right of an equitable nature. But, as the supreme court have so decided, it must be admitted that Garrison is a necessary party, and he is made a party to the suit.

§ 138. *A bill may be dismissed as to a party, not within the jurisdiction of the court, who files a disclaimer.*

He admits the conveyance to the Joneses, and disclaims all interest in the case, and asks to be dismissed, and the bill as to him stands dismissed. The cases are numerous, where if a reason is shown why a person is not made a party, as, want of jurisdiction, the court will retain the case and decree between parties before the court; if they can do so without affecting the interests of those who are without its jurisdiction.

And it is fairly to be presumed, if the original bill had stated that Garrison, being a citizen of Illinois, was not within the jurisdiction of the court, and could not therefore be made a party, that the supreme court would have sustained the jurisdiction. The late proceedings in the case amount to this, and the additional fact is solemnly admitted by Garrison, that he executed a conveyance to the Joneses. This shows that he has no interest in addition to his disclaimer, and as the bill has been dismissed as to him, it must stand as though Garrison were not a party to the suit, as he in fact is not, and the facts upon the face of the proceeding show why he is not a party. This objection, therefore, to the jurisdiction of the court cannot be sustained.

§ 139. *An agreement to admit depositions lasts to the end of the cause, although it may be taken to the supreme court and remanded.*

An objection is made to various depositions which were admitted at a former

hearing of the case, and which were not legally admissible, except under an agreement previously made; and it is contended, that this agreement cannot be considered in force now. That it cannot be extended beyond the hearing formerly had in the case, and on the appeal to the supreme court. And it is urged as an additional reason, that new matter has been introduced into the case by the complainants and defendants, and also other parties. This objection does not seem to have much force. The agreement was to admit the depositions now objected to, without any conditions as to any subsequent changes in the cause that might take place. The effect of the agreement was to legalize the depositions; to place them on as favorable a footing as if they had been taken between the same parties, and in conformity to law.

The objection as to new parties can only refer to Garrison, and he, in fact, is not now a party; but, if he were, the introduction of his name makes no change in the merits of the case.

The case has been brought to a hearing under the agreement, as to the admission of this evidence, and we think the agreement is as binding now, as it was before the former hearing. As well might the objection be urged to the admission of depositions legally taken and used at the former hearing. They stand on no better footing than the depositions covered by the agreement.

§ 140. *A receipt thirty years old need not be proved by the subscribing witness.*

The receipt of Garrison is objected to, because it has not been proved by the subscribing witness. This receipt is more than thirty years old, and the instrument is apparently authentic, and stands connected with other facts proved, which go to establish it; and under such circumstances, proof of its execution, by the subscribing witness, may be dispensed with. 1 Starkie, 342. Circumstances go strongly to show, independently of the admissions of Garrison, that a deed was made by him to William and Michael Jones; but whatever doubt may be suggested as to the execution of the deed, there can be none as to the receipt which vests the equity to the lot in them.

The bond set up in the supplemental bill for two hundred and fifty acres of land executed by Bradshaw, is proved, and also the other facts connected with it. This land was sold for \$400, which were received by Thomas Doyle, the father, who assigned the bond. This act it is said, was not obligatory on Thomas Doyle, Jr., and on coming of age, he might have disaffirmed the contract. If this were admitted it cannot avail, for he died before he became of age, and his legal representatives affirmed the contract. In consideration of having received and appropriated the above sum, the father procured the deed for the lot to be made to his son.

§ 141. *Deed not fraudulent.*

Thomas Doyle, Sen. was at this time somewhat embarrassed; but there are no facts in the case, when viewed in connection with the circumstances, which show this to have been a fraudulent transaction. The motive of the father, in doing justice to his infant son, seems to have been commendable. William and Michael Jones were engaged as partners in trade, and at the time the deed was executed, it was, probably, the impression of William, the active partner, that he could convey the real estate of the partnership the same as the personal. The deed, however, having been executed by one of the partners only, could convey to Thomas Doyle, Jr., no more than a moiety of the lot. But as the deed of Garrison is not established, this conveyance, and the one that was subsequently executed by Michael Jones, could only be considered as conveying the equitable interest to the lot.

§ 142. *What is legal proof of marriage.*

The heirship of Belinda, the wife of Hinde, is controverted. James and Margaret Bradford, the father and mother of Belinda, were reputed to be married, and lived together as man and wife. And the will of Bradford recognizes her as his wife, and that she at the time was pregnant. On this point the proof is satisfactory, and is not shaken by the unsettled rumors, which may have been circulated as to the manner in which the marriage was solemnized. The facts authorize the presumption of a legal marriage.

Thomas Doyle took this lot as a purchaser, and it descended to his half sister, he having neither brother nor sister of the whole blood. It is not material to inquire whether this lot was sold by the sheriff as the property of Thomas Doyle, Sen., for if it were sold, as alleged by Vattier, the sheriff could convey no title to it, as Doyle had none. In this purchase by Vattier, if made, no title was received, and consequently, if he conveyed the lot to Findlay, of which there is much doubt, having no right he could convey none.

§ 143. *Where a person takes property with notice of the title of another, or with knowledge of facts that, with ordinary diligence, would lead to a full knowledge of the title, he will take subject to the former title.*

Findlay having investigated the title, was made acquainted with it by Henderson, the recorder, and he then for \$700 induced Garrison to make him a deed for the lot, which was worth, at the time more than \$30,000. Garrison, at the same time, conveyed to his son twenty-three feet of the lot.

These circumstances, and the facts proved, go to establish notice, as against Findlay, and the inquiry then arises, whether Vattier, in receiving the conveyance from Findlay, had notice. There would seem to be little room to doubt that Vattier had notice. He had examined the title, set up a claim to the lot under a sheriff's sale, and alleges that he conveyed it to Findlay. He knew it was called Doyle's lot, and of the sale to Doyle by William and Michael Jones, he had some knowledge. He knew of Doyle's, and subsequently of Hinde's claim. In searching the record he must have found the deed from William Jones, in his own and his brother's names, to Thomas Doyle, Jr., which recited the deed from Garrison to them. In any point of view in which the facts can be considered, Vattier had notice of such facts as would have led him, by the use of ordinary diligence, to a full knowledge of the state of the title. Any want of knowledge, therefore, of which he may now complain, is chargeable to his own negligence. Sugden on Vend., 498; 1 Atk., 489; 2 Ves. Jr., 440; 4 East, 220.

The conveyance to Cummins, as set up in the amended answer of Vattier, is answered by the special replication of the complainants, filed without objection, that the lot was immediately reconveyed to Hinde, for the use of his infant children. The beneficial interest is in the minor heirs of Belinda Hinde, and the suit is prosecuted, as well before as after the conveyance to and from Cummins, in their behalf. These conveyances, therefore, do not change the nature of the interest now under consideration.

Upon a full consideration of the case, and finding the equity of the complainants sustained by proof, and that both Findlay and Vattier are chargeable with notice of the equity of Thomas Doyle, Jr., at the time they received their deeds for the lot, the court will decree that Vattier, Findlay having now no interest in the premises, shall convey all his right and title to the property to the complainants in pursuance of the right asserted in their bill.

HALLETT v. COLLINS.

(10 Howard, 174—187. 1850.)

APPEAL from U. S. Circuit Court, Southern District of Alabama.

Opinion by MR. JUSTICE GRIER.

STATEMENT OF FACTS.—It will not be necessary in the consideration of this case to notice particularly the great mass of documents and testimony spread upon the record, further than to state the results as they affect the several points raised by the pleadings and argued by the counsel.

1. The first of these in order is that which relates to the sufficiency of the probate of the will of Joseph Collins, under whom the complainant claims. But as his claim to two-thirds of the property in dispute is through his deceased brothers, he is compelled to remove the objection which has been urged to his and their legitimacy; and if he can succeed in this, and thus establish his right by descent, the decision of the question as to his title by devise will be unnecessary. We shall therefore proceed to examine the second point, as to the legitimacy of the complainant.

§ 144. *Laws of marriage in Spanish colonies.*

2. It is not denied that the complainant and his deceased brothers, Joseph and George, were the children of Joseph Collins by Elizabeth Wilson, but it is contended that the parents were never legally married. The evidence on this subject is as follows: Joseph Collins resided in the country south of the thirty-first degree of north latitude, between the Iberville and Perdido, and died there about the year 1811 or 1812, while that country was still in the actual possession of the Spanish government. In the year 1805 he resided in Pascagoula. Elizabeth Wilson resided also in the same place, and in the family of Dr. White, who was a syndic or chief public officer in that place. A contract of marriage was entered into by Joseph Collins and Elizabeth Wilson before Dr. White, who performed the marriage ceremony. The parties continued to live together as man and wife, and were so reputed, till the death of Collins. It is true that some persons did not consider their marriage as valid, because it was not celebrated in presence of a priest, while others entertained a contrary opinion. It is in proof also that Collins himself, when he made his will, entertained doubts on the subject.

It is a matter of history that many marriages were contracted in the presence of civil magistrates, and without the sanction of a priest, in the Spanish colonies which have since been ceded to the United States. Whether such marriages are to be treated as valid by courts of law is a question of some importance, as it may affect the titles and legitimacy of many of the descendants of the early settlers. It is not the first time that it has arisen, as may be seen by the cases of *Patton v. Philadelphia*, 1 La. Ann., 98, and *Phillips v. Gregg*, 10 Watts, 158. The question then will be, whether an actual contract of marriage, made before a civil magistrate, and followed by cohabitation and acknowledgment, but without the presence of a priest, was valid, and the offspring thereof legitimate according to the laws in force in the Spanish colonies previous to their cession.

That marriage might be validly contracted by mutual promises alone, or what were called *sponsalia de præsenti*, without the presence or benediction of a priest, was an established principle of civil and canon law antecedent to the council of Trent. See *Pothier du Contrat de Mariage*, part II, c. 1; *Zouch, Sanchez, etc.*; and *Dalrymple v Dalrymple*, 2 Haggard's Con. Rep., 54, where all

the learning on this subject is collected. Whether such a marriage was sufficient, by the common law in England previous to the marriage act, has been disputed of late years in that country, though never doubted here. See the case of *The Queen v. Millis*, 10 Cl. & Fin., 534.

On the continent clandestine marriages, although they subjected the parties to the censures of the church, were not only held valid by the civil and canon law, but were pronounced by the council of Trent to be *vera matrimonia*. But a different rule was established for the future by that council, in their decree of the 11th of November, 1563. This decree makes null and void every marriage not celebrated before the parish or other priest, or by license of the ordinary, and before two or three witnesses.

But it was not within the power of an ecclesiastical decree, *proprie vigore*, to affect the *status* or civil relations of persons. This could only be effected by the supreme civil power. The church might punish, by her censures, those who disregarded her ordinances. But until the decree of the council was adopted and confirmed by the civil power, the offspring of a clandestine marriage, which was ecclesiastically void, would be held as canonically legitimate. In France the decree of the council was not promulgated, but a more stringent system of law was established by the Ordonnance de Blois and others which followed it. In Spain it was received and promulgated by Philip the Second in his European dominions. But the laws applicable to the colonies consisted of a code issued by the council of the Indies antecedent to the council of Trent, and are to be found in the code or treatise called *Las Siete Partidas* and the laws of Toro. The law of marriage, as contained in the *Partidas*, is the same as that which we have stated to be the general law of Europe antecedent to the council, namely, "that consent alone, joined with the will to marry, constitutes marriage." We have no evidence, historical or traditional, that any portion of this code was ever authoritatively changed in any of the American colonies; nor has it been shown that, in the *Recopilacion de los Indies*, digested for the government of the colonies by the order of Philip the Fourth, and published in 1661, nearly a century after the council of Trent, any change was made in the doctrine of the *Partidas* on the subject of marriage, in order to accommodate it to that of the council. It may be supposed that, as a matter of conscience and subjection to ecclesiastical superiors, a Catholic population would in general conform to the usages of the church. But such conformity would be no evidence of the change of the law by the civil power. Indeed, the fact that the civil magistrates of Louisiana had always been accustomed to perform marriage ceremonies where the parties were Protestants, or where no priest was within reach, is conclusive evidence that the law of the *Partidas* had never been changed, nor the decree of the council of Trent promulgated, so as to have the effect of law on this subject in the colony. The case of *Patton v. Philadelphia*, 1 La. Ann., 98, already referred to, shows the opinion of the supreme court of Louisiana on this subject, which, on a question relating to the early history and institutions of that country, should be held conclusive.

3. These preliminary questions being thus disposed of, our next subject of inquiry must be whether Joseph Collins had any right or title to the land in dispute which descended to and vested in his heirs.

On the 3d of January, 1803, Joseph Collins, who was captain of dragoons and surveyor of the district, made application to Don Joaquim de Osorno, military commandant of Mobile, and obtained a permit, in the usual form, to

take possession of a certain lot of marshy ground therein described, near to or in the city of Mobile. The permit was dated on the 26th of April, 1803. This, though merely an inception of a title, was capable of being ripened into a legal title by possession and improvement, which would give him a right to call on the intendant-general to perfect his grant by a complete title. In order to keep up his possession and improvement on this lot, Collins entered into agreement, under seal, dated the 21st of November, 1806, with William E. Kennedy, by which Kennedy covenanted to improve the lot, "so that, by fencing and ditching, the said lot may not be forfeited, and that he will begin to improve said lots immediately." By this agreement Collins was to have the south half of the lot, and the north half was to be conveyed to Kennedy.

Whether Kennedy was at this time the owner of the Baudain claim to the same lot, and the compromise of their conflicting claims was in part the consideration of this contract, or whether the Baudain claim was first purchased by Kennedy in 1814, when its transfer bears date, is a question of no importance in the case. For it is clearly proved that Kennedy took and held possession of the lot and made the improvements in pursuance and under his contract with Collins. And whether we consider him as agent, partner or tenant of Collins, his purchase of another claim would inure to their joint benefit. He could not use the possession and improvement made for Collins to complete an imperfect and abandoned grant to Baudain, as was done, and by such act exclude Collins from his half of the lot. The deed which Kennedy afterwards gave to Inerarity shows clearly that he entertained no such dishonest intention. For after acknowledging by this deed his contract with Collins, and stating his intention to complete the title under the Baudain permit or grant, he proceeded to substantiate his title before the commissioners by proving the possession and improvements made by him under his contract with Collins as the meritorious foundation of his claim; and thus obtained a favorable report from the commissioners under the Baudain grant, which had been before rejected for want of such proof.

§ 145. *A person improving land upon a contract with the owner cannot buy in an outstanding title. He becomes a trustee.*

By the act of congress of the 8th of May, 1822, section 2 (3 Stats. at Large, 700), all claims to lots in the town of Mobile, on which favorable reports had been made by the commissioners, "founded on orders of survey, requettes, permissions to settle, or other written evidence of claims, derived from either the French, British or Spanish authorities, and bearing date before the 20th of December, 1803, and which ought, in the opinion of the commissioners, to be confirmed, were confirmed in the same manner as if the title had been completed."

By this act the legal title to this lot became vested in William E. Kennedy. A patent would be but further evidence of a title which was conferred and vested by force of the act itself. Having thus obtained the legal title in his own name, Kennedy required no deed from Collins or his representatives, but became seized thereof for his own use as to the northern half, and for the use of Collins, or in trust for his heirs, as to the southern. Inerarity might have maintained an action of covenant on his deed, and compelled him to transfer the legal title by a further assurance. There might be some question, perhaps, whether the legal estate did not immediately vest in Inerarity by estoppel. But as the conveyance is a deed poll, in the nature of a quitclaim and release, without a warranty, and with a covenant for further assurance to Inerarity,

or the heirs of Collins, it most probably would not. But for the purposes of this case the question is wholly immaterial. Inerarity, as a creditor of the estate of Collins, would have a right to demand the payment of his debt, before he should make a transfer to the heirs. But whether as holder of the legal or equitable estate in trust, his beneficial interest amounted to no more.

§ 146. *Presumption from the production of one part of a duplicate deed.*

Some objections have been urged to the view we have taken of this transaction, on the ground that the contract made in 1806 with Collins was not binding. But, although we cannot perceive the right of persons who have purchased the legal title from Kennedy, with full notice of the trust, to object to a contract which Kennedy has executed, we shall proceed to notice them. The first objection is, that Collins did not sign the indenture or articles of agreement of 21st November, 1806, and was therefore not bound to convey to Kennedy; and there was therefore no consideration which could make the deed binding on him. But the deed on its face purports to be an indenture, of which Collins, from the nature of the transaction, would be holder of the counterpart, signed by Kennedy. The original, which is signed by the grantor, would be in possession of Kennedy, the grantee, who cannot object to the validity of his covenant, because a paper is not produced which, if in existence, is in his own possession. Much less could he be heard to make this allegation after the contract had been executed by his own deed sealed and delivered in pursuance of it.

It has been objected, also, that the original contract with Collins was void as against the policy of the law. But it was certainly not against the policy of the laws of Spain, under which it was made, for it was a fulfillment of the conditions of the grant made to Collins. And it cannot well be said to be contrary to the policy of the laws of the United States, who have confirmed the land to Kennedy, in virtue of the very possession and improvements made in pursuance of the contract. Thus far, then, we have, in 1822, the legal title to the whole lot vested in W. E. Kennedy, in trust, as to the southern half, for the heirs of Collins.

§ 147. *The rule which protects bona fide purchasers does not embrace purchasers of merely equitable titles.*

4. What, then, was the effect of the deed made to Samuel Kitchen, dated, or antedated, some two months before the deed to Inerarity? The circumstances which tend to show that this deed was made after that to Inerarity, and for the purpose, if possible, of defeating it, are very strong and convincing.

1. Joshua Kennedy, who acted as the agent for Kitchen, or used Kitchen's name for his own purposes, was a witness to the deed to Inerarity, and made no objections, nor suggestions, that he had bought and paid for this lot a few days before, as agent of Kitchen,—a circumstance not easily accounted for, if such had been the fact. 2. The deed to Kitchen was acknowledged after that to Inerarity, at the same time with another deed from W. E. Kennedy to Joshua Kennedy, containing property previously sold to Inerarity, and having the same witness, Diego McBoy. "And 3. The frequent declarations of Joshua Kennedy, that the object of the deed made to Kitchen through his intervention, was to defeat Inerarity's claim to that property." And, lastly, the fact that Samuel Kitchen gave Joshua Kennedy an obligation to convey the lot to him on request; which was afterwards fulfilled by giving his deed to William Kitchen for a nominal consideration; and that William's name was used by Kennedy for the purpose of covering and complicating the transaction.

But it is a question of no importance in the case whether the deed to Samuel Kitchen was delivered on the day it bears date, or that on which it was acknowledged. He was not the purchaser of a legal title without notice of a secret equity. The rule with regard to purchasers of a mere equity is *Prior in tempore potior in jure*.

The equitable title of Collins, of which the deed to Inerarity contained a new acknowledgment, had its origin at least as far back as 1806. So that, even if we could bring ourselves to believe that Joshua Kennedy, whether acting for Kitchen or himself, had purchased and paid his money without notice of the title of Collins' heirs, it would not enable him to defeat their claim. The legal title first became vested in W. E. Kennedy in 1822, and passed by his deed of 1824 to Joshua Kennedy, with full knowledge of the trust. His attempt to defeat it by covering the land with the vagrant and probably fraudulent claim under Price, after he had obtained the legal title from the United States, was as unsuccessful as the first, and wholly inoperative, except to show the shifts and contrivances resorted to in order "to defeat Inerarity's claim."

§ 148. *Under what circumstances a deed from young heirs will be set aside.*

5. We come now to the consideration of the validity of the deeds of release obtained from George and Sidney E. Collins in 1829 and 1830.

At this time the property had risen in value, with a prospect of a much greater increase; and the frailty of the title was but too transparent to a man of the judgment and shrewdness of Joshua Kennedy, notwithstanding the means used to obscure it. The heirs had just come of age. They were ignorant of the nature or value of their title. Kennedy is not only in possession of their land, but of the legal title. He persuades them to release their title to William Kitchen for the sum of \$1,000 each; a sum which, to young men just out of their apprenticeship, poor, and ignorant of their rights, would appear large and attractive. Kennedy is well acquainted with the nature and value of their claim; they are wholly ignorant of it. He informs them that their claim is worthless, but that Kitchen was willing to give them this sum for the sake of peace and quieting his title. Besides, he had so complicated and covered up the title that it was impossible that they could comprehend it, or know the value of their claim if the documents had been laid before them. Under such circumstances should a chancellor hesitate in setting aside the releases, if it appeared that the title thus obtained was for a consideration much below the value of the property? It needs no citation of authorities to show that deeds, obtained under such circumstances, would be held void.

6. The transfer by Inerarity of the equitable trust title held by him can add nothing to the validity of Kennedy's title. Whether transferred by him voluntarily, or through the medium of a decree in chancery, can make no difference in this case. Nor is Inerarity liable to any imputations of collusion or improper conduct in the matter. He was bound to transfer his title to the heirs on payment of his debt. And when their releases to Kitchen were produced, by which he appeared to be substituted to their rights, Inerarity, who was ignorant of the means used to obtain them, might justly believe that he was bound to convey to him. He did so after consulting counsel and after a decree in equity. Such a decree would be made as a matter of course. But its effect would only be to substitute Kitchen or Kennedy to the rights of Inerarity. The title would be still subject to the trust for Collins' heirs, and unless their title was vested in Kennedy by these releases, he held the land

still subject to their rights. But when the releases to the heirs are set aside Kennedy is entitled to recover the money paid to Inerarity, as there is no allegation that the debt claimed by Forbes & Co. against Collins' estate was not justly due.

But before leaving this part of the case, it will be proper to notice an objection urged with some plausibility in the argument. The record exhibits much contradictory testimony as to the value of this property at the time the releases were executed, and it has been contended that Kennedy paid the full value for it, being altogether over \$4,000. After such a length of time, it may be expected that the estimates of witnesses from recollection will differ widely. But when we look at the public assessments and the sales of contiguous property about the same time, which are the best tests, it would seem that the boast of Joshua Kennedy himself that he had bought for \$4,000, property worth \$40,000, was not an exaggeration of the truth. But assuming the true value to have been one-half that sum, and taking into consideration the facts and circumstances already stated, we think the circuit court was fully justified in setting aside these conveyances and decreeing that the defendants should account.

7. The absence of the complainant from the state, and the late discovery of the fraud, fully account for the delay and apparent laches in prosecuting his claim, which have been objected to on the argument.

The decree of the court below is therefore affirmed, but with this addition: "That the master, in taking the account of rents, profits, sales, etc., shall allow to the defendants the sum paid to James Inerarity for his claim against the estate of Joseph Collins."

McQUIDDY v. WARE.

(20 Wallace, 14-20. 1878.)

APPEAL from U. S. Circuit Court, Eastern District of Missouri.

STATEMENT OF FACTS.—McQuiddy left his home in Missouri and joined the Confederate army, in which he served under Gen. Price, and left Missouri with the troops under the command of that officer. In 1862 and 1863, his creditors proceeded against him as a person whose residence was unknown, or a non-resident debtor. His property was sold by virtue of these suits, and in 1871 he filed a bill to set aside the sales, upon the ground that the affidavits upon which the suits were based were false; that he was absent for a temporary purpose when the suits were begun, and that his residence was well known to be in Nodaway county. The defendants demurred and the demurrer was sustained.

Opinion by MR. JUSTICE DAVIS.

In the view we take of this case we are not required to wade through the various statutes of Missouri, and the decisions of the courts of the state, in order to determine whether or not the proceedings in question are valid. The complainant is not, in our opinion, in a position to invoke the aid of a court of equity to decide that question. The bill presents the case of a man who chose to neglect his private interests for the purpose of devoting his time to the destruction of the government, complaining that his creditors enforced the collection of their debts on a wrong theory of his *status*, in consequence of entering the service of the enemy. There is no pretense that the debts were not meritorious, or that the judgments were entered for a larger

amount than he owed. The real ground of complaint is that he was not an absent or absconding debtor, or a person whose residence was unknown, and was not, therefore, subject to the proceedings which were instituted against him. Whether this be so or not it is easy enough to see in the anomalous condition of affairs existing at the time in Missouri, that creditors might honestly suppose that an individual, leaving his state to destroy the government under which his rights of property were acquired, did not intend to return to it, and proceed to collect their debts under that supposition. The inquiry is whether a party acting in this way has stated such a case as entitles him to equitable relief, because his creditors, who ought to have been provided for before he left, mistook the condition he occupied, and treated him as a person who had permanently abandoned his home.

There is no averment that he did not have *actual notice* of the proceedings against him in time to protect his rights. And, it is fair to infer, in the absence of such an averment, that it could not be truthfully made. It is difficult to suppose, when he moved his family to Tennessee, that he did not communicate with friends in Missouri who were acquainted with the true state of his affairs.

§ 149. *A petition for review may be filed in Missouri within three years after the judgment.*

Besides, if the proceedings against him were irregular, why did he not seek his remedy under the statutes of Missouri, which concede to the party against whom judgment has been rendered, on constructive notice only, the right to come in at any time within three years and file his petition for review. If this had been done, and the state court had permitted the cases to be reopened for the reasons set forth in the bill, his remedy would have been complete, as the bill charges the purchasers at the sale with notice of all irregularities. It cannot be said that there was no opportunity of doing this, for the earliest judgment was in May, 1862, and both the others in November, 1863, and the war was substantially over in May, 1865. There is no averment of the want of this opportunity, nor is the absence of it aided by the general allegation, without specification of time or circumstance, that he could not with safety return to Nodaway county on account of existing prejudices. This might be true, and yet the opening of the judgments obtained by an attorney, as his personal presence was not required for that purpose. It were easy enough before the three years expired to communicate with St. Louis by letter, or even to go there, and it is very certain that he could not have been under any apprehension while there of being disturbed in the assertion of his legal rights.

But if the proceedings, instead of being irregular and voidable, are null and void, as they are characterized in the bill, the remedy at law is complete, for there is in such a condition of things nothing in the way of the successful maintenance of an action of ejectment, which will result not only in the restoration of the lands, but also their rents and profits.

§ 150. *Where there has been gross laches, equity will not interfere. Six years' delay to assert rights is such laches.*

Apart from all this, the maxim that he who seeks equity must do equity in the transaction in respect to which relief is sought, has not been observed by this complainant. While admitting his indebtedness, and that it has existed for ten years or more, he does not make a tender in court of what is justly due, although he is asking the court to set aside the proceedings by which this indebtedness was satisfied, on the ground of their absolute nullity. The will-

ingness to pay what is found to be due on the adjustment of the accounts for rents and profits is not the sort of offer required of a person in the situation of this complainant.

Moreover, there has been an utter lack of personal diligence, which is required in such a case as this in order to bring into activity the powers of a court of equity. Equity always refuses to interfere where there has been gross laches in the prosecution of rights. There is no artificial rule on such a subject, but each case as it arises must be determined by its own particular circumstances. These proceedings were begun early in the war, and yet no move is made to disturb them until July, 1871, more than six years after hostilities ceased. Why this delay? The complainant says he was in ignorance of them until recently, and that as soon as he ascertained them he took steps to assert his rights. Such a general allegation will not suffice to provoke the interposition of a court of equity. It will not do to remain wilfully ignorant of a thing readily ascertainable. There has been free and uninterrupted communication between Tennessee and Missouri since the war closed, and the courts everywhere accessible for the prosecution of any cause of action. Besides, in the very nature of things, the complainant must have known soon after it occurred that an improved farm, once occupied by him, was in the possession of adverse claimants. This was notice sufficient to put him on inquiry, and this inquiry would have resulted in ascertaining all the facts stated in the bill. There is no reason given for the delay, nor any facts and circumstances on which any satisfactory excuse can be predicated.

Here, then, is the case of a party engaging in the rebellion without provision for his debts, to which there was no defense, asking a court of equity, after the lapse of many years without sufficient excuse for the delay, to interfere in his behalf because his creditors adopted the wrong methods for the enforcement of their claims against him. And this, too, without any specific charge of fraud, except in the matter of the affidavits on which the proceedings were founded.

Such a charge, under the circumstances, is too weak and unsatisfactory to relieve the complainant from the consequences of his own folly. In any aspect of the case we think the demurrer was properly sustained, and the decree of the circuit court dismissing the bill is therefore affirmed.

BURGESS v GRAFFAM.

(Circuit Court for Massachusetts: 10 Federal Reporter, 216-220. 1882.)

STATEMENT OF FACTS.—Bill in equity charging defendants with conspiracy to deprive plaintiff of a valuable property by sale of it under executions upon several small judgments rendered against her in her absence, and keeping the sale from her knowledge. The answer denied the frauds charged, and by an amended bill Doble was made defendant, he having bought the property from the original purchaser at execution sale.

Opinion by LOWELL, J.

Of the actions against her the defendant had notice, and she cannot aver and prove, in this collateral suit, that they were not founded upon just debts. By a recent statute of Massachusetts the power of a judgment creditor to sell his debtor's lands at auction, which was formerly confined to equities of redemption, has been extended to unincumbered estates. St. 1874, c. 188; *Hackett v. Buck*, 128 Mass., 369; *Woodward v. Sartwell*, 129 Mass., 210. No

notice is required to be given to the debtor unless he is found within the county. A notice must be posted in the town, and one in each of two adjoining towns, and must be published in some newspaper printed in the county. These notices are not intended for the information of the debtor, as is apparent from their character, and from the fact that they are equally essential when the debtor has had personal notice as when he has had none. Their office is to inform the public and obtain bidders at the sale.

§ 151. *The sheriff does not stand in any fiduciary relation to a debtor whose lands are sold by him at execution sale. He is merely an agent or servant of the law.*

In the sale on Graffam's executio all the forms of law were complied with: It was made at the office of the sheriff, as is not unusual. There were no bidders excepting the creditor, and the sheriff did not adjourn the sale, as he should have done, if he had any reason to suppose that competitors would appear at the adjournment. I do not know that there was any hope of this, for the law requires no notice of the adjournment excepting a proclamation at the time and place of the original sale. I cannot agree that the sheriff stands in a fiduciary relation to the debtor. He is a mere agent or servant of the law, and must be protected if he has honestly carried out the instructions of the statute.

I do not find a conspiracy among these defendants such as is charged against them. I think it probable that Graffam was angry with the complainant for her neglect and refusal to pay his small bill; that he hoped to obtain power over her by a failure on her part to learn of the sale, in order that he might compel her to do what he considered right; that is, to pay him and his attorney handsomely, according to their own views of liberality, for their time and trouble and vexation. He might have followed methods more advantageous to the complainant. He might have levied on her real estate by appraisal and extent; or, after selling the realty, he might have paid himself from the rents and profits; he might have taken personal property; he might have warned her of the danger in which she stood. Graffam says he did warn her; but it is very doubtful whether the conversation which he testifies to did not take place after the foreclosure was complete. If it was before that time it is the worse for him, because it was a totally inadequate warning not unlikely to mislead her. This is the only evidence of any act of his which looks like concealment; but I do not think it was intended to deceive her, nor that it did, in fact, deceive her. I believe the truth to be that he did not feel easy to take this valuable estate, even after the foreclosure, until he had given her one more opportunity to pay the debt; and that, finding her still unreasonable, his conscience was appeased.

These several things that Graffam might have done, he did not do; but whatever might be required of him by good morals, or good neighborhood, or a regard to the opinion of mankind, he was under no legal obligation to do any of these things; and, as I have failed to find on his part any positive act of fraud or concealment, or anything more than silence when the law required no speech, I cannot find illegality in his conduct, and, of course, there was no conspiracy on the part of the other defendants. I must, therefore, dismiss the bill as against the attorney, the deputy sheriff and the defendant, Newhall, who sold his judgment to Graffam, as he had a right to do, and the defendants who removed the furniture. If these persons are liable to suit it is in trespass or trover.

§ 152. *Circumstances under which a purchaser is chargeable with notice.*

The only remaining questions are whether Doble is a *bona fide* purchaser without notice; and whether the plaintiff can and ought to be permitted to redeem the estate. By a recent statute of Massachusetts a *lis pendens* is not to affect the title to real estate, except as to the parties to the suit, and volunteers and persons having actual notice, until a memorandum containing certain particulars of the suit has been recorded in the registry of deeds, and no such memorandum was filed by the defendant. Whether this statute must govern the action of the circuit court in equity I do not now consider. Doble, in my opinion, is either not a purchaser, or he is one with notice. He bought the estate two or three days after the bill was filed for about one-fourth of its value; the deed does not contain the true date, nor the true price; and he had a written agreement with Graffam, regulating their respective rights in case of litigation with this plaintiff within three years. The litigation was not already begun, to be sure, but he had notice that it was probable, and provided against that contingency. He is clearly a purchaser with notice, unless the whole contrivance was the cover of a sham sale, which I am inclined to think it was.

§ 153. *Right to amend a bill in equity.*

The bill is not framed as a bill to redeem, but all the facts necessary to such a bill have been pleaded and proved; the technical defect is that the complainant does not ask for redemption, nor offer to pay what is due. The court has full power to permit an amendment at this stage of the case, if the facts authorize a redemption. *Neale v. Neales*, 9 Wall., 1.

§ 154. *Circumstances under which land sold under execution can be redeemed, although the statutory period has expired.*

The land was sold for about one-fiftieth part of its value, with all due form; but it is not usual to sell land for so small a debt, when there are readier means for collecting it, by levy and extent, or by taking personal property. For this reason I do not think I ought to hold the complainant to have lost the estate by her negligence. She had no actual notice of the sale, and could have had none, except by some accident. She knew that her property might be taken to pay the debt; but there is no evidence that she knew that, by the operation of law, fifty times the debt was likely to be taken. I hold, therefore, that through some failure of notice, not imputable to the defendant Graffam, because he was not bound to give notice, and not imputable to the complainant, who happened to live in a distant city, she has lost her estate by a harsh and intentionally undisclosed act of the defendant, though a disclosure was not legally obligatory.

Courts of equity were instituted to relieve against such mischances. A very analogous case of relief is found in *National Bank of N. A. v. Norwich Savings Soc.*, 37 Conn., 444. There a decree of foreclosure had been made by a court having jurisdiction, and a second mortgagee had notice by mail, as required by the statute, and the decree recited that notice had been given; but, as it had not been received, the foreclosure was opened after the full time allowed by the decree had expired. There are many cases where statutory foreclosures are held conclusive in equity, but they are cases in which there was actual notice, and the only question was whether, when a statute has given ample time for redemption, by parties having notice, anything short of fraud should be permitted to excuse a failure to act within the ample time allowed by statute.

I hold, therefore, that the plaintiff may amend within sixty days, on these terms: that she shall pay all costs to the date of this decree, and a reasonable attorney fee to the counsel who conducted the case for the defendants. If this is done, she may redeem against Graffam and Doble. Interlocutory decree accordingly.

BARTH v. MAKEEVER.

(Circuit Court for Indiana: 4 Bissell, 206-214. 1868.)

Opinion by McDONALD, J.

STATEMENT OF FACTS.—This is a bill in equity, filed by Sebastian Barth against John Makeever, Daniel S. Makeever, Ephraim Sayers, Thomas J. Sayers, Thomas Clark, Henry G. Ely, Edward E. Bowen, William H. McConnell, Ingram Little, Abraham Trounstone, Joseph Trounstone and Charles Keiffer. The defendant, John Makeever, has filed a disclaimer. The defendants, Daniel S. Makeever, Ephraim Sayers and Thomas J. Sayers, have demurred to the bill. The other defendants have not yet entered an appearance. The point now to be decided is whether the demurrer ought to be sustained. Two points are made in support of the demurrer: *first*, that this court has no jurisdiction over the parties; *second*, that there is no equity on the face of the bill. We will examine these points in their order.

I. Has this court jurisdiction over the parties to the bill? The bill alleges that, on the 26th of June, 1858, said "Ely *et al.*" recovered in this court two judgments against said Clark—one for \$771.90, the other for \$760.24; that on the 20th of May, 1860, one "Day and Matlock" recovered in this court a judgment against said Clark for \$2,278.86; that on the 22d of November, 1860, said "Abraham Trounstone *et al.*" recovered in this court a judgment against said Clark for \$1,538.75; and that these judgments, from their dates respectively, were, and continue to be, liens on divers tracts of land situate in Jasper and Newton counties, Indiana, abundantly sufficient to satisfy said judgments, and then, and long afterwards, the property of Clark.

The bill avers that Clark, on the 3d of May, 1861, became the owner by purchase of a tract of fifteen acres of land in Marion county, Indiana; and that he sold and conveyed the same, for a valuable consideration, to the complainant, Barth, on the 4th of July, 1861.

The bill further alleges that, on the 9th of January, 1861, "Trounstone *et al.*" took out execution on their said judgment, and the same was returned replevied by "Wm. C. Pierce and M. P. Carr," as Clark's sureties; that on the 26th of June, 1861, another execution was issued on the same judgment which the marshal levied on several of said tracts of land in Jasper county, and returned the same not sold for want of bidders; that on the 8th of December, 1863, a *venditioni exponas* was issued on the same judgment, and was returned "unsatisfied without a sale, having ascertained that Thomas Clark was and is not the owner of the land;" that on the 16th of June, 1864, another *feri facias* was issued on the same judgment, was levied on divers said tracts of land in Jasper county, and was returned not sold; and that, on the 6th of February, 1865, another *venditioni exponas* was issued on the same judgment, and the return on it showed a sale of one of the parcels of land in Jasper county for \$33.

The bill further states that, on the 26th of April, 1865, "Trounstone *et al.*" assigned their said judgment to the defendants, John Makeever, Daniel S.

Makeever and Ephraim Sayers; that about the same time said Ely assigned his said two judgments to said Ingram Little; and that thereupon all said assignees of said judgments, in consideration of \$65, released the liens of said assigned judgments on a large portion of the land which had been levied on as aforesaid. But the bill does not state to whom the release was executed.

The bill also avers that in May, 1865, on the petition of John Makeever, Daniel S. Makeever and Ephraim Sayers, this court set aside all said levies, except that on one tract of land.

The bill also avers that on the 10th of June, 1865, another *fiery facias* was issued on the judgment in favor of "Trounstone *et al.*," to the marshal, who at the same time, had in his hands two other executions on the two judgments rendered in favor of said Ely as above stated; and that by virtue of those three executions, the marshal levied on Barth's fifteen acres of land, and sold the same for \$1,150, to the said Ephraim Sayers, Thomas J. Sayers and Daniel S. Makeever. But whether the marshal conveyed to them the land pursuant to this sale, is not stated in the bill.

The bill also charges that after the rendition of said judgments, and before the said conveyance by Clark to Barth, the said John Makeever, Daniel S. Makeever, Ephraim Sayers and Thomas J. Sayers, became respectively owners by purchase from Clark of large portions of the lands, the levy on which had been set aside as aforesaid, of sufficient value to pay all said judgments; and that the obtaining of the execution of said release, and the procuring of said setting aside of levies, and the said levy on and sale of Barth's land, were effected by them in fraud of Barth's rights, and were fraudulently intended by them to screen their own lands aforesaid from liability to said judgments and wrongfully to subject Barth's to the payment thereof.

The object of the bill evidently is to show that the judgments in question became liens on all said lands in Jasper and Newton counties before they became liens on the after-acquired land of Clark which he sold to Barth; that therefore those lands ought to have been levied and sold to satisfy said judgments before resort was had to Barth's; that said order setting aside the first levy, as well as said release, was a fraud on Barth; and that consequently the levy and sale of Barth's land was, under the circumstances, an abuse of the process of this court as well as a fraud on him.

The bill attempts to excuse the complainant's apparent negligence in not earlier urging these objections to said proceedings, by averring that he is a man of foreign birth, and speaks and understands our language very imperfectly, and was utterly ignorant of the existence of these proceedings till within a few days before he filed his bill. The bill prays that said levy and sale of Barth's land be set aside, and for other relief. The bill is silent as to the citizenship of the parties.

The complainant evidently founds his claim on the suppositions first, that the release alleged frees his lands from the lien of the judgments, at least to the extent of the value of the property released; and, secondly, that the Jasper and Newton county lands were primarily liable for the satisfaction of the judgments, and therefore the sale of Barth's land under the circumstances, was a misapplication and abuse of the process of the court. As to the release, however, as the pleadings now stand, it is entitled to no consideration, because the bill does not show to whom it was executed. But as to the second ground of the claim, namely, the primary liability of the lands in Jasper and Newton counties, if, under the facts stated, the law creates such primary liability, it

becomes a very serious question whether the sale of Barth's land first was not such a misapplication and abuse of our process as to give us jurisdiction to redress the wrong even as to parties over whom we could not take original jurisdiction for the want of proper citizenship.

But under the facts stated, does the law create a primary liability against the Jasper and Newton county lands, and only a secondary liability as to the Barth land? This question must be answered by a proper construction of the Indiana statutes relating to judgment liens on lands. For the acts of congress are construed as adopting those statutes. *Simpson v. Niles*, 1 Ind., 196; *Doe v. Shrew*, 2 McL., 78; *Ward v. Chamberlain*, 2 Black, 430.

§ 155. *In Indiana a judgment is a lien not only upon the lands owned by the debtor at the time of its rendition, but also upon all subsequently acquired lands from the moment of their acquisition.*

Under the Indiana statutes, it is well settled that judgments not only bind the lands of the debtor owned by him at the rendition thereof, but also his subsequently acquired lands from the moment of their acquisition. *Michaelis v. Boyd*, 1 Ind., 259.

If the judgment liens had attached on all the lands in question at the same moment, and if John Makeever, Daniel S. Makeever, Ephraim Sayers and Thomas J. Sayers had purchased a part of them from Clark before Barth made his purchase, it would be clear that Barth's land would have to go first to satisfy the judgments. For it is a rule, both as to mortgage and judgment liens, that where a debtor sells portions of the lands bound by a lien to different persons and at different times, the parcels thus sold will be liable to discharge the lien in the inverse order of such sales. 4 Kent, 179, note b; *Aiken v. Bruen*, 21 Ind., 137. But it is insisted by the complainant that this rule is inapplicable to the present case; and he claims that another rule equally well settled does apply, namely, that when a judgment exists against a man, and after its rendition he acquires lands and sells them before any execution issues on the judgment, the purchaser takes them clear of any judgment lien. And it must be admitted that this rule is strongly supported by the cases of *Calhoun v. Snyder*, 6 Binn., 135, and *Roads v. Symmes*, 1 Hamm., 281. But we can hardly consider these cases as authority on the point in question; for they were made on statutes materially different from the Indiana act touching judgment liens. Indeed, upon the authorities above cited, we must regard it as settled law in this state that judgment liens attach on subsequently acquired lands at the date of their acquisition.

§ 156. — *and a sale of such subsequently acquired lands, before the execution has issued, does not destroy the judgment lien upon them.*

The question whether a conveyance of such lands by the debtor before execution issues on the judgment destroys the lien, however, has not been settled here; but it is a question which seems to us to admit of very little doubt. Surely when a judgment lien once attaches on subsequently acquired land, it vests such a right in the creditor as cannot, without his act or consent, be divested by the voluntary act of the debtor conveying the land to a stranger. The circumstance, therefore, that Clark conveyed this land to Barth before the execution issued cannot help the complainant.

§ 157. — *when execution is levied on different tracts at different times, the earliest need not necessarily be exhausted before touching the later ones.*

But it is urged in support of the bill that, as the judgment liens on the Barth land are younger than those on the other lands in question, the latter lands

must be deemed primarily liable to the satisfaction of these judgments, and must, therefore, be first levied and sold for that purpose before a seizure and sale of the Barth land. This, however, seems to us to be a mere assumption. We have found no authority in support of it. We see no good reason for it. We see no good reason why, because a judgment lien attaches on one piece of land earlier and on another later, the former must bear the whole burden till it is exhausted, before the latter shall be touched.

§ 158. *When outside persons whose interests become complicated with the litigation may have redress in the national courts irrespective of their citizenship.*

Now, as the bill contains no averment touching the citizenship of the parties to it, it is obvious that our jurisdiction over the parties must, irrespective of their citizenship, depend upon the subject-matter of the bill. And the point insisted on as this subject-matter is, that the bill shows a misapplication and abuse of the process of this court which we have jurisdiction to correct without regard to citizenship. If, indeed, the bill does show such misapplication and abuse, we should entertain no doubt of our jurisdiction. In the case of *Conwell v. The White Water Valley Canal Company*, 4 Biss., 195 (Courts, §§ 638-42), decided at the present term, we laid down a rule on this subject, to which we are disposed to adhere. It is this:

"In a cause over which a national court has acquired jurisdiction solely by reason of the citizenship of the parties, if the rights and interests of third persons should become complicated with the litigation, either as to the original judgment, or any property in the custody of the court, or any abuse or misapplication of its process; and if no state court has power to determine and guard those rights and interests, without a conflict of authority with the national court, the latter court will, from the necessity of the case, and to prevent a failure of justice, give such third persons a hearing irrespective of their citizenship, so far as to protect their rights and interests relating to such judgment or property, and as to correct any abuse or misapplication of its process, and no farther."

But does this rule reach the present case? Does it appear by the bill that there has been any abuse or misapplication of our process? From what has been already said we think these questions must be answered in the negative. In our opinion, the bill, as it now stands, so far from showing that Barth's land ought not to have been first seized and sold, really indicates a state of facts bringing the case within the rule established in the case of *Aiken v. Bruen*, above cited. And, if so, Barth's land would be primarily liable to satisfy these judgments, also the other lands only secondarily liable. If this conclusion be just, Barth has no right to complain that there has been any abuse or misapplication of the process of this court.

II. In support of the demurrer, it is urged that, even if the court has jurisdiction of the parties, there is no equity on the face of the bill on which a decree could be rightly rendered in favor of the complainant. We have already anticipated and sustained this objection to some extent. The bill, however, is defective in many other respects. It materially violates the twentieth rule in equity established by the supreme court. It infringes a fundamental rule of pleading by omitting to give the full names of all the persons to whom it refers. Thus it describes certain plaintiffs as "*Abraham Trounstone et al.*," "*Henry G. Ely et al.*," "*Day & Matlock.*" It refers to no exhibits. And, in fine, it shows the marks of haste and the want of care, to such an extent that

any decree which we might render in favor of the complainant would, in our opinion, be erroneous.

§ 159. *The full christian names and surnames of all persons referred to in the bill must be inserted therein; but a defect in this particular may be amended.*

Although, as the bill now stands, we might perhaps be justified in dismissing it, at this stage, for want of jurisdiction, as it yet may be improved by amendment stating to whom the release in question was executed, indicating whether the marshal executed a conveyance of the Barth land, giving the full christian and surnames of all the persons referred to in it, putting it in the shape required by the twentieth equity rule of the supreme court, and otherwise reforming it, we will, for the present, merely sustain the demurrer, and give leave to the complainant to amend. If he should not choose to amend, the bill will be dismissed for want of jurisdiction.

MAGNIAC v. THOMSON.

(Circuit Court for Pennsylvania: 2 Wallace, Jr., 209-268. 1852.)

STATEMENT OF FACTS.—In 1825 Thomson was arrested upon a *ca. sa.*, at the suit of Magniac & Co., for a debt of \$22,000. He had previously settled certain property on his wife, with a provision in the contract that, upon the death of either husband or wife, there being no issue, the property was to go to the survivor. While under arrest under the *ca. sa.*, an agreement was entered into between him and the plaintiffs that he should be enlarged without prejudice to the plaintiffs' rights, and that an issue should be promptly and fairly tried, whether the property so settled by Thomson on Mrs. Thomson was or was not liable for the former's debts. If it was, it should be subjected to the payment of plaintiff's debt; if it was not, it should remain in the possession of Mrs. Thomson. Under this agreement Thomson was enlarged, and the issue was tried, carried by appeal to the supreme court of the United States, and there decided in favor of the validity of the settlement. Mrs. Thomson died without issue, and under the terms of the settlement the property reverted to Thomson, and this bill was filed to subject it to the payment of complainant's debt.

Opinion by GRIER, J.

The bill is undoubtedly drawn with much ingenuity, and in view of the difficulties in which the learned pleader saw it to be encompassed. He has, therefore, by allegations of fraud and mistake, endeavored to draw the case within those well known heads of chancery jurisdiction. But the facts and circumstances stated in the bill show that there was neither fraud nor mistake in the case.

§ 160. *Equity affords no relief for a mistake of law.*

If a man, ignorant of the law that the release of one joint debtor is a release of the other, should give such a release, equity will not interfere to protect him against the legal consequences of his act. *Hunt v. Rousmaniere*, 1 Pet., 1. And even if the mere allegation of a mistake of the law would give jurisdiction to courts of equity, and be a sufficient ground for relief, the documents connected with this transaction, being executed by most able and learned counsel, leave not the slightest room for any pretense of a mistake of the law. On the contrary, it will appear (as we shall show) that they were fully aware of the legal effect and consequences of the voluntary discharge of the defendant from imprisonment, and obtained all that they expected to obtain by his arrest.

§ 161. *A court of equity, when examining a bill to find a grievance, will be governed by the substantive facts, and not by such allegations as fraudulently, deceitfully, etc.*

Assuming, for the purposes of this case, that *if* the defendant had obtained his discharge from the arrest by fraud and deceit practiced on the plaintiff, equity would interfere and annul the discharge so obtained, as to all its legal effects prejudicial to the defrauded party; yet the facts stated in the plaintiffs' bill do not allege such a case. Thomson made no false representations in order to obtain his discharge; he made no concealment of his property; he gave security to pay the value of the property settled on his wife, if it should be determined that the property was liable to the payment of such debts; he fulfilled his contract in good faith. These facts are all admitted by the bill which sets forth the agreement. But the imputation of fraud, which it is supposed will justify the interference of a court of equity, is the fact that the defendant and plaintiff differ in their construction of the intention and legal effect of that agreement. And the bill prays that the defendant may be enjoined from setting up *his* construction of it in a court of law by way of defense to the plaintiffs' claim. Much as this bill has been seasoned with the phrases "fraudulently, deceitfully," etc., this is, in fact, all the fraud imputed to the defendant. A court of equity, when examining a bill of complaint to find a grievance which will justify its interposition, looks to the substantive facts averred in it, not to the adjectives or adverbs which may be added to qualify them.

The case presented by the bill, stripped of all unnecessary epithets, is, in short, this: The complainants obtained a judgment against the defendant some twenty-five years ago. The only property in possession of the defendant from which the judgment could, in whole or in part, be satisfied, was that contained in his marriage settlement, and conveyed for the trusts of that settlement. Whether this settlement was fraudulent or void as against creditors, and this property liable to be taken in execution, was a doubtful question. No bankrupt law was then in existence by which the defendant could be compelled to assign for the use of his creditors, and thus have the question tried. The plaintiffs, therefore, arrest his body on a *ca. sa.*; the defendant proposes to give them security for the value of all the property contained in the marriage settlement, and all other of which he was possessed, if they will release him; and if, on the trial of an issue for that purpose, the court shall decide that this settlement was void, as against creditors, then the whole amount to be applied to the satisfaction of the plaintiffs' judgment.

By this contract the plaintiffs obtained a greater advantage than they could have expected from any general insolvent assignment. For if they had continued to hold the defendant's body, he might have made an assignment with preferences, and afterwards obtained his discharge under the laws of the United States. But by this contract they obtained *all*, even if that *all* turned out to be nothing. The chance of setting aside the marriage settlement was considered a good one, and well worthy of pursuit; while the expectancy dependent on the chances of his surviving his wife, and failure of issue, was held of no account.

§ 162. *Where an agreement is bona fide, without a suspicion of fraud or deceit, and a judgment is thereby satisfied at law, equity will not interfere.*

We can see nothing in this transaction tending to show, either that the plaintiffs were not fully aware of the legal effect of the arrest and voluntary

discharge of the defendant, or that, after having obtained from defendant an assignment with security to deliver all his property to the sole use of the plaintiffs' execution, they ever calculated on the probability or possibility that Thomson might thereafter acquire property, and be subject to future executions; or intended that this judgment should, notwithstanding his arrest and assignment, remain as an *incubus* upon all his future struggles to amend his fortunes. Content with the surrender of all the property within the power and control of the defendant, they did not covenant for his future earnings or possible acquisitions, nor for the renewed imprisonment of his body at their discretion. It is not usual to exact such hard bargains. It was a case of actual mercantile bankruptcy, without a technical discharge under a bankrupt law; and we see no reason to believe that either party, at the time of the contract, had any intention that there should be any future recourse to the judgment. They took good security for the performance of the agreement which was the consideration of defendant's release, knowing that such a release would operate as a legal satisfaction of their judgment. The transaction was *bona fide*, without any suspicion of deceit, misrepresentation, or fraud, on the part of defendant. Why, then, should equity interfere, if the judgment stands satisfied at law?

§ 163. *Judgment satisfied at law, equity will not relieve, when.*

When a plaintiff has a valid legal judgment, equity may interfere as ancillary to a court of law, to enable the plaintiff to reach means of actual satisfaction, which were beyond the grasp of an execution. But where a judgment is satisfied at law, equity will not interfere, unless where this satisfaction has been obtained by fraud or deceit, or made under some mistake of fact. As the facts exhibited by this bill, when severed from the epithets and adjectives used in framing it, show a transaction of which these qualities cannot be predicated; the defendant seems to have supported the first proposition of the hypothesis stated in the demurrer, viz., that if the arrest and discharge of defendant has operated as a legal satisfaction of the judgment, the plaintiffs have shown no sufficient ground for the interference of a court of equity. The second proposition, that if the arrest and discharge had no such operation in law, then plaintiffs have full and adequate relief at law, is one which needs no argument; and, as a necessary corollary, this bill would have to be dismissed.

But as the question as to the legal effect of this arrest and discharge will recur to us immediately, on the law side of the court, and as its decision cannot be avoided by leaving it to another tribunal; and, moreover, as it has been fully and ably argued by the learned counsel, it will be proper to notice it and state our conclusions.

The doctrines of law as laid down by C. J. Hobart, in *Foster v. Jackson*, Hob., 60, seem to have been sanctioned by the subsequent decisions in England and this country. *Blumfield's Case*, 5 Rep., 86, b., reported by Lord Coke, which preceded it, is noticed in that decision. The difference of opinion between the learned judges, Coke and Hobart, as expressed in these cases, seems to have caused the Statute of 21 Jac. I., c. 24, which gives an execution against a defendant's lands and goods, who has been arrested and died in prison. The question in *Blumfield's Case* arose, where the plaintiff had several judgments against joint and several debtors for the same debt. It was decided that the arrest and discharge of the defendant in one judgment was not actual satisfaction of the debt so as to bar an execution on the other judgment. The distinction between actual satisfaction as regards other parties bound for the

same debt, and the legal and *quasi* satisfaction as between the parties, by an arrest and discharge of the defendant, is admitted in the case of *Foster v. Jackson*. To this extent *Blumfield's Case* has always been held as good law; but the other *dicta* and speculations of the learned reporter of that case cannot be received to affect the authority of the subsequent cases.

§ 164. *The arrest of a judgment debtor is legal satisfaction of the judgment.*

Without attempting to notice all the cases which are to be found in the more modern books of reports, the following may be stated as containing principles which have been universally admitted to be correct law, both in England and this country. They all proceed on the admitted axiom, that as between the parties, plaintiff and defendant, in the judgments, the arrest of the body of the defendant is legal satisfaction of the judgment, unless the party has been discharged by the act of God, or the act of law, without the plaintiff's consent.

Thus, in *Vigers v. Aldrich*, 4 Burr., 2483, and *Jaques v. Withy*, 1 Term R., 557, it is decided, that if a defendant has been taken in execution and discharged on an agreement, the judgment is satisfied, and the action must be on the agreement. *Clark v. Clement*, 6 Term R., 525, and *Tanner v. Hague*, 7 Term R., 420, confirm the same doctrine. In *Blackburn v. Stupart*, 2 East, 243, reported by East, where the defendant was discharged on his agreement that he should be liable to be taken in execution again, it was held that the defendant could not be twice held in execution on the same judgment.

The question in the Pennsylvania case of *Sharpe v. Speckenable*, 3 Serg. & R., 463, was, whether a discharge of the principal under the bread act, operated such a satisfaction of the judgment as could be pleaded by the bail in an action on his recognizance; and it was decided that it did not, on two grounds: 1st. Because the surety in a collateral suit could only set up actual satisfaction; and 2d. The act of assembly, permitting the discharge of the principal, provided that it should not acquit any other person bound for the debt. This decision does not in the least deny the doctrine of the English case (*Blackburn v. Stupart*) already referred to and reported by East, but rather admits and affirms it.

§ 165. *How far a debtor under arrest may contract with his creditor for his liberty. Duress of imprisonment.*

The other case, *Jackson v. Knight*, would, as a statement of *common law doctrines*, be somewhat anomalous; but this decision was after the common law had been changed by statute, which allows another execution where the "defendant is discharged at his own request." The necessity for such a provision in the statute is evidence of the state of the law antecedently.

If the plaintiffs in this case had exacted from the defendant, as the price of his discharge, not only an assignment of all his property, but also a covenant and agreement that the judgment should be considered as unsatisfied, and that his property and his body should be liable at any time thereafter to be seized in execution, we think it clear that this latter agreement would be treated at law as altogether void. The common law, while it gave the power to the creditor of seizing the body of his debtor in execution, discouraged the use of a power so liable to abuse. It treated such an arrest as the *ultima ratio*, the end of all executions on that judgment, and legal satisfaction of it; and while it left the imprisoned debtor capable of making any contract for future payment as a consideration for his discharge by the creditor, it gave such creditor no further remedy than he could obtain by an action on such contract.

§ 166. *Courts of law would not regard any agreement for future execution made by a prisoner as binding.*

An agreement made by the debtor under duress of imprisonment by which he should be again liable to imprisonment on the same judgment, was contrary to the policy of the law and void. He was not permitted, when once in duress, to bargain away his liberty.

It is very evident, also, that an executory agreement which may be made the consideration of the discharge, even though indorsed on the execution or filed in the court, can neither be treated as a judgment or recognizance, or as matter of record of any description; and if it be not under seal, the action on it will be as liable to be defeated by a plea of the statute of limitations as it would be on any other simple contract.

Now, the argument for the plaintiffs in this case assumes that the agreement was intended to give the plaintiffs a right to issue further executions on this judgment; and, as we have seen, if such were its literal tenor, it would be void. But we think it due to the plaintiffs to say that a proper construction of this contract will vindicate them from the charge of exacting so hard a bargain from a debtor under duress of imprisonment, and more especially when the debt is one of suretyship only. Among mercantile men, if a debtor, and more especially a surety, surrenders all his present property to his creditors, it is not usual to exact a lien on his future acquisitions. This agreement, while it very properly demands as the price of defendant's discharge an assignment of all his property, and security for its delivery in case the issue as to the validity of the marriage settlement should be adjudged in favor of plaintiffs, does not contain, in direct terms, any covenant that the arrest and discharge should not operate as satisfaction of the judgment, or that future executions might be issued on it. It merely states, in general terms (what was no doubt a fact) that the agreement to release the defendant was for *his accommodation*, and covenants that no "prejudice whatever should arise to the plaintiffs' right by the defendant's enlargement, or otherwise however."

Now, the very learned counsel for plaintiffs, who dictated this instrument, well knew that this arrest and voluntary discharge of the defendant operated as a *legal discharge of the judgment*; and he knew, also, that a court of law would not regard any agreement for future execution made by a prisoner as binding. He cannot, therefore, be presumed, by this very vague and indefinite language, to have intended what he was unwilling to express in plain terms, to wit, that the defendant having given good security for the delivery of all his property to plaintiff, as the price of his discharge, should nevertheless be liable to imprisonment the next day, or at any time thereafter. Yet such is the construction which it is now contended should be given to this language, a construction which makes the plaintiff take, and the defendant give, everything for nothing.

What, then, may be supposed to have been intended by these words, "prejudice to the plaintiffs' rights?" When lawyers covenant about judgments and executions, they do not usually seek out such ambiguous and general phrases to express their meaning. What were the plaintiffs' "rights" which were the subject-matter of the contract? For to these must we look to ascertain the meaning of this clause. The right they contracted for, and for which they got security, was the application of all the property of defendant to *their* debt. Whether that all was much or little, cannot affect the case. They considered the marriage settlement as void; the chance of setting it aside val-

uable; and the chance from the possibility of Thomson's survivorship without children of the marriage, as nothing. They accordingly agreed that if the issue should be decided against them the "property should be entirely discharged." Knowing that the discharge of defendant operated as satisfaction of the judgment, they were anxious that the "rights" obtained by the contract as a consideration for it should not be affected. The language used plainly indicates some uncertainty in the mind of the scrivener, whether the discharge might not be possibly set up as actual satisfaction of the debt and not merely as technical satisfaction of the judgment. To guard against any such attempt to affect or injure the "rights" which were the subject of the contract, and guaranteed to plaintiffs by it *ex majore cautela*, was this language inserted in it. The words "otherwise, however," mean anything or nothing, and only tend to show that there was some vague notion of a possible legal advantage which might be taken, and which the learned counsel could not foresee clearly, and thought might be excluded by these comprehensive terms.

The intelligent and honorable men who executed this agreement cannot be supposed incapable of expressing clearly their intention. Nor can we presume any intention to coerce the defendant into so hard a bargain, or conceal it under vague and ambiguous generalities, as a different construction of this agreement would import.

We are of opinion, therefore: 1st. That the judgment against the defendant was legally satisfied by his arrest in execution and voluntary discharge. 2d. That this effect of his discharge was not affected nor intended so to be, by anything contained in the agreement made on that occasion. 3d. That the bill shows no reason for setting aside this contract on the ground of fraud or mistake. 4th. That it is no part of the functions of a court of equity to enjoin a defendant from setting up a legal and just defense in a court of law, under the allegation that it is a fraud for him to differ with the plaintiffs in their construction of his contract. The defendant has as good a right to impute fraud to the plaintiffs for the construction they put upon it. The court imputes it to neither party, but dismisses the bill with costs. (a)

BANK OF CIRCLEVILLE v. IGLEHART.

(Circuit Court for Illinois: 6 McLean, 568-573. 1855.)

Opinion of the COURT.

STATEMENT OF FACTS.—This is a bill in chancery to enforce a decree entered against the defendant in the state of Ohio. The defendant, with others, became a large stockholder in the Bank of Circleville, established at Circleville, in the state of Ohio, which bank, being in embarrassed circumstances, was forced into liquidation under the laws of Ohio, and William B. Thrall and two other persons were appointed receivers, to wind up the bank by collecting its debts, etc. Finding that the assets of the bank were wholly insufficient to pay its debts, a bill was filed against its stockholders to compel them to pay the amount, in full, of their subscriptions of stock. The defendant owed on his stock the sum of \$29,750. Other stockholders owed large sums on their stock, and the cause being certified to the supreme court in which a decree was entered against the stockholders, requiring them to pay to the receivers the full amount of their subscriptions of stock, with interest thereon from the date

(a) Affirmed, *Magniac v. Thomson*, 15 How., 281.

of the decree, "if in the process of closing up the affairs of said bank, by the receivers, it should be found necessary to require the full payment thereof." But if the whole amount should not be required, then the said defendants should pay to the receivers such parts of the amounts due from them collectively as with the other assets of the bank will be sufficient to pay its debts; the stockholders to pay a just proportion according to their respective balances due. But the decree was not to bind the stockholders to pay any demand against the bank which had not been previously presented, or reduced to judgment, or exhibited within one year after 1848. And the bill states that the demands against the bank amount to \$25,000, and may greatly exceed that sum.

And the bill alleges that all the stockholders except the defendants, Baker, Crane, and Renich, are insolvent, and that it is necessary that these persons should pay the full amount of their instalment, or at least so much thereof as shall be necessary to enable the receivers of the bank to liquidate its liabilities. The bill states the other stockholders are citizens of Ohio.

The first receivers having resigned, others were appointed, who are now prosecuting this suit. The defendant is called to answer, as to the extent of the liabilities of the bank, and how much remains unpaid, and whether any assets belong to the bank except as aforesaid; and the complainants pray that an account may be taken of the amount due and owing by the defendant, and that he be required to pay to the receivers of the bank or their successors, the amount found to be due by said defendant, or such part thereof as may be necessary, with the other available assets of the bank, to enable the receivers to pay the liabilities of the bank, including costs and expenses.

The defendant demurs to the bill, and for cause of demurrer says, that the complainants have not in their bill stated such a case as entitles them to any such discovery or relief as is prayed.

§ 167. *To maintain an action of debt on a decree for money the sum must be certain, or such as the court can make certain.*

It is first objected that there is an adequate remedy at law.

That an action of debt may be sustained on a decree for money is admitted. And it appears from the decree, to enforce which this bill is filed, that the defendant was found to owe to the bank, on account of his stock, \$29,750; and to this amount he was held liable to the receivers of the bank. But the decree was not absolutely for this amount. It was that he was liable on his subscription of stock to the above amount, and that he should pay, by way of contribution, with other stockholders, similarly liable, such amount, not exceeding the said sum, as with the other funds will pay the debts of the bank.

It is clear that on such a decree an action at law cannot be sustained. The sum is not certain, nor has a court of law the means of making it certain. The debts of the bank must be ascertained, the amount of the assets and what per cent. on the stock debts will make up the deficiency. And by looking into the bills it appears that these facts are called for in the answer of the defendant, and they must be ascertained before the relief prayed for can be given.

A bill in equity will lie to carry a former decree into execution, when from neglect of the parties or other cause, subsequent events have intervened, making the further aid of the court necessary. *Leniton v. Detts*, 5 Black's Rep., 396.

It appears that the court of common pleas of Pickaway county, Ohio, after the cause was remanded to it, by the supreme court, ordered the sheriff to col-

lect the full amount decreed against the stockholders. The complainant claims nothing under that order, but relies upon the equity of the original decree. And we must take the case as made in the bill, and which is presented by the demurrer.

The decree was remanded to the court of common pleas to be carried out, and if found necessary to pay the debts of the bank, it had power to award execution for the full amount of the stock indebtedment. The court directed the execution for the full amount, under the authority of the mandate, but this was merely in the execution of the decree. The execution was returned without realizing any fruits of the decree. And the decree is now brought before this court for execution the same as it was before the common pleas of Pickaway county.

By the bill the decree is brought before this court for execution, and it becomes necessary that we should give effect to it, according to its terms, and we are not bound by an executing order of the common pleas of Pickaway county. It is no part of the decree, but a mode of giving effect to it, under which no amount was collected.

It is urged that, from the bill, the liabilities of the bank do not appear to have been presented within the time limited in the decree. The decree embraced all demands presented before it was entered, and all judgments against the bank and all demands which might be presented within one year from the 1st day of January, 1848. From the notice of this decree it is seen that it could not have been entered for a specific sum to be paid absolutely.

The complainants allege that the costs chargeable to the bank will not be less than \$3,000, and that the liabilities of the bank, exclusive of interest, amount to the sum of \$22,640, and that adding thereto the costs and expenses of winding up the affairs of the bank, the liabilities will be above the sum of \$50,000.

Until a full exhibit of the debts of the bank shall be made, it will not be possible to designate, with precision, their amount. The decree entered by the court was the only one which could be given before the exhibit of the debts was made. It graduated the charge on the stockholders so as to make their contributions equal, *pro rata*, on the amount of the stock debts. We think this part of the bill is sufficient. The courts in Ohio which entered and sanctioned the decree are courts of general jurisdiction, and this will be recognized by this court, without any allegation to that effect in the bill.

§ 168. *Where a liability on a decree for money is several, other parties likewise severally liable for other sums are not necessary parties.*

It is also urged that the bill is defective, for want of proper parties. That the other stockholders who were parties to the decree are necessary parties. These individuals in the bill are alleged to be citizens of Ohio, and cannot be made parties. No decree is asked against them, and they can in no respect be prejudiced by any decision which shall be made in this case. And in addition to this consideration, the liability of the defendants under the decree is distinct and separate; each one being required to contribute *pro rata* on his debt for stock, so as to pay the liabilities of the bank. Each is liable on his own subscription for stock, and the only inquiry in this case will be how much of the stock must be paid to carry out the decree. If the whole amount shall be required, the other parties to the original decree cannot be injured, nor will they be injured if the court should find that the payment of less than the whole will be sufficient. No decree that this court shall make in this case can

affect injuriously the interests of other parties to the decree. The *pro rata* contribution by the decree is the rule of action of this court, in giving effect to it, the same as in the court of Ohio.

This view is not in conflict with the case of *Bargh & Arcularius v. Ingersoll*, 4 McLean, 11. In that case the suit was brought on a joint liability, one of the parties being a citizen of the same state with the plaintiff. But in this case the defendant is a citizen of Illinois, and his brother and partner died some years ago, insolvent; so that the present defendant stands on his individual responsibility, in no respect so connected with others as to affect the jurisdiction of this court. As regards the question of distribution, the principle being fixed by the Ohio decree, it may as well be made, so far as the defendant is concerned, by this as the Ohio court. The report of a master can lay the facts before us. The act of 1839 authorizes this court to take jurisdiction on a joint demand, under the statutory provision, that a judgment against a joint obligor shall not prejudice his co-obligor.

Upon the whole, the demurrer is overruled and a rule for answer is entered.

HIGGINS v. JENKS.

(Circuit Court for Maine: 3 Ware, 17-27. 1853.)

Opinion by WARE, J.

STATEMENT OF FACTS.—This is a bill in equity seeking a specific execution of a contract. On the 9th of August, the defendants being then engaged in building a ship of about one thousand one hundred tons burthen, the plaintiff entered into a written contract for the purchase of three-eighths of her, upon which he was to pay at the rate of \$55 a ton, two-thirds of the amount in cash, deducting therefrom the cost of the rigging, which he was to furnish, and the other third in his notes, indorsed by Brookman & Co., of New York, in four, nine and twelve months; and it was further agreed that Higgins should superintend and direct the completion and the rigging of the ship, for which he was to receive no other compensation than payment of his board; and that when completed he should sail her as master and have for his compensation the best wages with primage, etc., allowed to masters commanding similar ships from the port of Bath. In conformity with the agreement, the plaintiff has superintended and directed the work on the ship from the time of the contract until about the time of filing the bill; has furnished the rigging as it has been wanted, and made all his cash payments as often as demanded, and is now ready on the completion of the ship to deliver the securities named in the agreement for the balance due.

The plaintiff apprehending that the defendants intended to disable themselves from performing their part of the contract by a sale and transfer of the vessel, filed this bill praying for an injunction against a sale of the three-eighths bargained to him, and on their disavowing any such intention, amended his bill praying an injunction against the sale of the other five-eighths, except with notice of his contract and subject to whatever rights he has under it, with a further prayer for an injunction against appointing any other person as master and for a specific execution of the contract.

Since the filing of the bill the defendants have transferred five-eighths of the ship to Messrs. John and George Patten, and by a further amendment they have been made parties defendant, and the same remedies by injunction and specific performance are asked against them. The original defendants have

appeared and put in affidavits admitting the contract and offering to convey the three-eighths, and giving as a reason for refusing to fulfil the contract by putting the plaintiff in as master, that they have, since the contract was made, heard many reports and stories in disparagement of the plaintiff's character as a ship-master, and against his truthfulness and integrity in his dealings as a man, from which they have become satisfied that he is not a fit person to have the command and management of such a ship, and that they should not consider their property in her to be safe in his hands.

§ 169. *Where parties purchase with full notice of a claim upon the property, or an incumbrance or privilege on it, they stand on the same footing as their vendors.*

Mr. George Patten, one of the new defendants, has put in an affidavit admitting the purchase of five-eighths of the ship of Jenks & Harding, and stating that a parol agreement for the purchase was made on the 5th of the month, the day on which the bill was filed, but that the contract was not completed and the transfer made by a bill of sale until the 8th, three days after — admitting that he knew that Higgins was the purchaser of three-eighths, and that he expected to go as master, but that he did not know the precise terms of the contract.

As to the Messrs. Patten, the purchasers, their purchase was made under such circumstances that they must be deemed and considered as having purchased with full notice of the contract with Higgins. They knew of his contract, and they knew of his expectation of going master. The contract was in the hands of their vendors, and they might have seen it by asking for it, as it was their duty to do. I consider them as standing on the same ground and having the same rights as their vendors, and no others. They took the five-eighths subject to all the right which Higgins had against Jenks & Harding.

§ 170. *What is necessary to sustain a defense based on surprise.*

The defense made by the affidavits of Jenks & Harding against a preliminary injunction till the hearing, and the same will be relied on at the final hearing against a decree for a specific execution, is in substance that of a surprise; that at the time of the contract they supposed Higgins to be a well qualified master and a trustworthy man; that they are now undeceived, and from what they have since learned of his qualification as a ship-master and of his character as a man, they verily believe that they cannot with safety and prudence confide to him the command of the ship or intrust to him the management of their property. But it is not pretended that they were deceived by any artifice or management on the part of the plaintiff.

The negotiation between the parties for the sale and purchase of this vessel commenced sometime before the contract was consummated; the precise time does not appear, but I infer from the affidavits and the exhibits in the case in the early part — at least as early as the middle of July. It was completed on the 9th of August. Capt. Higgins is a native of this state and was born and brought up in Orland, an adjoining town of Bucksport. Early in life he had been in the command of two small vessels in this state, engaged, I infer, in the coasting trade. Afterwards he went to New York, and was there employed as a ship-master. If he was a stranger to the defendants it would seem that during the month in which the negotiations were pending the defendants might, without difficulty, have made all the necessary inquiries and obtained all the necessary information in relation to his qualifications and character, and it is hardly to be supposed that, as men of ordinary caution

and prudence, they would have agreed to intrust to his management and control so large and valuable a property as five-eighths of this ship of the value of \$37,000, according to the rate at which the sale was made to plaintiff, or that they would have been willing to have entered into that confidential relation of joint owner of the vessel, intrusting to him the command, unless they had been pretty well assured of his qualification as a seaman, and of his integrity as a man. With all this time and opportunity for informing themselves, it seems to me that their excuse of surprise for not fulfilling their engagement ought to be scrutinized pretty narrowly. It was nearly three months after the plaintiff had been engaged in executing his part of the contract, and about four from the commencement of the negotiation for the purchase, that he was informed that he would not have the command of the vessel, though I cannot but believe that it must have been well understood by the defendants that this was Capt. Higgins' principal object in the purchase; that it was not so much his object to make an investment in the vessel, as to provide himself with an honorable and lucrative employment.

§ 171. *Where defendants can show a real surprise, and that plaintiff is unfit to carry into effect the contract he has made, an injunction and a specific performance should be refused, and he should be left to his remedy at law.*

If, however, it is made satisfactorily to appear that there has been a real surprise; if it be shown that for want of capacity and want of integrity, the plaintiff is unfit to be intrusted with the command of such a ship, and that the defendants cannot safely intrust their property in his hands, as this application for an injunction and specific performance is addressed to the discretion of the court, and is not a claim strictly *ex debito justitiæ*, my opinion would be that he ought to be left to his remedy at law. Under this view of the subject it becomes necessary to examine the foundation of the defendants' excuse for not performing their engagement. They have produced a large number of affidavits in their justification, most of them from persons residing in Bath, Bucksport, Eastport and Calais, in which places he seems formerly to have been best known, all speaking of him in terms strongly unfavorable; some who have had dealings with him charging him with dishonesty, others speaking only of his general reputation for want of integrity, and for want of veracity, and several of them adding that he commonly was known by the name of the lying Higgins. They uniformly speak of him as a man unfit to be intrusted with such a vessel. All this testimony is open to one general observation, that it relates to a period ten or twelve years ago, when he was employed in the command of small vessels in the coasting trade of this state, and while he was young, and soon after arriving at his majority.

Some years ago, precisely when does not appear, but as I collect it from the affidavits, eight or nine years, the plaintiff left this part of the country and went to New York, and has since been employed as a ship-master from that port. The defendants have produced two affidavits from New York, one of Richard P. Buck, formerly of Bucksport, and now a commission merchant and ship-owner of New York, who states that he has been acquainted with Capt. Higgins for six years; that he has been consigned to him but never employed by him; that he thinks him unfit to have the command of a ship of one thousand tons; that he would not intrust him with the command of a ship, because he believed him to be incompetent; that he considers him untrustworthy and irresponsible; that he would not trust him for a hundred dollars; and he adds that he should not have given his affidavit if he had not been called upon by

a subpoena. The other is of Benj. Carver, formerly a ship-master, and now a dealer in ship chandlery. He has known Higgins for three or four years; has but little acquaintance with him, but has formed an unfavorable opinion of his character, and would be unwilling to purchase into a ship of which he was part owner. This is all the evidence which the defendants have produced from New York, where the plaintiff has been employed for the last eight or nine years. That of Carver is a little, and but a little more than negative. That of Buck is explicit and full as to his opinion, and it may be remarked that he is the only one of the affiants who has taken pains to inform us that he gives his affidavit from necessity, and in the same breath says that he would not trust the plaintiff for \$100. This appears to me to be pretty strong language for an unwilling witness towards a neighbor, who has shown himself able to fulfil a contract for more than \$20,000.

The defendants have also produced the affidavits of Mr. Curtis and of Mr. Dimmock, each president of an insurance company in Boston, who had insured vessels commanded by the plaintiff and had had losses. They both say that after examining the statements of the losses and the circumstances under which they happened, they were so dissatisfied that they should be unwilling to insure a vessel of which he had the command. If this evidence stood alone, and unexplained, and unqualified, it would appear to me to be entitled to very grave consideration. If the plaintiff has justly earned such a reputation that where his character is known, a vessel under his command could not be insured at all, or not at the usual rate, it would be a decisive objection to the application that he here makes, and I should feel bound to leave him to his remedy at law. But in this connection it is proper to consider the affidavit of Zebulon Cook, formerly of Boston and now of New York, an insurance broker of great experience, and entitled to full credit as a man of integrity and as an expert in the business. He was employed by the owners of one of the vessels insured in Boston, to prepare a statement of the loss, and he says that in making up the statement, his intercourse with Capt. Higgins was protracted for some weeks, and that in the information and explanation he gave, he showed so much frankness and fairness that he became favorably impressed towards him; and that he has heard nothing since to change that opinion. This was one of the cases from which the Boston insurers formed their unfavorable opinion, and perhaps it would not be unreasonable to allow one opinion to balance the other.

To meet this testimony impeaching his character, the plaintiff has produced the affidavits of five gentlemen of New York and six from Boston, belonging to reputable mercantile houses, who have been acquainted with him for the last seven or eight years, who have had transactions of business with him, all speaking in strong terms of his capacity and integrity, opinions which they have formed from their intercourse with him in business as well as from his general reputation. One of them, Mr. Deshon, of Boston, was acquainted with the affair of the Kanahwa, one of the insurance cases complained of by the Boston offices, and formed so favorable an opinion from his own observation and what he heard from others, that he was very desirous of selling him part of a ship as late as last August, and putting him into her as master.

On a fair consideration of the plaintiff's affidavits, I think that they more than balance and neutralize those of the defendants. These relate almost exclusively to a period ten or twelve years ago. The plaintiff was then a young man just past his majority. They undoubtedly leave on the mind an unfavor-

able impression of the plaintiff's character at that time. But whatever the truth may be, this has not prevented him from obtaining employment, and rising in his profession, and passing from the command of small coasting vessels to those of a larger class engaged in foreign trade; and for the last nine or ten years, while he has sailed from New York, notwithstanding the opinion of Mr. Buck, I feel bound to consider him as having maintained a fair reputation as a ship-master, and as qualified and competent for any kind of business he may be required to transact in that employment, and I must hold the excuse which the defendants have offered for not performing their engagements to be removed.

§ 172. *Where a party in purchasing a share of a vessel acquires the right to command her, he is entitled to secure that privilege by an injunction against a sale of the controlling interest in the vessel without due recognition of his rights.*

The question then fairly arises, and to my mind free and disembarrassed, whether the plaintiff, on the principles upon which courts of equity exercise this discretionary jurisdiction, is entitled to the relief, by way of injunction, for which he asks. As to the first prayer of the bill, that is an injunction against the transfer of the five-eighths of the vessel without notice of his contract, and whatever rights he has under it, I can see no objection to it. If the contract gives him any right in the nature of a privilege and preference to the command of the ship, an obligation, charge, lien, or *nexus* which follows and adheres to the thing and qualifies the right of ownership, it is what he has bargained and paid for, and whatever it may amount to he is on every principle of justice entitled to. If it is a right of any value, he might lose it by a transfer to a *bona fide* purchaser without notice. But, if with notice, he would have the same right, whether it is to a specific performance or only to a compensation in damages against the assignees, or against the original owners.

§ 173. *Where a part owner of a vessel has by contract a right to command her, a preliminary injunction will be granted restraining the owners of the controlling interest from appointing any other person to the command.*

As to the second prayer for an injunction against the appointment of any other person to the command, there is certainly much more difficulty; nor do I pretend, after the best consideration I have been able to give to the subject, to hold an opinion free from doubt. It appears to me that this injunction ought not to be granted, unless on the ground that the contract is a proper one for a decree of specific performance, and this is only to be determined at the final hearing. I am aware that it is not unusual in cases admitting of doubt for the court to grant a preliminary injunction, to preserve all matters unchanged till the hearing, but it is usually in cases where things may remain *in statu quo* without sacrifice to either party. In this case the effect may be to keep the vessel unemployed at the wharf till the hearing, to the injury of all interests.

Without undertaking to anticipate what may be the opinion of the court on a final hearing, it may not be out of place here to remark that the grounds on which courts of equity take jurisdiction to decree a specific performance of contracts, is, that a court of law can give for the breach of a contract no other remedy than damages; that in the particular case damages are an imperfect and inadequate remedy; that it is against conscience to leave to a party his election, either to pay damages for a voluntary breach of his engagements, or faithfully to perform them, and that it is unequal and unjust to the complainant to leave him to recover, by a suit at law, such damages as a jury

may think proper to give him, in a case where the damages are uncertain and conjectural, instead of having the full benefit for which he has bargained by a specific execution of his contract. 2 Story's Eq., §§ 717, 719.

It cannot be denied that this reasoning of courts of equity applies in its full force to the present case. It is sufficiently apparent in this case that the principal object of the plaintiff in this purchase was not a mere investment of money. It was to provide for himself a safe, lucrative and honorable employment in his profession. If he had purchased only as an investment, there would be no particular hardship in leaving him to an action of law for damages. A jury would have a clear and intelligible rule by which to ascertain the damage. But by what rule is a jury to calculate the damage to the plaintiff of the disappointment in being thrown out of employment, with all his available means locked up in this vessel. It is plain that the damage is altogether uncertain and conjectural.

The counsel for the defendant have urged several objections to the granting an injunction, in a line of argument tending to show that this is not a case for specific performance. By what process, it is asked, will the court enforce a specific performance, and if it is enforced of what avail will it be for the plaintiff? The force of this argument presses on the prayer for an injunction against appointing any other person as master. It is said, if the plaintiff is placed in the command, that the defendants, being the major owners, may immediately displace him and appoint a new master, and that a decree for a specific performance would be nugatory. What the plaintiff asks for, and what he has bargained and paid for, is that the ship shall be finished and made ready for sea with all convenient speed, and he placed in the command. He has performed, or tendered the performance of, all his part of the contract in its precise terms, and he claims a like performance on the part of the defendants. When the contract is carried into execution they may exercise all the rights the law allows them. Whether they, as major owners, can immediately remove him from the command will be the subject of after consideration. It is certain in ordinary cases the major owners have this right. They may displace a master without assigning any reason.

But if the master is a part owner, a court of admiralty, by which this jurisdiction is exercised, according to Lord Stowell, requires some justifying cause to be shown by the major owners beyond their own pleasure before it will interfere to displace him. *The New Draper*, 4 Rob., 290. By the common law, as a tenant in common, he has equal right to the possession with any other owner, and the admiralty pays so much respect to his common-law right that it will not interfere to disturb his possession without some cause shown, and would, I think, be reluctant to do it without a sufficient cause when the master was in possession under such a contract as this.

On the whole, I shall grant both parts of the injunction asked for. And I do it with less reluctance as the injunction is only until the further order of the court. If I am wrong, no irreparable injury will be done to the defendants, as they may at any time apply to the circuit judge to have the injunction removed.

SMITH v. BURNHAM.

(Circuit Court for Massachusetts: 3 Sumner, 435-471. 1838.)

STATEMENT OF FACTS.—This bill stated that some time in June, 1834, plaintiff and defendant entered into an agreement to become copartners in the

purchase and sale of lands and lumber, in the state of Maine, upon a joint capital to be furnished by both, and profits and loss to be shared equally by both. The bill then proceeded to state that certain purchases and sales of land and lumber had been made by defendant, and certain advances of money had been made by plaintiff to defendant on same account, and called for an account of the partnership, and prayed that it might be dissolved, and the effects sold or equally divided between plaintiff and defendant. The answer denied all these statements, and relied on the statute of frauds as a full defense to such pretended agreement.

Opinion by STORY, J.

The main questions in the cause are, (1) In the first place, whether there was an agreement of general copartnership; (2) In the next place, whether any such advances or purchases were ever made in pursuance thereof, as are charged in the bill; (3) And, in the next place, whether if there was any such agreement, it not being pretended to be in writing, but merely by parol, it is not utterly void within the statute of frauds. To enable the plaintiff to maintain his suit, it is indispensable that he should make out the affirmative upon each of these points; that there was such a copartnership; that such advances and purchases were made; and that the agreement is not within the statute of frauds. The answer having positively denied the two former, as matters of fact, and the denials being responsive to the allegations of the bill, it follows, of course, that it is incumbent upon the plaintiff, by competent and satisfactory evidence, to overcome the answer and falsify its statements by two witnesses, or by one witness and other equivalent proofs, or it must stand for verity. It will not be sufficient that some of its statements may be brought into doubt. They must all be positively overcome, so far at least as the merits of the controversy are concerned.

And, first, as to the existence of the agreement of copartnership. And here it is most material to remark that there is not a single scrap of paper in the cause between the parties, alluding to, or in any manner whatsoever touching, the matter of such copartnership. Although, as the allegations of the bill show, large operations in the purchase and sales of land were contemplated, and large advances might from time to time be required to meet the exigencies of such a business, and entire confidence must have existed between the parties, not a single letter is produced which alludes to any negotiations or speculations or advances. The absence of all such documents, in a case of this sort, during the whole period of the supposed operations of the partnership, is certainly an awakening circumstance, difficult to account for in a satisfactory manner, if the agreement be real; but of easy and natural explanation, if it be a mere figment, or an unexecuted proposal.

§ 174. *Evidence of conversations and loose confessions is too indefinite for the enforcement of a contract.*

In the next place, there is no exact proof of the agreement — its terms, its nature, its extent, its duration, or its objects — from any witness present when it was formed. All that we know about it is derived from after conversations and loose confessions of the defendant, testified to by certain witnesses, which conversations and confessions, if entirely confided in, still leave the nature and terms of the agreement so loose and indefinite, that it is utterly impossible to ascertain its exact and full import in all respects, so as to enable a court of equity to execute it with a confidence that it understood the whole intentions of the parties. For example, in what proportions were the parties to be in-

terested, and to supply funds? To what purchases was the copartnership to extend? To all purchases of land or timber made by either of them respectively, or to those only made on joint account? If the latter, how were the purchases to be ascertained, and, as it were, ear-marked? What was to be the duration of the partnership? During pleasure or life, or for a limited period? All these are questions which must be answered with definite exactness and clearness before the court could make a satisfactory decree; and yet, looking to the whole evidence, it is scarcely possible to find sufficient materials for satisfactory answers to them; or, at least, for such answers as a court of equity might rely on with undoubting confidence.

§ 175. *Evidence of confessions, especially where it goes to the merits of a case, is open to much objection.*

And then, again, the whole substance of the case is to be made out, as has been already intimated, by confessions. Now, evidence of this sort, especially where it goes to the whole merits of the case, is certainly open to much objection. It was well remarked, by Sir William Grant, in *Lench v. Lench*, 10 Ves., 518, where an attempt was made to establish, by parol declarations and confessions of a party, a trust in real estate, that "It is in all cases most unsatisfactory evidence, on account of the facility with which it may be fabricated, and the impossibility of contradicting it. Besides, the slightest mistake or failure of recollection may totally alter the effect of the declaration." He added, in reference to the case before him, what is equally true in the case before us, that "there are no corroborating circumstances by any writing under his (the party's) hand. In most of the cases there has been at least something in writing, some account by which it appeared that the fund was laid out. This case has not the circumstance, considered of weight in other cases, the inability of the defendant to make the purchase with other funds." Indeed, it is scarcely possible to avoid feeling that this language meets the very difficulties of the present case. Here there is no writing, no account, no proof of the funds of the plaintiff being actually laid out in any lands, and no proof of inability of the defendant to make the purchases which he did make without the money or credit of the plaintiff to aid him.

§ 176. *Specific performance. Contract must be clear, and must be clearly proved.*

I have read over the whole evidence in this case; and although there is much from the confessions of the defendant which, if it stood alone, might lead one to the conclusion that there was some sort of partnership or joint interest intended by the parties in certain purchases made or to be made of lands and lumber in Maine, yet I am not entirely satisfied that it is so definite and satisfactory, as to its nature or extent, or the proportions of the parties, as would lead a court of equity to enforce it; for it is a general rule of such courts not to interfere to direct a specific performance of any agreement where the terms of the contract are not all definite and full, and its nature and extent are not made out by clear and unambiguous proofs. See 2 Story on Equity Juris., §§ 751, 764 and 767, and the cases there cited. But the countervailing proofs, on the part of the defendant, do certainly throw great doubts and uncertainties over the proofs on the other side, and lead us to the conclusion that there may have been some mistakes and misapprehensions, to say the least, on the part of the plaintiff's witnesses, as to the purport and effect of the conversations of the defendant, to which they testify.

But if this difficulty could be overcome, there are other considerations of

very grave importance touching the next point, namely, of the advances made by the plaintiff on account of the asserted copartnership; and if such advances were made, of the actual investment of such advance moneys in any lands or timber on account of the asserted copartnership. Upon this subject the bill states that, about the 20th of June, 1834, the plaintiff and defendant, being in the state of Maine for the purpose of prosecuting the business of the copartnership, purchased of one Babbitt, at Bangor, "one undivided moiety of a large quantity of logs or timber, for the sum of \$3,500, or thereabouts;" and the other undivided moiety was at the same time purchased of Babbitt by one Robert M. N. Smith for the like sum of \$3,500, or thereabouts; and by the terms of the sale a credit was to be given for some part of the purchase-money (but for what part the credit was to be given the bill does not state); and thereupon it was agreed that Smith should have the management and control of the timber, and sell the same, and account with the plaintiff and defendant for their moiety thereof; that the plaintiff then advanced to the defendant, on account of the purchase and for his share of the money then to be paid, the sum of \$1,000, or thereabouts; that afterwards, about the 1st of January, 1835, Smith accounted with the defendant for the proceeds of some part of the sales of the timber, and paid to the defendant the sum of \$2,000 on account of the plaintiff and defendant, and thereupon the plaintiff directed the defendant to retain the same, to be paid on account of certain lands purchased on joint account of one Black, and which will be hereafter mentioned.

The bill then states that, in further prosecution of the copartnership, the plaintiff and defendant, about the 1st of October, 1834, contracted with one Packard that he should convey to the plaintiff or his assigns a certain tract of land in Maine, and thereupon Packard executed and delivered to the plaintiff his bond, conditioned to convey the land to the plaintiff or his assigns, upon the making of certain payments by the plaintiff or his assigns; that about the 1st of December, 1834, the plaintiff delivered the said bond to the defendant, to enable the latter to comply with the conditions, and obtain a conveyance of the land; that the defendant, instead of so doing, gave up the bond to Packard to be canceled, alleging that it was not for the benefit of the copartnership to receive a conveyance.

The bill then states, that about the 12th of December, 1834, it was ascertained that one Black, in his own right, as agent or trustee, was desirous of selling several townships of land in Maine, and that one David Webster was ready and willing to purchase one undivided moiety thereof, and thereupon the plaintiff and defendant agreed, that their copartnership should purchase the other moiety thereof; and that the defendant should proceed without delay to make a contract with Black for the sale and conveyance thereof; and that the sum of \$1,000 retained by the defendant should go and be applied by the defendant, in and towards the first cash payment for the sale and conveyance of the said moiety by Black; and that, if the defendant should want more money for the purpose, he should give notice thereof to the plaintiff, who was to assist him in raising the requisite funds. The bill then states, that the defendant accordingly contracted with Black for the one moiety of nine and one half townships of land; and Webster contracted for the other moiety thereof; that the defendant then paid Black the sum of \$1,000, and no more, toward the purchase-money, and to bind the bargain; that the contract in writing of Black, for such sale and conveyance thereof, was by agreement between defendant and Webster, to run to them both, to convey the whole lands to them,

of which Webster was to be the owner of one moiety, and the defendant of the other; but whether Webster then knew that the purchase was then made by Burnham for the benefit of the copartnership, the bill alleges the plaintiff to be ignorant. The bill then states that Black executed the contract in writing accordingly.

The bill then alleges that the plaintiff and defendant afterwards, jointly and separately, offered the interest of the copartnership in the said townships for sale, and endeavored to effect a sale thereof; and that the defendant constantly spoke of the interest in the said lands as belonging to the copartnership, and spoke of, and recognized, and treated the said plaintiff, as having an equal and copartnership right therein.

The bill then states, that afterwards, about the 12th of February, 1835, the time approaching when another payment would become due to Black, the plaintiff made a further advance of \$4,400 to the defendant, to be applied towards such payment to Black. That soon afterwards the defendant sold the interest of the copartnership in seven and one half of the said townships, at a great profit; that the plaintiff was ready to have made any further advances on account of the copartnership, to enable the defendant to comply with his contract with Black, and had actually deposited in a bank at Bangor for the purpose the sum of \$5,000, to his own credit; but the defendant never asked for any further advances; and the plaintiff understood that Black did not exact strict payment, so that no more money was wanted. The credit was accordingly extended; and payment was subsequently made, by means of the proceeds of the sales of the copartnership interest in the lands aforesaid, of all the sums due to Black under the contract, and that the defendant has sold the interest of the copartnership in the remaining portion of the land, and realized therefrom a large profit, amounting to \$40,000.

These are all the specifications in the bill of any advances, for investments made under the asserted copartnership. As to the purchase of Babbitt, the answer gives a very different account of it from what is stated in the bill. It positively denies that there was ever any such copartnership interest therein; and as positively denies that the plaintiff ever advanced the sum of \$1,000 or any other sum to the defendant as the plaintiff's share of moneys to be paid for the logs. On the contrary, the answer asserts that on the 23d of July, 1834, the plaintiff lent \$1,010 to the defendant and took the defendant's promissory note therefor, payable on demand, with interest. The bill admits the giving of this note, and insists that it was taken and preserved as a memorandum of the amount and time of such advance, and that this is a customary mode of doing business in like cases. A copy of this note is annexed to the bill, and it is for the payment of \$1,010 to the plaintiff or order, on demand, with interest. Now, no satisfactory proof has been offered in this case that in transactions of this nature notes in such a form are ever given as mere memorandums of advances. That notes should be given in such cases, payable on demand, would seem to be sufficiently singular, and so inexpressive of the real intent of the parties as to excite some doubt whether it could be a usual course of business.

§ 177. *Promissory notes on interest will not be considered mere memoranda of times and amounts of advances made in copartnership accounts.*

But that such notes should be given, payable with interest, would seem to be utterly repugnant to all notions of propriety in the conduct of such business. *Prima facie*, such notes must be presumed to import a present absolute

indebtment of money, for which interest is to be paid. And to allow parol evidence to show that such was not the intention of the parties would be not only to vary, but to contradict the very words of the instrument. It appears to me that this very note is written evidence directly contradicting the allegations of the bill, that there was an advance of \$1,000 on copartnership account towards the purchase of the timber from Babbitt. I know not, indeed, where a court of equity could stop, if it could, under such circumstances as are presented in the present case, allow such a note to be treated as a mere memorandum of an advance for a purchase upon a copartnership account. The defendant has, in his answer, also expressly denied that he has ever received from Smith any moneys or notes on account of the timber, beyond the moneys which he had advanced without any interest therefor. But, as the case made by the bill is met by such direct denials of the copartnership, and of the advance of the \$1,000 on account thereof, and is unsupported by any sufficient evidence, the question of such advance may be dismissed from any further consideration. The testimony of R. M. N. Smith, who is principally relied on to establish this part of the plaintiff's case, is to the following effect: That he saw the plaintiff and Burnham at Bangor in the summer and fall of 1834; that they were there for the purpose of speculation in lands and other matters. That he was employed by them to use his influence and information for getting bonds for lands for them, and was to receive for his compensation half of the profits made on the sale of such bonds, and the plaintiff and Burnham were to share the other half equally between them. That both the plaintiff and Burnham stated to him that they were jointly and equally interested in any speculations they should make. That they jointly with him purchased a lot of logs of Babbitt in the early part of the summer of 1834, his interest to be one-half and that of the plaintiff and Burnham the other half, jointly and equally, between them. The plaintiff did not make any advance of money for the purchase of the logs, but it was to be made and was made by Burnham. That when the bargain was closed the plaintiff offered to go and get a sum of money to pay, and Burnham told him he had money enough in his pocket-book to pay what was required, and that the plaintiff and he could settle afterwards; and Burnham accordingly paid the advance money, about \$2,000. The witness gave to Burnham two notes or receipts to account for the advance, which were afterwards returned to him by Burnham on a settlement in the following autumn. The witness was to take the lumber and saw it up and sell it, and then he was to have half the profits, and the plaintiff and Burnham the other half. On the settlement he paid the whole advance of \$2,000; but no more is stated by him to have been paid to Burnham. That in December, 1834, he saw Burnham at Bangor. Soon after he and Burnham and Colonel Webster went to see Black at Ellsworth, and there Burnham and Webster concluded a bargain for the lands with Black. That the witness had no interest in the purchase; but that Burnham told him that "Webster was to have one-half, and the plaintiff and himself the other half together, they being jointly and equally interested in any purchase of land;" adding that the plaintiff's capital was not large, but his credit was good, and that they could make out their parts of the payment well enough. The witness added that: "In various conversations Burnham told him that he and the plaintiff were equally and jointly concerned in any operations to be made by either."

Now, giving the fullest effect to this testimony as to the Babbitt purchase, we see that *even Smith*, the copurchaser of the logs, does not pretend that he

ever knew of any such advance made by the plaintiff to the defendant on account of the logs. On the contrary, he admits that the whole money (\$2,000) was paid by the defendant out of his own funds; and if afterwards the plaintiff had repaid to the defendant his share of such advance, the note already alluded to could not have been given to the plaintiff in that account, but would seem to be utterly irreconcilable with the very nature of such a transaction. It is remarkable, too, that Smith confirms the answer as to his repayment of the money to the defendant which was advanced to him; and he does not even pretend that in his settlement with the defendant he ever paid him a cent beyond that advance. So far, then, as the Babbitt transaction goes, no case is made out in evidence which shows that the defendant has ever received any money beyond his advance from Smith on joint or copartnership account; and consequently the bill on this point is not maintained. Indeed, it is not averred in the bill that any profits were in fact made thereon. It should be added that if this objection were not decisive, it would be impossible for the court to maintain jurisdiction, to decree an account of this matter without Smith being made a direct party to the bill, as the proper and ultimate accounting party.

I have not thought it necessary to comment at large upon the bearing of Smith's testimony as to the Babbitt transaction and purchase, and the joint interest of the plaintiff and defendant therein, or as to the purchase from Black on their joint account. It certainly is, in some particulars, strong and direct to the purpose. But it consists wholly of asserted confessions of the defendant, and does not satisfactorily establish any general copartnership, such as is charged in the bill, between the plaintiff and the defendant, whatever might be its force as to a joint interest in the Babbitt purchase or the Black purchase. Similar remarks are applicable to the testimony of Woodman as to the Babbitt purchase. He testifies to conversations of the defendant of a very general nature, and in very general terms, in the autumn of 1834, in the latter part of September or the beginning of October, to this effect; that the plaintiff had gone into land speculations with him; that he and the plaintiff had purchased logs on which they had made, or should make, \$1,600; that they had made a large purchase of lands, or had the refusal of a number of townships; that they should make on lands a large sum, say \$80,000; and that in the whole conversation the defendant used the word "we," coupling himself and the plaintiff together, though he did not use the word partner, partnership or joint interest. Now it is impossible not to perceive how very loose and unsatisfactory such statements are to found any satisfactory proofs of a definite, fixed copartnership. It is also to be remembered that, though this conversation was long after the Babbitt purchase, yet it was long before the purchase of Black; so that, as to the latter, nothing more could have been contemplated, giving the fullest effect to the language, than future speculations in those lands on joint account. The testimony of Pearson Cogswell, as to the purchase of the lumber, is equally loose and unsatisfactory. All that he says is, that some time previous to December, 1834, on board of a steamboat, Burnham said to him, "I," or "Frederick Smith and I, have let Robert M. N. Smith have money to purchase lumber." In respect to the purchase from Black, he is more full; but still very general. He states in effect that in various conversations with him Burnham acknowledged that the purchase from Black was made (with Webster) on the joint account of himself and the plaintiff; that he and the plaintiff were in partnership in purchasing the bond from

Black, and other land and lumber in Maine, and in their eastern speculations; and that he often spoke of the plaintiff's having an interest in their purchases, and being engaged in the business of their purchases in Maine. But at the same time, he says, that Burnham did not, as he recollects, state what interest or what proportion of interest the plaintiff had with him in any lands, or the precise terms, nature, limits, commencement, duration or extent of their connection.

The testimony of Dudley Smith, the brother of the plaintiff, is even more general and loose. In relation to the lumber purchase, he says that on the last of August, or the 1st of September, 1834, he was present at a conversation in Gilford (N. H.) between the plaintiff and Burnham, respecting the buying and selling of land in Maine. They spoke of having been in company, in that, and selling lumber; and among other things, Burnham asked the plaintiff if he wished to continue on in company in the lands; and the plaintiff answered, yes. They then agreed that Burnham should go to Boston and to Maine, on the business, where the plaintiff was to join him, and to pay half the expenses. A few days after Burnham said to him; we (meaning the plaintiff and Burnham) shall make something on our lumber; but I do not see how your brother (the plaintiff) is going to make out his part of the money?

The witness states further, that on the 10th of February, 1835, at Gilford, he was present at another meeting and conversation, between the plaintiff and Burnham; that they spoke of going to the state of Maine together. That afterwards it was concluded that Burnham alone should go, as it was not necessary to go on the land, and that Burnham should take the money. That the witness got \$500 from the Village Bank, and delivered it to the plaintiff, who handed \$400 of it to Burnham, and also gave him a bundle of bank bills, which he said contained \$4,000. Burnham received it without counting it. The witness further adds, that the business spoken of in this conversation, as well as on another on the next day, as belonging to their (the plaintiff's and Burnham's) common interest, was the buying and selling of lands in Maine, and disposing of lumber. But he does not remember that Burnham mentioned the precise nature, limits, commencement, duration or extent of that connection.

Taking this testimony altogether, it seems to me far too loose and general in its texture, to establish the case, stated in the bill, of a general copartnership in land and lumber speculations in Maine. There may have been an agreement that the Babbitt purchase should be made upon joint account, or that the plaintiff should have an interest therein, at his election. But if there was, it does not appear to have been consummated by any joint advance made by him; and, at all events, Smith, the witness, and not Burnham, is the proper accounting party, as Burnham is not proved to have received any money thereout except for his advances. We may then dismiss this transaction from any further consideration.

In the next place, as to the purchase of land from Packard, or rather the bond for a conditional purchase from Packard. As the bond in this case was actually given up, and nothing was ever obtained under it, and no case is made by the bill for any relief touching the same, the only aspect in which it can become material is as a link of evidence to establish a particular copartnership in those lands, or an act of purchase under the asserted general copartnership. It is in the latter view that it is presented in the bill. Does it establish this latter view? In the first place, the bond was taken from Packard in the name of the plaintiff alone; and so far as this fact goes, although the bill asserts

the bond to have been taken on joint account, it is written evidence of a sole right, if not contradicting, at least not confirming, the notion of a joint interest. In the next place, the answer expressly denies that there was any copartnership or joint interest in the bond, or that it was taken on partnership account; and it insists, on the contrary, that although the bond was taken in the name of the plaintiff, yet it was so for the sole account and benefit of the defendant and one John B. Morgan. The reason assigned in the answer for this mode of transacting the business is, that before the making of the bond it came to the defendant's knowledge that, in consequence of certain writings between one Asa W. Babcock and the said Packard, Packard could not, as the defendant believed, make the bond to the defendant without in some way affecting a certain contract for taking timber from the said land, or interfering therewith. That on this account a bond was arranged to be taken in the name of the plaintiff, without his knowledge or authority, for the benefit of the defendant and Morgan. That the plaintiff came to Bangor before the bond was executed, and the circumstances were mentioned to him, and he was told by the defendant that if he wanted to have any share in the contract he might have it; that the plaintiff made no objection to the bonds being made as aforesaid; and it was so executed, accordingly, and delivered to the defendant. That the plaintiff said he would take a share therein; but did not say what share, nor was it understood or agreed what share he should have; but that it was never understood or agreed that the plaintiff and the defendant should have any copartnership interest therein. The answer further denies that the plaintiff ever gave to the defendant the sum of \$2,300, or any other sum to enable him to comply with the conditions of the bond. The answer further avers that it was agreed between the plaintiff, the defendant and Packard, that the defendant should give a counter bond or contract to Packard and the plaintiff; and the defendant accordingly did give such bond or contract to the effect that the plaintiff and the defendant would take the land at \$1.25 per acre, to be paid for at certain given times by instalments, the plaintiff agreeing to take an interest in the lands, if they could be obtained at the price last mentioned, but not as a copartner, as the defendant understood the agreement. The answer then goes on to state that Packard refused to part with the land at less than \$1.50 per acre; and thereupon the contract was rescinded by the consent of the parties, and the bonds mutually given up.

The testimony of Morgan, the other supposed co-contractor, is in the case. He states that in the autumn, and, as he thinks, in September, 1834, he had a conversation while riding with Burnham, and that in the course of the ride, Burnham spoke freely of the connection in business subsisting between himself and the plaintiff, and informed him that the plaintiff had agreed to furnish \$12,000; that the agreement between him and the plaintiff was, "that they should be equally interested in all purchases of land, etc., to be made." Burnham added, "that the agreement between the plaintiff and himself was not in writing, and he could work the plaintiff out of it; and that he would take hold of the purchase with him (Morgan), and take one-half on his own account alone." He adds, that he was connected in the autumn of 1834 with the plaintiff and Burnham in the purchase of the Packard lands, his interest to be one-third and that of the plaintiff and Burnham to be one-third each. Afterwards, in the same autumn, the parties all met at Portland, and it was then agreed that Burnham should go to Packard, and endeavor to purchase the land of him at

\$1.25 per acre, if possible, if not, at \$1.50 per acre; that the plaintiff should pay to Burnham a sum of money, to be employed in the purchase; and, accordingly, the plaintiff did pay to Burnham a large package of bank bills, how much he does not know. Burnham went away, and on his return stated that he had not been able to purchase the land of Packard; and that the bonds had been given up. The witness adds, that Burnham's explanation and conduct were not satisfactory to him, or to the plaintiff. The witness further, in his cross-examination, states, that in the course of his ride with Burnham, as above mentioned, Burnham told him that he and the plaintiff had agreed to be jointly concerned in equal shares in buying land and lumber; that there were no limits to their plans except their means; and that this connection between him and the plaintiff had subsisted somewhat more than a year. In this last statement the witness must certainly be under a mistake; for the bill itself assigns the connection or copartnership to have commenced in June, 1834. The witness also adds, that Burnham particularly mentioned, that he and Smith had a joint interest in the land to be purchased of Packard, and in certain other land, which the plaintiff had gone to Hallowell to secure; and that within two years before the time of taking his deposition (which was in June, 1837), Burnham had declared to him, that no one was concerned with him in the purchase of the land from Black, except Colonel Webster; or something to that effect.

This is the only evidence strictly applicable to the Packard purchase. It has been asserted in the argument for the plaintiff, that the money paid in Morgan's presence was undoubtedly that for a part of which the second note stated in the bill, dated on the 11th of December, 1834, for \$1,000, was given as a memorandum. The bill does not (as far as I recollect) contain the same assertion. The terms of the note seem, however, inconsistent with any notion of its being a mere memorandum; for it contains a promise to pay the \$1,000 to the plaintiff or order on demand, with interest. Like the other notes in the case, it is negotiable, and on interest, which would seem to show that it was a business transaction between debtor and creditor, and not a mere deposit of money with a partner for partnership purposes. The answer admits that the defendant borrowed \$1,000 of the plaintiff on the 11th of December, 1834; and that he gave a note for the same of the same date; but it positively denies that it was anything but a private loan, and as positively denies that it was received for any copartnership business, or as a part of the capital stock thereof. Morgan states nothing on this point. But his testimony is inconsistent with the bill in one particular; for it states that the purchase of Packard was on the joint account, and for the mutual benefit of the plaintiff and the defendant; whereas, upon Morgan's testimony, he was interested therein to the extent of one third. But the main difficulty remaining in this part of the case is, that Morgan is a single witness against the answer; and whatever may be the scruples of the court in giving entire credit to the statements of the answer as to the Packard purchase, there is no inconsiderable difficulty in giving effect to all the statements in Morgan's testimony, as well from the looseness of some parts as from the want of exact facts in others. If the transaction with Packard, as it is presented to the court upon a full survey of the bill, the answer and the evidence, satisfactorily establishes anything, I cannot admit it to go farther than to show an intended interest of the plaintiff in that particular transaction; but not clearly, of itself, to establish a general copartnership. If a general copartnership were established, *aliunde*, by the evidence, it would be easy to refer this transaction to that source.

In the next place, as to the purchase from Black, which, after all, constitutes the main hinge of the controversy. In regard to this part of the case, there is much testimony of confessions of Burnham, at different times to different persons, and in different places, that the plaintiff was jointly interested with him in that purchase, as well as in his eastern speculations generally, in lands and lumber. Some of this testimony has been already stated; and much of the remaining part is of the same general character, consisting of loose declarations of joint interest and copartnership between Burnham and the plaintiff. I do not pretend to go over the particulars of this testimony, though some of it is abundantly open to comment. The testimony of Clarke is clearly not admissible, since he was not examined on the cross-interrogatories. If it were admissible, it seems to me utterly discredited by the contradictions between that and his petition and affidavits, filed in the cause of *Clarke v. Burnham*, in the circuit court in Maine. Perhaps the strongest testimony is that of William M. Kimball to conversations which he states that he had with the defendant at several times. First, in January, 1835, at Boston, soon after the purchase of Black, in which he says that the defendant told him that he and Frederick Smith had lately purchased several townships in the state of Maine, but he does not remember the number of townships, nor the precise sums paid for them; but it was several hundred thousand dollars; and that the land was in the Bingham purchase. That the defendant added, that he and Smith had purchased together; that they were partners in the purchase; that they both advanced money towards the purchase; and that Smith had not advanced so much as he had expected him to advance. Next he states a conversation with the defendants, in February of the same year, at Meredith Bridge, in New Hampshire, in which the defendant said, that he and Smith were connected together in the purchase of the townships in Maine; that Smith had not made out so much money as he expected he would; and he was sorry he had taken him into partnership; that he might have made out all the money for the purchase, and have had all the profits; that Smith would finally make something by the trade, and the witness thinks he said forty or fifty thousand dollars. In the next place, he states a conversation with the defendant, in January, 1836, in Boston, in which the defendant made statements of the same purport as the other conversations respecting Smith's interest. In respect to this testimony, it is open to the remark, that its whole force, so far as the purchase from Black is concerned, depends upon this, whether the conversation related to the lands so purchased, or to other lands in the Bingham purchase. Now, it is expressly stated by other witnesses (Jordan and Stuart), that Smith and the defendant were jointly interested, as they understood from them, in other lands in the Bingham purchase, or at least in township No. 1 in the Bingham purchase. But I do not dwell on these or some other circumstances affecting this testimony, although I cannot but think that the letters annexed to the bill, which passed between the plaintiff and the defendant, in November, 1835, have a strong tendency to shake the credibility of Kimball's statement as to all the conversations testified to by him, and especially that in January, 1836. These letters show, that as early as the spring of 1835, the plaintiff utterly refused to recognize the rights contended for by the plaintiff, and that there was then a controversy subsisting between them.

If the testimony to the conversations and confessions of Burnham, that the purchase from Black was made upon joint account, or partnership account, stood alone, it would, from the considerations already suggested, lay open to

some doubt and difficulty, owing to the intrinsic infirmity of all such evidence. But it seems to me, that it has to encounter so much opposition, if not contradiction, from other unexceptionable evidence in the case, that a court of equity ought to hesitate a great while, before it should lend entire credence to it, for the purpose of establishing the plaintiff's claim.

In the first place, to meet this claim at the threshold, we have the written contract of Black, by which he binds himself to deliver to David Webster and Daniel Burnham, their heirs or assigns, a deed in fee, with warranty, of the lands in controversy. This contract, therefore, being for the purchase of lands, is confined to the immediate parties, Webster and Burnham, without any mention of the plaintiff or of any other person being interested therein. The presumption therefore is, that no other person had any such interest therein except Webster and Burnham. How then is the interest of the plaintiff to be made out? It must be by showing that there is a trust created in his favor in the very lands. Now this is not attempted to be shown by any written evidence or document. The sole reliance of the plaintiff is, and must be, either that Burnham and he were, at the time, copartners in business, and that the purchase was made out of the partnership funds, or that the plaintiff actually advanced his own funds on joint account which were applied to the purchase. Now the bill does not contain any direct allegation that the moneys of the copartnership or of the plaintiff were actually applied to the purchase from Black. The answer explicitly denies that any such moneys were applied, and as explicitly denies that any person, except the defendant and Webster, had any right or title or interest in the purchase. It is true that the defendant admits in his answer that he did apply the \$4,400 for which he gave to the plaintiff a negotiable note on the 7th of February, 1835, with other moneys of his own towards the purchase. But he positively states that the \$4,400 was a mere private loan to himself and was not so applied as the moneys either of the plaintiff or of the supposed copartnership. The note itself on its face supports the answer in this respect, for its terms are just such as ought to exist in the case of a loan and seem altogether irreconcilable with such a transaction as the bill asserts, a mere advance to one partner on partnership account.

Another striking fact in this part of the case is, that although the purchase money exceeds \$200,000, yet there is not a scrap of paper showing the assent of the plaintiff thereto or his obligation to pay any part thereof, or his being a copurchaser with Burnham. Now, certainly, in so large a purchase, it is scarcely credible that a person of limited means like Burnham should take upon himself the whole personal responsibility of paying the whole money without having his partner a party to the contract, or bound to contribute towards the payment or even without having any proof in writing to show that he was a partner. Suppose the speculation had turned out in the event to be a very losing bargain, what recourse could Burnham have had against the plaintiff? And if the plaintiff had a known fixed copartnership interest, how happens it that there is no correspondence showing the fact and calling upon the plaintiff to provide his share of the money? And how happens it that the plaintiff's name does not appear upon the face of the notes given for the purchase money?

There is another most important portion of testimony bearing upon this part of the case which has not been contradicted or even its credibility doubted. Webster was deeply interested, not only in his own half of the purchase, but

also in knowing who were the persons liable for the other half, as the notes included a joint responsibility for the whole purchase money. Now Webster positively states that the purchase was made on the joint and exclusive account of Burnham and himself, and that he never knew of any other person being interested therein. He further states that when the purchase was about to be made Burnham offered the plaintiff one-half of his proportion and went on to propose to the plaintiff to become interested and to join with Webster and himself, or either of them, in the purchase, each taking one-third; and that the plaintiff "declined undertaking the purchase either way, observing that it was too great a thing and that he did not dare to take hold of it." Webster further adds, that the plaintiff was present when the agreement was finally concluded between Burnham and himself, to make the purchase upon their own exclusive account; and the plaintiff declined to take any interest in the purchase. He then asserts, that the plaintiff "never had, or took any part, share, or interest in this contract or purchase." Now it seems exceedingly difficult to resist the cogency of this testimony. It stands uncontradicted, and comes from a witness deeply interested in, and a party to the purchase, and who had the most complete knowledge of all the preliminary arrangements. What gives it additional weight is, that it stands in entire harmony with all the written documents in the case. They are just such as ought to exist, if the testimony be true; and such as naturally followed from the transaction. And they are just such as would not ordinarily exist, if the purchase had been made on the joint account of the plaintiff and defendant and Webster.

But an additional circumstance, which strikes me as of great weight in this connection is, if the purchase from Black had been made on the joint account of the plaintiff and the defendant, the total absence of all written communications and correspondence between them on that subject, either contemporaneous, or subsequent. The purchase was one of great magnitude and responsibility; large sums were to be raised to pay the purchase money; notes were to be given; and yet not a single letter passed between the parties communicating information, proposing arrangements, or asking advice or assistance respecting it. Such a deep and unbroken silence, long continued, does, I confess, lead my mind to distrust the existence of the partnership. It would have a strong tendency to create doubts, even if the testimonial evidence was far more full, and direct, and distinct, than it can be admitted to be. But when it is brought in connection with the other facts of the case, already mentioned, it is impossible not to feel that it has, and ought to have, much influence in confirming pre-existing doubts, and sharpening other objections.

§ 178. *Parol contract within statute of frauds.*

But, supposing the objections already stated not to be insuperable, we come, in the next place, to the consideration of the important point, whether a parol contract of this sort, for a partnership in speculations in land, to be bought and sold on joint account, is not within the true intent of the statute of frauds. It seems to me, that it must be so considered, both upon principle and authority. There is no substantial difference in the language of the statute of frauds of Massachusetts, New Hampshire, and Maine on this subject; or between them and the English statute of frauds of the 29 Car. 2d, ch. 3. The doctrines, therefore, decided upon this point in England, as well as in each of these states, bear directly upon the present case, if not as absolute authorities, at least as containing the opinions of the most enlightened judges upon the language and the intent of the provisions of the statute. I do not perceive that the bill has

stated in what state the supposed parol agreement for the copartnership was actually made; and of course the court cannot, strictly speaking, say by what local law it is to be governed. But as, from the allegations in the bill, it may be taken to have been made, either in Massachusetts, or in Maine, or in New Hampshire, it is not of much importance to insist on this defect in the bill, although, perhaps, in strictness, it might be deemed a fatal omission, if properly presented to the court. But as the statutes of frauds in all these states have received, and indeed require, the same construction, the objection may well be passed over.

Then, in the first place, upon principle, how stands this case? It insists upon a parol copartnership for the purchase and sale of lands for the joint account of the partners. If so, this is clearly the case of a parol contract respecting an interest in lands. It was contemplated, according to the very structure of the bill itself, that, upon every purchase made under the supposed contract of partnership, the plaintiff should have an interest in the lands purchased to the extent of one moiety, or his share in the partnership. Now, if the purchase was made in the name of Burnham as to one moiety, it was to be in trust for the plaintiff. By the statute of frauds all estates made or created by parol, and not put in writing and signed by the party making or creating the same, are mere estates at will. And all grants and assignments, as well as all declarations or creations of trusts or confidences in lands, are also to be manifested and proved by some writing, signed by the party who is by law enabled to grant, assign or declare such trust; otherwise the same are utterly void and of no effect. And all contracts for the sale of lands, or of any interest in or concerning the same, are also required to be in writing; otherwise no action is maintainable thereon. There is an exception of trusts and confidences which arise or result by the implication or construction of law, or are to be transferred or extinguished by an act or operation of law.

Now, taking these clauses together or separately, the same conclusion would seem to follow as to the parol agreement in the present case. If the agreement could be treated as a sale by the defendant to the plaintiff of any interest in the lands to be purchased, it would be within the statute. If it could be treated as the case of an estate created in lands, it would be a mere estate at will, which would defeat the whole intention of the agreement and the whole object of the bill. I incline to think that it properly falls under neither of these predicaments, but that it is the case of the declaration or creation of a trust or confidence in lands not arising or resulting by implication or operation of law. The trust arises *eo instanti* upon each purchase, and is then to attach, if at all. If the land is not sold, the plaintiff would still be entitled to his moiety of the land as a trust in equity, just as much as he would be entitled to a moiety of the proceeds upon a subsequent sale. Suppose the defendant should die after any particular purchase and before the sale, would it not be clear that the trust, if it had any legal existence, would attach in favor of the plaintiff, as to his moiety, just as much against the heirs of the defendant or persons purchasing under them with notice as against the defendant himself? Certainly it would. It has been ingeniously argued that the interest of the plaintiff is in a moiety of the profits or proceeds of the sale, and not in the land itself, and that, therefore, at least when the land has been sold by the defendant, the agreement attaches to the moiety of the proceeds. But the agreement, if good at all, attaches also to the land at the time of the purchase; and it is then an agreement for an interest by way of trust in the

land, a sort of springing trust; and it is in virtue of this trust estate, and of this only, that any right can attach to the moiety of the proceeds. The right to follow the proceeds is a right which, if it exists at all, flows from the interest in the lands and the trust created in favor of the plaintiff. It is not collateral, but direct. Indeed, the bill puts the agreement as one of a copartnership for "purchasing and selling lands" by means of a capital to be furnished by the partners, the profits and losses to be equally shared by them.

Then, again, it is suggested that the agreement is not within the statute of frauds, because it did not so much contemplate an interest in the lands purchased as an interest in the contracts to convey lands obtained by the defendant for the partnership, and the profits made on the sale thereof. But it is a sufficient answer to this suggestion that such is not the agreement set up in the bill. It is not an agreement to purchase contracts for the conveyance of lands to be sold for the partnership, but an agreement for the purchase and sale of lands for the partnership. But if the bill had stated the agreement to be, as the argument has supposed, it would not have changed the legal posture of the case. A contract for the conveyance of lands is a contract respecting an interest in lands. It creates an equitable estate in the vendee in the very lands, and makes the vendor a trustee for him.

§ 179. *A contract for the sale of an equitable interest in lands, whether it be under a contract for the conveyance by a third person or otherwise, is clearly a sale within the statute of frauds.*

A contract for the sale of an equitable estate in lands, whether it be under a contract for the conveyance by a third person or otherwise, is clearly a sale of an interest in the lands within the statute of frauds. See *Hughes v. Moore*, 7 Cranch, 176, 192, 193, 194. A partnership to buy contracts for the sale of lands is a partnership for the purchase of an equitable interest in those lands. If the transactions are to be carried on by and in the name of one partner, the partnership is to create a trust for the other in those contracts, and consequently, if the agreement for the partnership is by parol, it is to create such trust by parol. This would bring the case within the purview of the statute of frauds. Let us apply this doctrine to the case of the purchase from Black. Webster and the defendant only entered into the written contract with Black for the purchase of the lands. They alone were the parties to it. They alone, at law, have the legal rights growing out of it. How then does the plaintiff make out any title or interest in that contract? It is by setting up a parol trust to the one moiety of the land purchased by the defendant by that contract under the parol agreement for the partnership; that trust being one of the express terms of that agreement.

Then it seems clear that this is not the case of a resulting trust by implication or construction of law. It is not the purchase of an estate by one man in the name of another, where the purchase money is paid by the former, and the deed taken in the name of the latter. It is not the case of a purchase confessedly paid for out of the funds of an existing partnership for partnership purposes, and the deed taken in the name of one partner. In each of these cases a resulting trust will arise by operation of law in favor of the party or parties advancing the money. See Sugden on Vendors, 9th ed., ch. 15, § 2, pp. 134, 135; *Dyer v. Dyer*, 2 Cox, 92, 93; 2 Story's Eq. Jurisp., §§ 1201 to 1207. Here no partnership funds, as such, existed; and no partnership funds, as such, are shown to have been applied. Lord Hardwicke, in *Lloyd v. Spillet*, 2 Atk., 150, said that resulting trusts, or trusts by operation of law,

were, first, when an estate is purchased in the name of one person, but the money or consideration is given by another; or, secondly, where a trust is declared as to part, and nothing said as to the rest, what remains undisposed of results to the heir at law. And he added he did not know any other instance, besides these two, where the court had declared resulting trusts by operation of law, unless in cases of fraud, and where transactions have been carried on *mala fide*. The trust in the present case, if any there was, was one arising directly *ex contractu*, and not by implication or operation of law. I take it to be clear, upon principle, that if one person contracts by parol with another that he will purchase an estate for the latter, he purchases the estate and takes the conveyance in his own name, and pays for it out of his own money and not out of that of the other party, that will not create a trust by implication of law in favor of the other party. The law in such case treats it as a parol contract to purchase and hold in trust for the benefit of another, and not as a trust arising by operation of law. I agree, also, that if trust money is invested in lands, whether rightfully or tortiously, it may be followed into the land as a trust created by the operation of law. But then the proof must be clear that it is trust money which has been so invested. It is the character of the fund, in such a case, that creates and attaches the trust to the land. *Lench v. Lench*, 10 Ves., 517. Indeed, there is here another difficulty in construing it to be the case of a resulting trust in the lands purchased; for it would defeat the intentions of the parties, as set up in the bill, that the defendant should sell the lands on the joint account. *White v. Carpenter*, 2 Paige, 241-265; *Leman v. Whitley*, 4 Rus., 423, 426.

But let us see how the present case stands upon authority as to this objection. Sir Edward Sugden, in the ninth edition of his *Treatise on the Law of Vendors and Purchasers of Estates*, 2 Sugden on Vendors, p. 139, 9th ed., 1834, has stated that, "Where a man employs another person by parol as an agent to buy an estate, who buys it accordingly, but denies the trust, and no part of the purchase money is paid by the principal, and there is no written agreement, he cannot compel the agent to convey the estate to him, as that would be directly within the statute of frauds." It appears to me, that this is fully borne out by the authorities. It was the very point in *Bartlett v. Pickersgill*, 4 East, 578, note; S. C. 1 Eden, 515; 1 Cox, 15. There the defendant bought an estate for the plaintiff; but there was no written agreement between them, and no part of the purchase money was paid by the plaintiff. The defendant articulated for the estate in his own name, and refused to convey to the plaintiff, who brought the bill to compel a conveyance. There being no written evidence that the estate was purchased for the plaintiff, the question was, whether parol evidence was admissible to establish it. Lord Keeper Henley held, that it was not admissible. On that occasion he said: "The question is, whether this evidence be competent or not? That will depend upon the statute of frauds. To allow it in this case would be to overturn the statute. The reason for making the statute was the confusion of property owing to perjury either for money or affection. The statute says: 'No trust shall be of land, unless there be a memorandum in writing, except such trusts as arise by operation of law. It is not like the case of money paid by one man, and a conveyance taken in the name of another.'" I am not aware that the doctrine of this case has ever been impugned or shaken. On the contrary, Mr. Chancellor Kent has fully recognized its authority on several occasions, and particularly in *Boyd v. McLean*, 1 Johns., Ch., 582, 589; *Steere v. Steere*, 5 Johns., Ch., 1, 19;

and *Bottsford v. Burr*, 2 Johns., Ch., 405, 409. In this latter case he acted upon its authority, it constituting one of the main questions in controversy.

There is another case of *Atkins v. Rowe*, Mosely, 133, where some persons, desirous of obtaining a lease of three houses, agreed that one of them should bid for all the houses, but that the lease should be for their joint benefit. Accordingly he bid, and a lease was made to him; and a bill was filed by the others to have the benefit of the lease, and that the purchaser might be decreed to be a trustee. He pleaded the statute of frauds in bar to the discovery and relief. According to Mosely's Reports, the lord chancellor (Lord King) seemed to be of opinion in favor of the plaintiff; and ordered the plea to stand for an answer, with liberty to except, and the benefit of it to be saved to the hearing. Sir Edward Sugden, however, informs us, that the defendant by his answer denied the agreement, and the cause being at issue, several witnesses were examined on both sides. There was a contrariety of evidence; but the plaintiff proved the agreement by one positive witness, corroborated by circumstances. The lord chancellor dismissed the bill with costs; and his decree was affirmed by the house of lords. Sugden on Vendors, 9th ed., 1834, Vol. II, pp. 133, 134.

There is another case, *Lamas v. Bayly*, 1 Vern., 627, where two persons entered into a treaty for the purchase of an estate, and one of them desisted, and permitted the other to go on with the intended purchase upon a parol agreement that he should have the part of the estate he desired. The estate was purchased, and then the purchaser refused to comply with the parol agreement, and a bill was brought to enforce it. At the rolls the plaintiff had a decree, partly upon the ground that the desisting was a part performance, but chiefly upon the ground that it was a fraud, and like the case where a man agreed to purchase as agent for another, and would afterwards retain the purchase to himself. Upon an appeal, the lord chancellor (Cowper) reversed the decree, upon the ground (as the reporter says) that it was within the statute of frauds. However, I do not rely on this case, because it appears from Mr. Raithby's note (1), that the decree in the register's book is, "that his lordship declared that the circumstances in this case appeared too slight to ground a decree for performance of the said agreement."

In *Rastal v. Hutchinson*, 1 Dick., 44, the bill charged that the plaintiff had employed the defendant to purchase a house for him, and he accordingly made the purchase in his own name, and took a conveyance to himself, and refused to make a conveyance to the plaintiff; and that in order to prevent the plaintiff from enjoying the premises, he had reconveyed to the grantor, who was also made a party to the bill; and the bill prayed a performance of the purchase. The defendant pleaded the statute of frauds. Upon the plea being argued, it was ordered to stand for an answer, with liberty for the plaintiff to except, and the benefit saved to the hearing. What afterwards became of the case does not appear. The benefit of the plea being reserved to the hearing is an order too equivocal in its nature to found any absolute opinion upon it.

Then there is the case of *Crop v. Norton*, 2 Atk., 74; 9 Mod., 233, 235, where Lord Hardwicke is reported to have said: "That where a purchase is made, and the purchase money is paid by one, and the conveyance is taken in the name of another, there is a resulting trust for the person who paid the consideration. But this is, where the whole consideration moves from such person. But I never knew it, where the consideration moved from several persons, for this would introduce all the mischiefs which the statute of frauds

was intended to prevent." Now, if this language was meant to apply to all joint purchases, where definite proportions of the estate were to be purchased for each party, as one-fourth, one-third or one-half, each paying his proportion of the purchase money accordingly, it cannot be maintained; and the doctrine was overturned in *Wray v. Steele*, 2 Ves. & Beam., 388, by the vice-chancellor, Sir Thomas Plumer. But if the language was used (as I conceive it was), with reference to the case then before Lord Hardwicke, where there was a mixture of considerations of different natures, and no such definite proportions of the estate to be purchased and held by each party were ascertained, and no definite proportions of the purchase money to be paid by each were fixed, then, in my judgment, there is great ground to sustain the doctrine. How, under such circumstances, would it be possible to say what interest or trust in the property each was to take? Surely it would be too much to say that it was to depend upon the future valuation of the property, or the future contributions made by the parties respectively towards the purchase, or the possible values of the interests in other property contributed by each. In *Crop v. Norton*, the purchaser surrendered his own interest in the old lease for one life, upon taking the new, and the other party, claiming as purchaser, paid £1,500 towards the renewal for three lives. But no sum was fixed as the agreed value of the old lease for the one life. Lord Hardwicke would not, under such circumstances, allow the parol agreement to control an express declaration of trust by the purchaser. Sir Thomas Plumer, in *Wray v. Steele*, 2 Ves. & Beam., 388, 390, has taken the same view of the case of *Crop v. Norton*, as that suggested above; saying that the doctrine laid down by Lord Hardwicke must be understood with relation to the case before him, and not generally. That it was a mixed case, the consideration consisting not merely of money, but of the surrender of an old lease; and it was decided on the particular facts.

Mr. Chancellor Jones, in his elaborate opinion in *White v. Carpenter*, 2 Paige, 241, took the same view of the doctrine of Lord Hardwicke, saying: "The grounds of the decision of Lord Hardwicke show that Lord Eldon was right in saying that this case was misconceived, when it was cited as an authority for the rule that a trust could not result from the payment of part of the purchase money. The principle is that the whole consideration for the whole estate, or for a moiety, or a third, or some other definite part of the whole, must be paid to be the foundation of a resulting trust. And that the contribution or payment of a sum of money generally for the estate, when such payment does not constitute the whole consideration, does not raise a trust by operation of law for him who pays it. And the reason of this distinction obviously is, that neither the entire interest in the whole estate, nor in any given part of it, could result from such a payment to the party who makes it, without injustice to the grantee by whom the residue of the consideration is contributed." Upon the rehearing, Mr. Chancellor Walworth seems to have approved the doctrine of Mr. Chancellor Jones on this point (2 Paige, 265). The same doctrine was fully recognized in *Sayre v. Townsend*, 15 Wend., 647. Now, under one aspect of this case, namely, the doubtfulness of the evidence to establish the proportions of the partners in the asserted partnership, and the extent of the advances made, or to be made, by the plaintiff towards the joint purchases, this doctrine might have had a most important bearing. But I now refer to it for the more direct purpose of showing that mixed purchases of this sort are held to be within the statute of frauds, when

there have not been definite proportions and advances made towards the purchase money by each of the parties interested.

The case of *Leman v. Whitley*, 4 Russ., 423, is a strong case to show the general doctrine of the court as to the admission of parol evidence in cases within the statute of frauds. There a son had conveyed to his father, nominally as a purchaser, but really as a trustee, that the father, who was in better credit than the son, might raise money on the estate by way of mortgage for the use of the son. The father died before the money was raised by mortgage. Upon a bill brought by the son for a reconveyance, it was held that the case fell within the statute of frauds, and that parol evidence was inadmissible to establish the trust.

The case of *Groves v. Groves*, 3 Young & Jerv., 163, shows how reluctant the court is to create any trust upon mere confessions, even confessions that the purchase money had been paid by a third person.

The case of *Forsyth v. Clark*, 15 Wend., 637, establishes the doctrine that, if a purchase is made of lands by one partner, it will not create a resulting trust thereon in favor of the partnership, even if the partnership funds have been appropriated to the purpose, unless the appropriation has been in pursuance of an agreement of the partners at the time of the purchase. If there be no funds of the partnership, as such, to be appropriated to the purpose, it would seem, *a fortiori*, that no such resulting trust could arise. The same point was decided in *Hoxie v. Carr*, 1 Sumn., 173, 186.

Some cases have been cited on the other side, the most material of which I shall proceed to mention. Of these the most striking is *Lees v. Nuthall*, 1 Russ. & M., 53; S. C. 1 Tamlyn, 282. There the defendant, an attorney, had been employed to purchase an equity of redemption of a mortgaged estate for his client, the plaintiff, and the attorney had purchased it in his own name, and insisted upon holding it in his own right. But the master of the rolls (Sir John Leach) held him to be a trustee for his client, and decreed a conveyance to be made to the client upon the payment of the purchase money. The ground of the decision was, that the subsisting relation between the plaintiff and the defendant, as principal and agent, or client and attorney, disabled the defendant from holding the purchase for his own use. Now, that case is distinguishable from the present in the important fact, that the present purchase was made by the defendant, not as a mere agent, but as a principal in interest, and properly in his own name. If, in that case, the attorney had been authorized to purchase in his own name, in trust for his principal, that would have given rise to the very question now before the court.

Then the case of *Hess v. Fox*, 10 Wend., 436. There a parol agreement was made between the mortgagor and mortgagee of an estate, that the mortgagor should convey an absolute title to the mortgagee, in order that the latter might sell the estate, and that, after discharging his own debt, the mortgagee should pay over the surplus to the mortgagor. The court held the case not to be within the statute of frauds. There the legal title to the estate was vested in the mortgagee. The sale was executed and the surplus money was claimed under the agreement, as the consideration for parting with the title. Now there was here a plain resulting trust to the mortgagor, upon the conveyance of the equity of redemption, for he had received no consideration therefor. The sale of the equity was then a sale for his use.

Then the case of *Burnel v. Taintor*, 4 Conn., 568. That was a case, where there was a parol agreement of the plaintiff and the intestate, to buy and sell

lands on joint account. The plaintiff was to make the bargain for the purchasers, and to render all necessary services; the intestate was to furnish the purchase money, and take the deeds in his own name, and execute the deeds or sales; and the profits were to be divided between them. After the death of the intestate, this action was brought for an account of the profits against the administrator. The case went off upon other points; but it was the opinion of a majority of the court, that the agreement was not "upon any contract for the sale of lands, tenements, or hereditaments, or any interest in or concerning them, within the statute of frauds of Connecticut;" though it was thought to be a mere point of speculation, not necessary to be decided in the case. Now the point in the present case is not, whether the contract was a sale of lands, or any interest therein, within the statute of frauds; but whether it is the case of a trust in lands, or the proceeds thereof, within the statute of frauds. This case, therefore, may be dismissed from our consideration, as it did not turn upon the point now in controversy.

As to the case of *Griffith v. Young*, 12 East, 518, it is sufficient to say, that in that case the money had been expressly received by the defendant from a third person, to pay over to the plaintiff upon a consideration executed. But Lord Ellenborough said, that if the contract had been executory, it would have been within the statute of frauds.

There is a case, *Potts v. Waugh*, 4 Mass., 424, which seems to me also to approach nearly to the point of this very question. It was there decided, that the law merchant respecting dormant partners does not extend to partnerships formed for speculations in the purchase and sale of lands; that when lands are sold, no man as a dormant partner can claim any part of the lands by virtue of any conveyance, to which he is not, on the face of it, a party; and that, if the nominal purchaser choose to hold the lands, the party who has advanced the money, if not named as grantee, can have no title to the land (at law), whatever remedy he may have against him, to whom the land was conveyed [in equity]. The court were also of opinion that a purchase and sale of that sort, by such a partnership, was within the statute of frauds.

These are all the most direct authorities on which it seems important to comment. It seems to me that they leave the case of *Bartlett v. Pickersgill*, 4 East, 578, note; S. C., 1 Eden, 515; S. C., 1 Cox, 14, in full force, unimpeached and unimpeachable. The true result to be deduced from the authorities seems to me to be, that in the first place the present cannot be deemed the case of a resulting trust in the lands purchased of Black, or of the proceeds thereof, or in any other lands to be purchased on behalf of the asserted partnership; and, in the next place, that the whole title of the plaintiff resolves itself into a parol trust, created by an express agreement of the parties in the purchase and sale of lands on joint account, which is within the statute of frauds. It seems to me, that to admit the plaintiff to recover in this case, would break down the whole operation and policy of the statute of frauds in regard to trusts. I find, too, that the same view of the matter has been taken by Sir Edward Sugden, a most truly respectable authority upon such a subject, in the last edition of his treatise on Vendors and Purchasers.

Upon the whole, my opinion is that the bill ought to be dismissed; but, under all the circumstances, without costs to either party.

TILGHMAN v. TILGHMAN'S EXECUTORS.

(Circuit Court for Pennsylvania: 1 Baldwin, 464-501. 1832.)

STATEMENT OF FACTS.—In anticipation of a marriage, in 1816, between Benjamin Chew, Jr., and the daughter of Judge Tilghman, there was a conversation and verbal agreement between the fathers as to the provision each would make for his child. It was, in effect, that each of the young persons should have \$30,000. Later there was a more definite written contract between Judge Tilghman and Benjamin Chew, Jr., in which the former stated definitely what his daughter's portion would be, and from what sources it would be derived. This was fully agreed to by Chew, and the marriage soon afterwards took place. Miss Tilghman was under twenty-one years of age, and it was necessary that she should attain her majority before the land could be sold, out of which her portion was to be raised. Two months after she was twenty-one she died, and during that two months nothing had been done to sell the land or raise the money. After Judge Tilghman's death, which took place in 1827, this bill was filed by certain legatees against his executors for an account and the payment of their legacies. Benjamin Chew, Jr., was one of the executors, and in his answer claimed that under the marriage contract he was entitled to the \$30,000 his wife was to have received, and to retain that much of the assets in his hands, on the ground that Judge Tilghman's estate was responsible to him for it. Further facts appear in the opinion of the court.

Opinion by BALDWIN, J.

The alleged contract between Mr. Tilghman, and Mr. Chew, the defendant, consists of two parts: 1. The conversation between Mr. Tilghman and Mr. Chew, Sen., communicated to Mr. Chew, Jr.; 2. The letter of Mr. Tilghman of the 10th of July 1816, assented to by both the Messrs. Chew. Taking the conversation as a verbal agreement, it was a mutual promise that each should provide for his own child a portion of \$30,000; no fund was designated out of which the portions were to be raised on either side, except as to \$5,000 by Mr. Chew, by conveying a farm in Jersey to his son; neither party assumed any obligation to provide for the child of the other, referred to any provision for the issue of the marriage, or any limitation or mode of settlement of the respective portions. The object seems to have been a personal provision for the parties to the marriage, to be made separately by their parents, each taking on himself the raising their portions for their own use; neither promised that the child of the other should have any interest in his own child's portion during the marriage, or after the death of either. The promise of Mr. Chew, Sen., to make the same provision for the issue after his son's death, as he was to make for his son in his life-time, formed no part of the conversation before the marriage, but is admitted to have been made afterwards; that promise however did not extend to Mrs. Chew if she survived her husband, and as the Jersey farm was to be conveyed to Mr. Chew, Jr., in fee, she could have only her dower out of it. The declaration by Mr. Chew, Sen., of his intention to make the same provision for his son's family by his will, as he would have made for his son if living, was also after the marriage, and in consideration of the agreement of the 10th of July; so that previous to that day, there is no evidence that Mr. Tilghman had made any promise or agreement to give the defendant any interest in his wife's portion, or to so settle it on her as to give him any control over it. The extent of any obligation assumed was to give or make

up to his daughter the stipulated portion; in law the defendant was no party to this promise so as to sustain an action for it, but even if he had any legal right to it, a court of law must award it to him absolutely, having no power to compel him to settle it on his wife or children.

§ 180. *Equity will not enforce a contract that is not precise and definite in its terms.*

This promise therefore could create no legal debt due to defendant or give him any claim to damages for its breach at law; it must be treated as other contracts for the payment of money or the performance of collateral acts. A plaintiff must show his interest in the act to be done, its extent, the breach of the contract, with the amount of damages he has sustained thereby; these would be insuperable obstacles in the present case (conceding the verbal agreement to be fully proved and clearly broken) to a recovery at law. It is only in a court of equity that all parties in interest could apply for the apportionment of a fund, to which no party had an exclusive right, but even there it would be difficult if not impracticable to give the present defendant any relief. The contract is so vague and indefinite in most of its important parts, that if the decision in this case turned upon it, "this defect in the proof would be fatal to the claim of the defendant." The contract sought to be enforced ought to be clearly proved, its terms to be precise, so that neither party could reasonably misunderstand them; if it is vague, uncertain or the evidence insufficient, a court of equity will leave the party to his remedy at law. *Colson v. Thompson, 2 Wheat., 341.*

§ 181. *When a contract in consideration of marriage will not be enforced.*

Contracts in consideration and contemplation of marriage are binding in law and equity, yet they must have those attributes which will alone induce courts of equity to decree a performance variant from their terms. In this case the promise of Mr. Tilghman was not made to meet any stipulation made by Mr. Chew in favor of the intended wife; each parent was free to have made a settlement on his own child of their respective portions with a reversion to themselves and their own right heirs, which equity would not disturb in the absence of any agreement to the contrary. Marriage agreements are construed in equity most liberally in favor of the issue of the marriage, who are considered as purchasers incapable of taking care of themselves; equity will protect them under marriage articles limiting an estate tail to the parties to the marriage, by decreeing to them an estate for life only, with a remainder to the issue in strict settlement. 2 Vern., 658; 1 Ves. Sen., 239; 2 Atk., 40; 2 Johns., C., 222; 1 Dess., 443. But this rule does not apply to the parties unless by the terms or manifest intention of the agreement they appear to have an interest in the fund to be provided. In this case there seems to me to be no such agreement or intention, but if Mr. Chew, Sen., had promised to give to his intended daughter-in-law a life estate in his son's portion if she survived him, there would have been powerful reasons for holding Mr. Tilghman bound to make an equivalent provision for his intended son-in-law. This would make the promise mutual, whereas all mutuality would be wanting by holding him so bound by the contract as stated and proved. It is not in equity a necessary incident to a marriage contract that the husband should have any interest in the wife's portion when she has none in his, or that the survivor should have a life estate in the other's portions; this will not be decreed unless agreed upon, or necessary to carry the contract into effect on principles of justice and equity.

In my opinion this contract created no debt or duty on the part of Mr.

Tilghman which can be enforced in equity, for the want of precision in its terms and the want of a promise by Mr. Tilghman to make a personal provision for the defendant, in both which respects the contract is defective.

§ 182. *When equity will not set up an antecedent contract in lieu of one that has failed.*

The next inquiry is whether the verbal contract formed a part of the written one of 10th July, or whether the latter is to be taken as the final agreement of the parties, complete in all its stipulations, according to their intention therein expressed, and a substitute for the verbal one as contended by complainants, releasing Mr. Tilghman from all personal liability. On the other hand, the defendant contends that there was an existing liability in Mr. Tilghman, continuing after the 10th of July, until that agreement was performed, the risk of which was assumed by him who remained liable under the first contract, when the second failed by his daughter's death.

It is difficult to account for the written proposition of the defendant which led to the contract of July, if there had been a subsisting contract made, definite and precise in its terms; the subject-matter was not a provision to be made by Mr. Tilghman for his daughter or her intended husband, or a conveyance of his property for the purpose, but her real estate which was to provide the marriage portion. On this subject the verbal contract was silent, as well as on the nature of the limitations. Had the defendant's proposition been accepted, he would have been without any interest in his wife's portion in the event which has happened, which is inconsistent with an existing obligation in Mr. Tilghman to give it to him absolutely or for life, or the existence of a contract so definite as to be visible or tangible in a court of equity as to give him any right. It remained then for the parties to make a contract specifying the fund for raising the portion, with such a limitation as would give the defendant an interest in it; this was intended to be done by the agreement of July, which is full and complete in all its parts; referring to no previous contract to be modified, it fully expresses the intention of the parties. So far as it accords with the previous inchoate contract, it reduces it to writing, which, in the absence of fraud, mistake, ignorance or latent ambiguity, cannot be varied, impaired or explained by parol evidence (2 Call, 12; 4 Dess., 211; 3 H. & M., 416, 417), or stating circumstances previously to the writing. 8 Wheat., 208, 211. If it differs from the terms of the conversation, the writing is a declaration of a change of the original intentions and an agreement to alter and rescind them. 1 Fonb., 173, 174; Tal., 20; Amb., 317.

§ 183. *How a contract may be reformed.*

This conversation between Mr. Tilghman and Mr. Chew, Sen., can be viewed only as leading to or forming the basis of the writing, or as a distinct substantive contract between the parties, put into writing as marriage articles; in either case a decree must be made conformably to the construction of the written agreement, or it must be reformed according to the rules of equity, by something which more correctly indicates the intention of the parties than the agreement itself. Otherwise it must be taken to be the only and very contract subsisting between them. Any contract, however solemn, may be reformed by matter of higher consideration than the contract, but this power of reformation is limited; there must be something definite by which to reform a contract; it must refer to or recite some other agreement on which it is predicated, which it was intended to carry into effect, to which it must conform, and by which it must be controlled, construed or regulated.

Articles in consideration of, and previous to marriage, are considered in equity as the heads of an agreement for a valuable consideration. 2 Atk., 40; 3 H. & M., 406. They will be so construed as to carry into effect the intention of the parties for the benefit of the issue for whom they are purchasers. 11 Ves., 228; 2 Dess., 126; 1 Dess., 443; 3 Ves., 245; 18 Ves., 54. Any mistakes will be corrected by reforming the article or settlement. A settlement after marriage, reciting articles before marriage, may be reformed by them; so if it was intended to be pursuant to the articles, any variance between them being presumed to be by accident. Tal., 20, 181; 1 Ves., Sen., 239; 2 P. Wms., 349, 356; 3 B. P. C., 333, 334; 1 P. Wms., 123; Com., 417; Amb., 317; 2 Vern., 658; 3 H. & M., 408. But the evidence of intention by which to make the reformation must be by a recital, a letter of instructions or declaration of intention, not by conjecture, but in words showing it. 1 Ves., 59, 151; 5 Ves., 597, n., 600; 3 Bro. Ch., 27. Otherwise the variance is presumed to be by a new agreement. 1 Fonb., 173, 174; Tal., 20. The great object of marriage settlements is to restrain the parties from disposing of the fund to the prejudice of the wife and issue, and it is in their favor, and necessarily against the husband, that equity reforms and construes them liberally to embrace the object intended; this will be done in favor of the husband or wife, where they claim in consideration of a settlement made, or to be made, by them or their friends, so as to make the contract operate beneficially for the party intended to be benefited by it. 1 Munf., 98, 112, 390. But if the plaintiff in equity has not completed his promised provision for his wife and issue, or if by her death without issue he has suffered no prejudice by what he has done towards its completion, or if by the agreement the portions were to be equal, and the husband has not made up his, equity will leave him to his legal remedy. 2 Freem., 35, 36; 3 Ves., 246.

If an instrument professing or intended to carry an agreement into effect is so drawn by mistake as not to effect the object, it will be reformed in conformity therewith; the instrument being insufficient for the purpose intended, the agreement is considered unexecuted, and the delinquent party will be held to its performance. If, however, the parties have deliberately agreed on an instrument to effect their intention, which meets the views of both, it becomes incorporated into their agreement, and if not founded in mistake in fact, and is executed in strict conformity with itself, equity will not decree another security, or act as if it had been agreed on or executed. It will compel the execution of agreements fairly made, but will not make them for parties, or decree the execution of any other instrument than the one agreed on. The death of the party who was to execute the instrument which was to give efficacy to the agreement, though it frustrates the intention of the parties by an event not provided for, does not alter the case. Where the parties have on deliberate advice rejected one instrument and adopted another, equity will not decree a different one to be executed, or that to be done which the parties supposed would be effected by the instrument finally agreed upon. *Hunt v. Rousmanier*, 1 Pet., 9, 17; S. C., 8 Wheat., 201, 210.

§ 184. *A party must rely on the case stated in his bill or answer.*

In the application of these principles to this case, I can perceive no just ground for reforming the agreement of the 10th of July; from its terms it appears to have been the only agreement intended to be carried into effect; so it appears to have been considered by all parties by their subsequent conduct, and having been deliberately made, must be considered as the only foundation

of defendant's claim. It is so set up in his answer and expressly stated, that though it varied essentially from the verbal contract, it was assented to by all parties and left with Mr. Tilghman for safe keeping as the contract agreed upon; such is the case presented by the answer on which the issue is depending on the general replication. This issue is on the facts and case stated in the answer, not on any other matter which may be offered or given in evidence at the hearing. 4 Madd., Rep., 21, 29; 3 Wheat., 527; 6 Wheat., 468. The opposite party must have notice by the answer of the matters relied on, so as to shape his replication accordingly, and offer countervailing evidence; he is not to be taken by surprise, or lose the opportunity of asking leave to file a special replication, which cannot be done without leave. 2 Wheat., 380; 1 Pet., C. C., 351. The same rule applies to a bill, so as to enable a defendant to demur, plead or answer according to the case stated. 1 Munf., 395; 7 Ves., 457; 12 Ves., 79; 9 Cranch, 25; 10 Wheat., 188; 6 J. C., 349. A party who sets up a right against another must be confined to the allegation of his bill or answer; the court will permit no evidence of any other matter than such as tends to prove those allegations, or decree on anything not put in issue or admitted by the pleadings. 1 Pet., 612; 1 Pet., C. C. 383; 11 Wheat., 103; 6 J. R., 559, 563.

§ 185. *Where an answer sets up an affirmative defense the respondent is held to the terms of his case as if he were a plaintiff.*

The defendant's counsel contended for a broader rule in case of an answer than a bill, where the answer is merely a defense against a right asserted by the plaintiff, as in a tithe cause, where it was held sufficient to set up a composition or commutation generally as a defense. Anst., 404, 491. Cases of this description are exceptions to the general rule on account of the difficulty of definite proof, but where a defendant in his answer goes beyond mere matter of defense, and sets up an affirmative claim, he becomes a plaintiff and must make out his case by proper allegations and corresponding proofs.

Such is the present case; both parties are claimants of the same fund, one to recover, the other to retain; the only ground of denial of the plaintiff's claim is an assertion of an affirmative claim by defendant in virtue of a contract set out in the answer; both parties being actors in their own adverse right, we must decide as if the defendant's case was in a bill filed by himself.

Taking then the agreement of the 10th of July, as the contract relied on for the foundation of the defendant's claim, it will be considered according to the intention of the parties, without regard to form or manner of expressing it, as a contract or articles of marriage formally executed as a valid, binding agreement or covenant, to be executed according to the principles of equity, regarding only its substance. The marriage having been solemnized is a consideration which entitles the defendant to the performance of the contract in good faith, for which the estate of Mr. Tilghman is answerable, if its breach has been by his default or its nonperformance has been owing to the occurrence of any event against which a court of equity can properly consider him as having undertaken to provide.

It was stipulated that so much of the daughter's estate be sold after she would arrive at twenty-one, as would raise \$30,000, which would be in nine months after the date of the agreement; no time was limited in which it was to be done after she arrived at twenty-one; the sale could not be before, for although Mr. Tilghman by the act of 1799 could sell, he was bound to appropriate the proceeds in the manner pointed out by that law. The postponement

of the sale was from necessity, not for the convenience of Mr. Tilghman; the annual value of the estate was trifling; neither party by the terms of the agreement assumed the risk of the settlement being defeated by the death of the daughter, nor is there any principle of equity which would make Mr. Tilghman personally answerable for the consequences. That does not seem to have been contemplated at the time; it was a proper subject for a provision, had any been intended; the object was a provision for the marriage; this agreement was agreed on for security of its performance, deliberately made and accepted as satisfactory. Had it been intended to substitute the estate of Mr. Tilghman as the fund in place of the daughter's estate in the event which has happened, it would have been so stipulated, or such intention have been manifested; had it been intended to bind the estate of the wife, she would have been a party. The defendant's proposals immediately preceding the contract were, that if no issue survived her, he would renounce the tenancy by the curtesy, and all legal right to his wife's personal estate; the same provision was to take effect on the subsequent death of the issue who should survive her. This proposal met the very case which has occurred and negatives the belief that in the same event Mr. Tilghman was personally to be bound or that a stipulation to that effect was left out of the agreement by accident or mistake; it must therefore be taken as the only security required, the insufficiency of which by the death of Mrs. Chew affords no ground for our interference. *Hunt v. Rousmanier* is authoritative on this point.

As the agreement could not be performed before the arrival of Mrs. Chew to twenty-one, no cause of action could accrue till that event. It happened on the 19th of April, 1817. She survived it two months, so that there was time to have completed the settlement. Yet though arrangements were made as to sales of her property by Mr. Tilghman, nothing was done in relation to the settlement, or any offer or demand made to execute it. Its completion required the concurrent act of all parties, of Mr. Tilghman to release his estate by the curtesy, of Mr. Chew and wife to convey the reversion. The acts must be simultaneous, or the conveyance of the fee must precede the release of the life estate, and the latter, if made to take effect immediately by a separate deed, would have left Mr. Chew and wife the sole power of disposing of the whole estate, with no other control than by a court of equity in virtue of the marriage articles. Mrs. Chew was then under the legal control of her husband; her deed was indispensable; it must be her voluntary act; Mr. Tilghman could exercise no control over her, nor could he, by his own act, complete the settlement. The important question then arises, on whom does the law throw the duty of doing, or offering to do, the acts necessary to performance, and what is such default in either party as subjects him to a debt or damages by nonperformance, without request by the other, when the contract fixes no time for performance?

§ 186. *Where no time is fixed for the performance of an act, the party desirous of its benefit must hasten it by a request.*

An obligation to pay money without naming the time of payment creates a debt due presently on demand. If for the performance of a transitory act, it must be done in a convenient time without request, when the concurrence of the obligee is not necessary; if it is necessary, the obligee must hasten the performance by a request, or the obligor may take his life-time. He shall also have a reasonable time after a request, and the obligee shall name a time for performance, as the making a feoffment. If the condition be to en-

feoff a stranger, the obligor shall require him to name the time and place, and do it in convenient time, unless the act requires the concurrence of the obligee, or of the obligee and stranger, in which case the obligor does not take on himself for the obligee who is party to the deed, as he does in the case of a stranger. 6 Co., 31; 2 Co., 79; Co. Litt., 208, 219; Cro. El., 798; 1 R. A., 436, pl. 1; 1 Brown's C., 55. In cases of forfeiture the party is allowed his life-time to perform the act. 1 Call, 88, 89. The party who is to have the benefit of the act may do it when he pleases. 3 D. C. D., 103; G., 3, pl. 16. Where prompt performance of the act is necessary to give the party its benefits, or its immediate fruition was the motive for the contract, it must be done in a reasonable time. Co. Litt., 208; 2 Co., 75, 78; Wing., Max., 463, 464, pl. 31; 5 Serg. & Rawle, 383. If to be done on demand, a reasonable time is allowed. 1 R. A., 443, 449; 3 D. C. Dig., 104. If the acts to be done are mutual or concurrent, the party who sues must aver and prove performance on his part, or an offer and readiness to do so. 2 Saund., 352, n.; Doug., 691; 11 Serg. & R., 200, 352; 12 Johns. Rep., 212. Acts to be done by both parties at the same time are deemed mutual and concurrent; though stipulated by different instruments they are one contract, one is the consideration for the other. 2 Wheat., 299; 8 Wheat., 224. A plaintiff in equity must aver and prove the performance of those acts which were the consideration of the contract to be enforced. 2 Wheat., 344. If the promise is to an intended son-in-law that the father will make for his intended wife the same provision as he had done for his other children, the plaintiff must aver and prove what that provision was. 1 Call, 849. Taking this contract, then, according to its terms, there was no legal obligation on Mr. Tilghman to be the first to move towards its completion. He was in no default without a request by the defendant, nor is there any case made out for equity to interfere to carry into effect the intention of the parties, to correct any mistakes or cure the effects of any accident.

§ 187. *Of what an answer is taken as an admission, and what the respondent is bound to prove.*

A different view of the case might be necessary, if the answer could be considered as evidence, so as to put the plaintiffs to disprove the matters set up in support of the defendant's claim, in the same manner as he is bound to do in relation to the denial of the plaintiff's right, according to the rules of equity in ordinary cases.

The defendant is not in this position. In his answer he admits the receipt of money as executor, by which he is bound to the extent of the charges against him. If, in his answer, he had averred the simultaneous payment of the sum so admitted, the whole must be taken as evidence, so as to put the plaintiff to disprove the payment. But if the payment or discharge is alleged at a different time from the receipt, or by a distinct transaction, the answer will be taken as an admission of the receipt, but not as evidence of the payment; so where the answer sets up an affirmative right or claim as a bar to an account, or to retain the money in the hands of the defendant, he must establish it independently of his oath. So where he, in his answer, alleges any distinct independent fact as a bar to plaintiff's claim. 6 Johns. Rep., 559; 2 Johns., C., 87, 90; Gilb., Ev., 45; 4 Brown's C., 75; 7 Ves., 404, 587; 13 Ves., 53, 54; Amb., 589; 2 Mad., Ch., 445; 2 Eq. C. Ab., 247, 248; 1 Wash., 124; 1 Munf., 395; 4 H. & M., 511; 1 Ves., 546. So of matter of avoidance set up by plea. 2 Wash., 199; 1 Johns. Rep., 590; 14 Johns. Rep., 74; 17 Johns. Rep., 367. An answer is no evidence as to matter not necessarily drawn out

by the bill, or not directly charged, if not inquired of or forming part of the discovery sought. So where the fact inquired into is immaterial, and the answer is a departure from the question. 14 Johns. Rep., 63, 74; 1 Munf., 396, 397; 10 Johns. Rep., 544; 2 Wheat., 383; 3 Wheat., 527; 6 Wheat., 468; 1 Johns., C., 461; 1 J. R., 589, 590.

On these well established principles, I have excluded from my consideration all the allegations of the answer to which they apply, and being clearly of opinion that the defendant has not made out his claim on the merits, have not examined into the effect of the lapse of time, or the staleness of the demand. It is proper, however, to remark, that I adhere to the rule laid down in *Baker v. Biddle*, and had this case required its application, it might have had a powerful if not a conclusive effect. There must be a decree to account.

FRENCH v. SHOEMAKER.

(14 Wallace, 814-885. 1871.)

APPEAL from U. S. Circuit Court, District of Virginia.

Opinion by MR. JUSTICE CLIFFORD.

STATEMENT OF FACTS.—Complicated as the transactions are out of which the present controversy has arisen, it will be impossible to explain the grounds of our decision in a manner which will be satisfactory to the parties, without giving in the first place a pretty full statement of the facts.

On the 27th of February, 1854, the legislature of Virginia passed an act incorporating a company to construct a railroad between Alexandria and Washington, by the name of the Alexandria and Washington Railroad Company, and the record shows that three-fourths of the stock of the company was taken by James S. French, and the other fourth by Walter Lenox, and that they continued to own the whole stock of the company and the entire railroad until they conveyed the same to the complainant. They proceeded to build the road, and in procuring means for that purpose they contracted large money obligations, and to secure those obligations they executed the three deeds of trust mentioned in the bill of complaint; that on the breaking out of the rebellion they went within the lines of the insurgents, and our government took possession of the railroad and used it for military purposes; that during their absence within the insurgent lines Joseph Davison presented a petition to the county court of the state representing that he was the agent and attorney of all the holders of the bonds in the deed of trust to Walter Lenox, and that the trustee therein named was incapacitated from acting as such, and praying that a certain other person named might be appointed in his place; that the county court removed the trustee named in the trust deed and appointed the person mentioned in the petition as substituted trustee, and that the substituted trustee subsequently, on the 10th of April, 1862, sold the railroad and everything belonging to it to the persons named in the record, and that the purchasers and others associated organized, or pretended to organize, a new company, called the Washington, Alexandria and Georgetown Railroad Company.

When the government relinquished the road, some time in the year 1865, this new company took possession of the same, and on the 1st of February, entered into a contract with the Adams Express Company in relation to the conveyance of express freight and the furnishing by the latter of means to operate the road. On the 28th of March, 1866, French and Lenox, having returned,

caused a suit to be instituted in the county court in the name of the Washington and Alexandria Railroad Company against the new company organized, or pretended to be organized, under the sale, to recover the railroad and property belonging to it, upon the ground that the whole proceedings by which the sale was made and the new company was formed were fraudulent and null and void. Dissatisfaction arose as to the contract with Adams Express Company, and on the 5th of May, 1866, by consent of both parties, a lease for ten years was made by the new or spurious company to Oscar A. Stevens and W. J. Phelps, and on the 18th of June following another contract for means of operation and in respect to the conveyance of express matter was made for ten years with the same express company. Litigations ensued with respect to those contracts, some of which were pending when the contracts which are the foundation of the present litigation were executed, and others were commenced at a later period. Serious embarrassments surrounded the parties who had caused the suit to be instituted to set aside the pretended sale of the road during their absence within the insurgent lines, and it was at this stage of the controversy, in November, 1866, that it was arranged that the parties interested should meet for consultation, as shown by the proofs, and as admitted by the respondents.

James S. French, S. M. Shoemaker, Walter Lencx, Oscar A. Stevens, J. Dean Smith, and R. T. Merrick were present at the interview. Satisfactory proof is exhibited that they came to an amicable arrangement, subject to the condition that the pending suit in the county court to set aside the pretended sale of the railroad should be determined in favor of the old company. They separated at the close of the consultation without reducing the agreement to writing, but it was drawn up in form, leaving the date blank, not long after, and was signed by all the parties except the complainant and respondent, who were not present. By the proofs, however, it appears that the complainant signed it shortly after, and the respondent, on the 6th of December, 1867, also signed it, though he earnestly objected to signing it when it was first presented to him for that purpose not long after it was signed by the other parties. He not only signed the agreement, but at the same time executed a conveyance of all his interest in the railroad to the complainant to secure the repayment of \$5,000, advanced to him by the grantee, and covenanted that it should be held by the grantee for the purpose and objects declared in the contract executed at the same time.

1. By that contract French and Lenox agreed to convey all their right, title and interest in the railroad to a corporation to be formed as specified, if such a company was formed, or to devote all their interest to the common benefit of the parties thereto, in the proportions specified, if the old company should be revived.

2. Stevens and Phelps agreed, if the parties decided to reorganize the old company or to form a new one as there suggested, to assign all their interest as lessees of the spurious company to such new company, or to hold the same for the exclusive benefit of the parties to the contracts in the proportions therein specified.

3. On behalf of himself and Adams Express Company the complainant agreed to aid the organization to be formed or revived by money and credit, to pay, settle or compromise all liabilities of the old company, and the liabilities of the lessees of the spurious company, for procuring stock and materials for working the road, and all other *bona fide* liabilities incurred by them

on behalf of the road, the claimant being substituted to all the rights and remedies of any such creditors for the benefit of the parties to the agreement or the organization by them formed or revived, subject to certain conditions therein specified, excepting twenty per cent. of the receipts, which it was agreed should be divided among the parties to the instrument according to their respective interests.

4. They also agreed that the arrangement should be carried into effect on the rendition of the decree of the county court in the pending case before mentioned, and that the company should then be formed and organized with a capital stock of three thousand shares, to be divided and distributed as follows: French and Lenox to have twelve hundred and fifty shares, Stevens and Phelps to have eight hundred and fifty shares, S. M. Shoemaker to have five hundred shares, J. Dean Smith to have two hundred shares, and George W. Brent also to have two hundred shares.

5. It was also agreed that the lessees should be continued as general manager and superintendent, at \$250 each as salary until otherwise ordered by the directors.

Five thousand dollars were paid by the complainant, or agreed to be paid, at the date of the agreement, and in consideration thereof the respondent executed the instrument called the assignment, in which he acknowledges the payment of that sum of money, and proceeds to say, "I do hereby assign, convey, transfer, and set over unto the said S. M. Shoemaker or his assigns, all my right, title, interest, claim and demand in and to the property, stock, road, road-bed, franchise, and charter of the corporation known as" the old company, or "any interest I may possess in and to the same, and do further agree to make such other and further conveyances or assurance as may be hereafter required by the grantee or his assigns for the following purposes," to wit: (1) To secure the payment of \$5,000 due to the grantee as an advance on the same. (2) For the purposes and objects set forth in the agreement bearing even date herewith, between the parties therein named, and which is particularly described in the pleadings.

Various defenses were set up in the answer, but those chiefly to be noticed are the two following: (1) That the signature of the respondent to the contract was obtained by fraud and oppression, that it is void as against public policy, and because it was fraudulently obtained. (2) That the assignment, though intended only as a mortgage to secure the \$5,000 advanced to him by the complainant, was fraudulently prepared with the design of deceiving the respondent into an assignment of his interest and estate in the road, and that he was compelled to sign it by threats, oppression, and persistent and deceptive influences and importunities.

Proofs were taken and the parties were fully heard upon the bill, answer and replication, and upon the cross-bill, answer and replication, and upon the proofs, and the circuit court being of the opinion that the equity of the case was with the complainant, granted an injunction perpetually restraining the respondent from any and every proceeding not in accordance with the contracts. Appeal was regularly taken to this court, and the principal error assigned here is that the circuit court erred in setting up and enforcing the contracts for the conveyance by the respondent of his right, title and interest in the railroad to the complainant.

Complaint is also made that the decree of the circuit court is equivalent to a decree for specific performance, but it is clear that it cannot be viewed in

that light, as the contracts were executed and the conveyance made and delivered nearly a year before the bill of complaint was filed, nor is that the theory of the defense as set up in the answer or in the cross-bill. On the contrary, they both admit the execution of the agreement and the assignment to secure the sum advanced, but the respondent appears to rely chiefly for his defense upon the circumstances of hardship, imposition and oppression alleged in the answer as affording a just ground to deny the prayer for relief contained in the bill filed by the complainant. He admits that the conveyance was made to secure the sum of \$5,000, but he alleges that he tendered the amount to the complainant on condition that the complainant would reconvey the property to him to be held as it was prior to the assignment, and that the complainant refused to receive the money on those terms.

Fraud is certainly charged in the answer, but the charge is wholly unsupported by any satisfactory proof, and the charge is virtually abandoned by the cross-bill, in which it is alleged that the respondent, notwithstanding the oppression and injustice which compelled him to execute the agreement, was willing and anxious, and for a long time continued to demand, that the same should be carried out according to its spirit and intent. What he there alleges as matter of complaint is that it was his necessities which compelled him to make the sacrifice and to surrender his stock on the hard terms of the agreement, and yet he affirms that he would have been satisfied if the other parties to the agreement had fairly and honestly performed their part of the same, but he alleges that they have utterly failed so to do, though often reminded of the delinquency, and repeatedly urged to commence their performance. Many instances of such alleged failures are specified, but it is a sufficient answer to them all to say that they are separately denied in the answer to the cross-bill, and that the party making the charges has failed to introduce any sufficient proof to warrant a finding in his favor in respect to any one of the accusations. Nearly eight months elapsed after the contracts were signed before the county court rendered their decree annulling the charter of the spurious company, and restoring the railroad to its rightful owners. They entered the final decree on the 28th of August, 1868, and on the 22d of September following, Walter Lenox called a meeting of the parties to the agreement, and the record shows that the respondent was duly notified and that he attended the meeting. He not only attended the meeting, but he knew that the persons composing the meeting intended to effect an organization under the agreements described in the pleadings, as they directed one of their number to prepare and publish a call for another meeting to carry that purpose into effect, in accordance with the code of the state, and as contemplated by the terms of those agreements.

Acting under those instructions the person designated for the purpose prepared the form of a call for such a meeting to be held on the 29th of October then next, and caused the same to be published; and the record also shows that the meeting was regularly held pursuant to the call for the same, and that the company was duly organized at that meeting by the choice of the complainant as president of the company. Prior to that meeting, however, to wit, on the 30th of the preceding month, the respondent, claiming to act as president of the road, obtained a writ of possession under the decree annulling the pretended sale of the road, and it appears that he was put in possession of the road by the sheriff, to whom he delivered the writ for that purpose. Instead of co-operating with the other parties to perfect the organization, the

respondent applied to the county court for an injunction to restrain the other parties from holding the meeting called for that purpose, but the subpoena was issued in this case on the same day, and the complainant obtained a rule requiring the respondent to show cause why an injunction should not issue restraining him from doing any act as president of the road, and from interfering in any way to prevent the execution of the agreement, and it appears that the subpoena and the order to show cause were served on him the day before he obtained his injunction forbidding the contemplated meeting.

Sufficient has already been remarked to show that the defense of fraud is not proved, but inasmuch as that defense is set up in several forms in the answer, it may be necessary to say that the antecedent remarks upon the subject apply to that defense in every form in which it is presented. Reference has also been made to the defense that the respondent was compelled to sign the contracts by threats, oppression, and by persistent and deceptive influences and importunities, but it becomes necessary to state that defense more in detail, and to give it a more careful consideration.

He alleges that he was induced to sign the two instruments by threats that if he refused he should be kept out of the possession of the road for years, and that in consequence of his pecuniary embarrassments, and through fear that the parties would render his property unavailing to him in case he continued to resist their importunities, he finally executed the agreement; that being pressed for the want of pecuniary means and overcome by threats, importunities and deceptive influences, he was ultimately forced to sign the agreement upon the condition that the complainant would advance him \$5,000, and that the contract should be immediately carried into effect.

Even if admitted to be true, the answer does not show that the instruments were executed under duress, as the respondent admits that the sum of \$5,000 was to be advanced as a part of the consideration for the transfer, and that he finally consented to the arrangement on the condition that the contract should be immediately executed. Much discussion to show that a contract or written obligation procured by means of duress is inoperative and void both at law and in equity is hardly required, as the proposition is not denied by either party. Actual violence, even at common law, is not necessary to establish duress, because consent is the very essence of a contract, and if there be compulsion, there is no actual consent, and moral compulsion, such as that produced by threats to take life or to inflict great bodily harm, as well as that produced by imprisonment, is everywhere regarded as sufficient in law to destroy free agency, without which there can be no contract, because in that state of the case there is no consent. *Brown v. Pierce*, 7 Wall., 214. In its more extended sense duress means that degree of constraint or danger, either actually inflicted or threatened and impending, which is sufficient in severity or in apprehension to overcome the mind and will of a person of ordinary firmness. *Chitty on Contracts*, 217; 2 Greenl. on Ev., 283. Decided cases may be found which deny that contracts procured by menace of a mere battery to the person, or of trespass to lands, or of loss of goods, can be avoided on that account, and the reason assigned for that restriction to the general rule is, that such threats are held not to be of a nature to overcome the mind and will of a firm and prudent man, because it is said that if such an injury is inflicted, sufficient and adequate redress may be obtained in an action at law, but the modern decisions in this country adopt a more liberal rule, and hold that contracts procured by threats of battery to the person or of destruction

of property may be avoided on the ground of duress, because in such a case there is nothing but the form of a contract without the substance. *Foshay v. Ferguson*, 5 Hill, 158; *Central Bank v. Copeland*, 18 Md., 317; *Eadie v. Slimmon*, 26 N. Y., 12; 1 Story's Eq. Juris. (9th ed.), 239. Grant all this and still the concession cannot benefit the respondent, as the proofs exhibited in the record are not sufficient to support the charges as made in the answer. Substantially the same charges are made by the respondent in his cross-bill, and every one of them is denied by the complainant under oath in his answer to that bill.

§ 188. *Where one knowingly makes a contract, the fact that embarrassed circumstances led him into it, will not empower equity to set it aside.*

Enough appears in the record to convince the court that the respondent was in straitened circumstances, that his business affairs had become complicated, that he was greatly embarrassed with litigations, and that he was in pressing want of pecuniary means, but the court is wholly unable to see that the complainant is responsible for those circumstances, or that he did any unlawful act to deprive the respondent of his property, or to create those necessities or embarrassments, or to compel him to do what he acknowledges he did do, which was to yield to the pressure of the circumstances surrounding him, and as a choice of evils accepted the advance of \$5,000, and the shares assigned him in the new organization as proposed, and voluntarily signed both the agreement and the assignment. Such an act as that of signing those instruments, under the circumstances disclosed in the record, must be regarded, both in equity and at law, as a voluntary act, as it was unattended by any act of violence, or threat of any kind, calculated in any degree to intimidate the party or to force the result, or to compel that consent which is the essence of every valid contract. Suppose he consented reluctantly, as he avers, still the fact is that he did consent when he might have refused to affix his signature to the instruments, as he had repeatedly done for the year preceding; and having consented to the arrangement and signed the instruments, he is bound by their terms, and must abide the consequences of his own voluntary act, unless some of his other defenses set up in the answer have a better foundation.

Want of consideration is also averred in the answer, but the terms of the instrument disprove the allegation, and the proofs introduced by the respondent as well as those introduced by the complainant show that the defense is unfounded.

Mistake and misapprehension on the part of the respondent are alleged, but the allegation is not sustained by any satisfactory proof, and the attending circumstances, taken in connection with the lapse of time from the original meeting to the time the respondent signed the instrument, convinces the court that the defense is without merit, which is all that need be remarked upon the subject.

Delay in execution of the contract is also alleged in the cross-bill, and that the complainant has failed to perform his part of the agreement, but those allegations are expressly denied in the answer to the cross-bill, and being unsustained by any satisfactory proofs the defense must be overruled.

Inequitable and unconscionable contracts, it is said, ought not to be sustained, but it is not possible to regard the arrangement in question as falling within that category, as by the terms of the agreement the complainant was to advance \$5,000 to the respondent, and to aid the organization by money and credit, to pay, settle and compromise all liabilities of the old company and

the liabilities of the lessees of the spurious company, for procuring stock and materials for working the road, and all other *bona fide* liabilities incurred by them in behalf of the road. Authentic data to enable the court to compute the amount of those liabilities are not given in the record, but enough appears to satisfy the court that they must have been very large, and amply sufficient to constitute a valuable consideration for the contract.

Suggestion is also made that the contract was against public policy, as some of the parties were interested in the spurious company, but the court is of the opinion that the charge is without any foundation, as it is clearly proper that parties whose pecuniary interests are complicated and conflicting should compromise the controversy, nor is it possible to see how the respondent is injured even if some one or more of the parties failed to perform their duty to the spurious company which was annulled.

§ 189. *Where a cross-bill raises the question of parties, to make them necessary it must appear that the original bill sought aid from or relief against them.*

Suffice it to say, in respect to the alleged want of proper parties, that the court is of the opinion that the objection cannot be sustained, and being entirely satisfied with reasons given for overruling the objection in the circuit court it is not necessary to give the point any further examination.

Want of mutuality in the contract is also suggested, but it is clear that the suggestion is not well founded, as the covenants to make the advance, pay the debts and liabilities of the company, and to allot the stock as stipulated, could be enforced by suit in any court of competent jurisdiction.

Strong doubts are entertained whether any of those defenses to the merits are open to the respondent, as the general rule is that where fraud is charged in the bill or set up in the answer, the party making the charge, if it is denied in a proper pleading, will be confined to that issue, but the court, being disinclined to place the decision upon that ground, has determined to give each defense a separate examination. *Eyre v. Potter*, 15 How., 42; *Fisher v. Boody*, 1 Curt., 206; *Price v. Berrington*, 7 Eng. L. & Eq., 254.

§ 190. *Where one signs an instrument after ample time for inquiry, examination and reflection, equity will not relieve from performance.*

Parties who execute contracts must expect that they will be enforced when due application for that purpose is made to a court of justice, nor can they reasonably hope that courts of justice will reopen matters which they have voluntarily and understandingly closed. Even if the terms of adjustment were unfavorable to the respondent, still he is bound by the arrangement, as he voluntarily signed both the agreement and the assignment. Had he refused his assent to the arrangement, the case might have been different, but the proofs show that he signed instruments after he had ample time for inquiry, examination and reflection, and having done so, neither a court of equity nor a court of law can release him from the obligation to fulfil his contracts according to the terms of the instruments.

Decree affirmed.

BAKER v. HUMPHREY.

(11 Otto, 494-508. 1879.)

APPEAL from U. S. Circuit Court, Eastern District of Michigan.

Opinion by MR. JUSTICE SWAYNE.

STATEMENT OF FACTS.—This is an appeal in equity. A brief statement of the case, as made by the bill, will be sufficient for the purposes of this opinion.

On the 27th of February, 1851, one William Scott conveyed the premises in controversy to Bela Chapman, taking from him a mortgage for the amount of the purchase money, which was \$3,500. Both the deed and mortgage were properly recorded. Chapman did not take possession of the premises. On the 29th of November, 1851, Scott assigned the mortgage to Jacob Sammons.

The assignment was duly recorded on the 19th of March, 1852. Sammons conveyed the premises with warranty to William M. Belote. From him there is a regular sequence of conveyances down to the complainant, Baker. Chapman lived near the property for years, and knew that Sammons and others were in adverse possession and claimed title, but never claimed or intimated that he had any title himself. He drew deeds of warranty and quit-claim of the premises from others claiming under Scott, and, as a justice of the peace or notary public, took the acknowledgment of such deeds. Upon these occasions also he was silent as to any defect in the title.

The complainant entered into a contract with the defendants Hurd & Smith to sell and convey the premises to them for the sum of \$8,000. He employed Wells S. Humphrey, a reputable attorney, who, for a long time, had been employed by the complainant when he had any legal business to do, to draw the contract. Humphrey accordingly drew the agreement and witnessed its execution. Hurd & Smith thereupon took possession and held it when the bill was filed. They employed Humphrey to procure an abstract of title. In examining the title he found there was no deed from Chapman.

He thereupon sought out Chapman, and by representing to him that the object was to protect the title of clients, procured Chapman to execute a quit-claim deed of the premises to George P. Humphrey, the brother of the attorney, for the sum of \$25. The deed bears date the 10th of June, 1872. George knew nothing of the transaction until some time afterwards. An action of ejectment was instituted in his name to recover the property. Baker tendered to him \$25, the amount he had paid for the deed; offered to pay any expenses incurred in his procuring it, and demanded a release. He declined to accept or convey.

The prayer of the bill is that the deed to George P. Humphrey be decreed to be fraudulent, and to stand for the benefit of the complainant; that the grantee be directed to convey to Baker, upon such terms as may be deemed equitable and for general relief. Such is the complainant's case, according to the averments of the bill. The testimony leaves no room for doubt as to the material facts of the case.

The direction for drawing the contract between Hurd & Smith and Baker was given to the attorney by Robling, the agent of Baker. Baker resided in Canada. Hurd & Smith directed the attorney to procure the abstract of title. With this Baker and Robling had nothing to do. The attorney disclosed the state of the title to Hurd & Smith, but carefully concealed it from Robling. Hurd & Smith, being assured by the attorney that whatever they might pay Baker could be recovered back if his title failed, executed the contract with Baker, and declined to buy the Chapman title, but gave the attorney their permission to buy it for himself. There is evidence in the record tending strongly to show that there was a secret agreement between them and the attorney, that if the Chapman title were sustained they should have the property for \$5,000, which was \$3,000 less than they had agreed to pay Baker. This would effect to them a saving of \$3,000 in the cost. They refused to file this bill, and declined to have anything to do with the litigation. It thus ap-

pears that, though unwilling to join in the battle, they were willing to share in the spoils with the adversary if the victory should be on that side.

There is in the record a bill for professional services rendered by the attorney against Baker. It contains a charge of \$2 for drawing the contract with Hurd & Smith. The aggregate amount of the bill is \$43. The first item is dated July 5, 1871, and the last July 12, 1872. The latter is the charge for drawing the contract. There is also a like bill against Baker and Smith of \$45, and one against Baker and Mears of \$6. These accounts throw light on the relation of client and counsel as it subsisted between the attorney and Baker.

§ 191. *Facts that constitute an estoppel in pais.*

With respect to Chapinan we shall let the record speak for itself. Vincent testifies: "I asked him, how is it, Chapman? I thought you owned that property" (referring to the premises in controversy). "He said, 'No; I never paid anything on it.' He said, 'Sammons has a right to rent. It is his property.' . . . I asked him how he came with the deed from Scott, and he said, 'It was only to shield Sammons; that afterwards Michael Dansmon paid the debt and the property went back to Sammons.' . . . 'When I met Bela Chapman, and he asked for Sammons and wife, he said he had drawn a deed from Sammons and wife to Belote for the premises, and wanted them to sign it.'"

Francis Sammons, a son of Sammons, the grantor to Belote, says: "A part of a house situated on that lot 3 was leased by my father to Bela Chapman, in 1851, for the purpose of storing goods, and he afterwards lived in it awhile. I collected the rent. I think he occupied it with his goods and family about three months. He never occupied or had possession of the premises at any other time, to my knowledge. He came from Mackinac when he put the goods in that house. He remained here four or five years after he came from Mackinac. He lived in Mackinac until his death. He came over to Cheboygan several times after he went to reside at Mackinac. Sometimes he would stay a week or two, visiting. At the time he lived here he was a notary public, justice of the peace, and postmaster. I know he was in the habit of drawing deeds and mortgages for any one that called on him. I don't think there was any one else here during the year 1852 and 1853 who drew deeds and mortgages but Bela Chapman in this village. My father sold the premises to William S. M. Belote. My father was in possession of the premises from 1846 until he sold to Belote."

Medard Metivier says: "I hold the office of county clerk and register of deeds for Cheboygan county; have held these offices since 1872. . . . I am in my sixtieth year. I came to live in this village in 1851. Lived here ever since, except about six years when I lived in Mackinac and Chicago during the war. I know Jacob Sammons and Bela Chapman; they are both dead. I remember being at the house of Jacob Sammons when a deed was executed by Sammons and wife to Belote. I witnessed the deed. That deed was witnessed by and acknowledged before Bela Chapman, as notary public. I think there was another deed executed by Sammons and wife to Belote, which I witnessed when Bela Chapman was present. I remember the circumstances distinctly of one deed being executed, witnessed by myself and Chapman, from the fact that the room was very dark, owing to Mrs. Sammons having very sore eyes, and we had to raise the curtain for more light. There was not any other full-grown person there, unless Mr. Belote was there, about which I cannot state positively, than Mr. and Mrs. Sammons, Mr. Chapman, and my-

self. A part of the deed which I witnessed was in print. It was an old-fashioned form of printed deed. Mr. Chapman brought the form from Mackinac or somewhere. He only had them here. I know the premises described in the bill in this cause, and Chapman ~~was~~ never in possession of them to my knowledge. I know Mr. Chapman's handwriting very well, and I remember particularly that the deeds witnessed by myself and Mr. Chapman and acknowledged before him were in his (Chapman's) handwriting, and that he drew both of them. I know one of the deeds then executed by Sammons and wife to Belote conveyed the premises in question and other property; cannot tell all of the other property."

These witnesses are unimpeached and are to be presumed unimpeachable. Their testimony is conclusive as to Chapman's relation to the property. If there could be any doubt on the point, it is removed by the fact that for \$25 he conveyed property about to be sold and which was sold by Baker to responsible parties for \$8,000. This fact alone is decisive as to the character of the transaction with respect to both parties. No honest mind can contemplate for a moment the conduct of the attorney without the strongest sense of disapprobation.

§ 192. *A quitclaim deed cannot make a bona fide purchaser.*

Chapman conveyed by deed a quitclaim to the attorney's brother. The attorney procured the deed to be so made. It was the same thing in the view of the law as if it had been made to the attorney himself. Neither of them was in any sense a *bona fide* purchaser. No one taking a quitclaim deed can stand in that relation. *May v. LeClaire*, 11 Wall., 217.

There are other obvious considerations which point to the same conclusion as a matter of fact. It is unnecessary to specify them, and we prefer not to do so.

The admissions of Chapman while he held the legal title, being contrary to his interest, are competent evidence against him and those claiming under him. He said the object of the conveyance to him was to protect the property against a creditor of Sammons. If such were the fact, the deed was declared void by the statute of Michigan against fraudulent conveyances (2 Comp. Laws of Mich., 146); and it was made so by the common law. The aid of the statute was not necessary to this result. *Clements v. Moore*, 6 Wall., 299. Nothing, therefore, passed by the deed to Chapman's grantee.

Chapman's connection with the deed from Sammons to Belote would bar him, if living, from setting up any claim at law or in equity to the premises. The facts make a complete case of *estoppel in pais*. This subject was fully examined in *Dickerson v. Colgrove*, 100 U. S., 578. We need not go over the same ground again. See, also, *City of Cincinnati v. The Lessee of White*, 6 Pet., 431 (DEDICATION, §§ 52-59); *Doe v. Rosser*, 3 East, 15; and *Brown v. Wheeler*, 17 Conn., 353. If Chapman had nothing to convey, his grantee could take nothing by the deed. The latter is in exactly the situation the former would occupy if he were living and were a party to this litigation. The estoppel was conclusive in favor of Belote and those claiming under him, and this complainant has a right to insist upon it.

§ 193. *When an attorney holds as trustee for his client.*

But there is another and a higher ground upon which our judgment may be rested. The relation of client and counsel subsisted between the attorney and Baker. The employment to draw the contract with Hurd & Smith was not a solitary instance of professional service which the latter was called upon to

render to the former. The bills of the attorney found in the record show the duration of the connection and the extent and variety of the items charged and paid for. They indicate a continuous understanding and consequent employment. Undoubtedly either party had the right to terminate the connection at any time; and if it were done, the other would have had no right to complain. But, until this occurred, the confidence manifested by the client gave him the right to expect a corresponding return of zeal, diligence and good faith on the part of the attorney.

The employment to draw the contract was sufficient alone to put the parties in this relation to each other. *Galbraith v. Elder*, 8 Watts (Pa.), 81; *Smith v. Brotherline*, 62 Pa. St., 461. But whether the relation subsisted previously or was created only for the purpose of the particular transaction in question, it carried with it the same consequences. *Williamson v. Moriarty*, 19 Weekly Rep., 818. It is the duty of an attorney to advise the client promptly whenever he has any information to give which it is important the client should receive. *Hoops v. Burnett*, 26 Miss., 428; *Jett v. Hempstead*, 25 Ark., 462; *Fox v. Cooper*, 2 Q. B., 827.

In *Taylor v. Blacklow*, 3 Bing. (N. C.), 235, an attorney employed to raise money on a mortgage learned the existence of certain defects in his client's title and disclosed them to another person. As a consequence his client was subjected to litigation and otherwise injured. It was held that an action would lie against the attorney and that the client was entitled to recover. In *Com. Dig.*, tit. "Action upon the case for a deceit, A., 5," it is said that such an action lies "if a man, being intrusted in his profession, deceive him who intrusted him; as if a man retained of counsel became afterwards of counsel with the other party in the same cause, or discover the evidence or secrets of the cause. So if an attorney act deceptive to the prejudice of his client, as if by collusion with the demandant he make default in a real action whereby the land is lost."

It has been held that if counsel be retained to defend a particular title to real estate he can never thereafter, unless his client consent, buy the opposing title without holding it in trust for those then having the title he was employed to sustain. *Henry v. Raiman*, 25 Pa. St., 354. Without expressing any opinion as to the soundness of this case with respect to the extent to which the principle of trusteeship is asserted, it may be laid down as a general rule that an attorney can in no case, without the client's consent, buy and hold otherwise than in trust, any adverse title or interest touching the thing to which his employment relates. He cannot in such a way put himself in an adversary position without this result. The cases to this effect are very numerous and they are all in harmony. We refer to a few of them. *Smith v. Brotherline*, 62 Pa. St., 461; *Davis v. Smith*, 43 Vt., 269; *Wheeler v. Willard*, 44 id., 641; *Giddings v. Eastman*, 5 Paige (N. Y.), 561; *Moore v. Bracken*, 27 Ill., 23; *Harper v. Perry*, 28 Wis., 57; *Hockenbury v. Carlisle*, 5 Watts & S., 348; *Hobedy v. Peters*, 6 Jurist, pt. 1, 1,794; *Jett v. Hempstead*, 25 Ark., 462; *Case v. Carroll*, 35 N. Y., 335; *Lewis v. Hillman*, 3 H. L. Cas., 607.

The same principle is applied in cases other than those of attorney and client. Where there are several joint lessees, and one of them procures a renewal of the lease to himself, the renewal inures equally to the benefit of all the original lessees. *Burrell v. Bull*, 3 Sandf., Ch., 15. Where there are two joint devisees, and one of them buys up a paramount outstanding title, he holds it in trust for the other to the extent of his interest in the property, the *ces-*

tui que trust refunding his proportion of the purchase money. *Van Horne v. Fonda*, 5 Johns., Ch., 388.

Where a surety takes up the obligation of himself and principal, he can enforce it only to the extent of what he paid and interest. *Reed v. Norris*, 2 Myl. & Cr., 361. Where a lessee had made valuable improvements pursuant to the requirements of his lease, and procured an adverse title intending to hold the premises in his own right, it was held that he was a trustee and entitled only to be paid what the title cost him. *Cleavinger v. Reimar*, 3 Watts & S., 486.

The case in hand is peculiarly a fit one for the application of the principle we have been considering. It is always dangerous for counsel to undertake to act, in regard to the same thing, for parties whose interests are diverse. Such a case requires care and circumspection on his part. Here there could be no objection, there being no apparent conflict of interests, but upon discovering that the title was imperfect it was the duty of the attorney promptly to report the result to Baker as well as to Hurd & Smith, and to advise with the former, if it were desired, as to the best mode of curing the defect. Instead of doing this he carefully concealed the facts from Baker, gave Hurd & Smith the choice of buying, and, upon their declining, bought the property for himself, and has since been engaged in a bitter litigation to wrest it from Baker. For his lapse at the outset there might be some excuse, but for his conduct subsequently there can be none. Both are condemned alike by sound ethics and the law. They are the same upon the subject. Actual fraud in such cases is not necessary to give the client a right to redress. A breach of duty is "constructive fraud," and is sufficient. *Story*, Eq. Jur., secs. 258, 311.

The legal profession is found wherever Christian civilization exists. Without it society could not well go on. But, like all other great instrumentalities, it may be potent for evil as well as for good. Hence the importance of keeping it on the high plane it ought to occupy. Its character depends upon the conduct of its members. They are officers of the law, as well as the agents of those by whom they are employed. Their fidelity is guarantied by the highest considerations of honor and good faith, and to these is superadded the sanction of an oath. The slightest divergence from rectitude involves the breach of all these obligations. None are more honored or more deserving than those of the brotherhood who, uniting ability with integrity, prove faithful to their trusts and worthy of the confidence reposed in them. Courts of justice can best serve both the public and the profession by applying firmly upon all proper occasions the salutary rules which have been established for their government in doing the business of their clients.

We shall discharge that duty in this instance by reversing the decree of the circuit court and remanding the case, with directions to enter a decree whereby it shall be required that the complainant, Baker, deposit in the clerk's office for the use of the defendant, George P. Humphrey, the sum of \$25, and that Humphrey thereupon convey to Baker the premises described in the bill, and that the deed contain a covenant against the grantor's own acts, and against the demands of all other persons claiming under him; and it is so ordered.

§ 194. General principles.—A court of equity will never interfere in opposition to conscience or good faith, nor to remedy the consequences of laches or neglect or want of reasonable diligence, nor where the party seeking relief does not come in with clean hands. *Creath v. Sims*, 5 How., 192 (§§ 2081-84).

§ 195. No relief in equity can be given on the basis of an agreement entered into since the

commencement of the suit, unless it is brought to the notice of the court by a supplemental bill. *Hobson v. McArthur*, 16 Pet., 182.

§ 196. Want of interest in the plaintiff in the subject of a bill in equity is fatal to the bill. *Nicholas v. Anderson*, 8 Wheat., 365.

§ 197. The principle, that where doubt exists chancery will not decree, does not refer to a particular fact in the cause, as the execution of the contract, but to the terms of the contract on which the decree is asked. Where these are doubtful chancery cannot aid. It will only carry into effect the intention of the parties, and this intention must appear from the contract. *Walton v. Coulson*, 1 McL., 120.

§ 198. It is conformable to the rule of proceedings in chancery to decree as between defendants where they set up conflicting rights. *Piatt v. Oliver*, 3 McL., 27.

§ 199. Parties to a bill praying specific relief will be held to have made an election if there be alternative remedies. *Ibid.*

§ 200. One of two persons having equal equities is justifiable in obtaining a priority by buying in the legal estate. *Fitzsimmons v. Ogden*, 7 Cr., 2.

§ 201. The purchaser of an equitable interest purchases at his peril, and takes the property burdened with every prior equity charged upon it. *Shirras v. Caig*, 7 Cr., 34 (Conv., §§ 556-58).

§ 202. Under a prayer for general relief, other relief may be granted than that which is particularly prayed for. But such relief must be agreeable to the case made by the bill. *English v. Foxall*, 2 Pet., 595.

§ 203. A court of equity will never interfere merely to settle equities between a debtor and his debtor, upon a bare possibility that a resort may ultimately be had to the latter. *United States v. Myers*, 2 Marsh., 516 (§§ 933-41).

§ 204. The forms of proceeding in a court of equity are flexible to suit the different postures of cases. It can adapt its decree to all the varieties of circumstances which may arise, and adjust it to all the peculiar rights of all the parties in interest. It may model the remedy so as to suit it to controlling equities and the real and substantial rights of the parties. In adapting its decree to the special circumstances of a case, a court of equity will adjust all cross equities, when all the parties in interest are before the court, so as to prevent multiplicity of suits. *Harvey v. Allen*, 16 Blatch., 29 (BANKS, NAT., §§ 266-68).

§ 205. When a party is obliged to ask the aid of a court of equity to enforce his legal rights, the court will compel him to do equity, and will only grant him relief to the extent of his legal rights. Thus where the consignees of a cargo, which had been seized by a foreign government before it came into their possession, brought a bill in equity to restrain the defendant from receiving and the United States from paying to the defendant the amount awarded as indemnity for the seizure under the French treaty of July 4, 1831, and to detain the whole fund for payment of their alleged services and expenses rendered about the cargo for the benefit of the shippers, it was held that the plaintiff's equity extended only to a portion of the fund sufficient for his claims for services and expenses, and that, as the amount of such services and expenses was nowhere alleged, the injunction could not be granted. *Ridgway v. Hays*, 5 Cr. C. C., 23.

§ 206. The courts of the United States cannot exercise any equity powers, except such as are conferred by an act of congress, and those judicial powers which the high court of chancery in England under its judicial capacity, as a court of equity, possessed and exercised at the time of the formation of the constitution of the United States. Powers, not judicial, exercised by the chancellor as the representative of the sovereign and by virtue of the king's prerogative as *parens patriæ*, are not possessed by the circuit courts. Consequently, whenever, by reason of citizenship or otherwise, a cause is brought before the federal tribunals, involving the validity of a bequest or devise to charitable uses, the question to be considered always is, whether it would be valid in the courts of the state. *Loring v. Marsh*, 2 Cliff., 469.

§ 207. In a suit in equity, the plaintiff can recover only on the case made in his bill, and not upon that made in the evidence. *Battle v. Mutual L. Ins. Co. of New York*, 10 Blatch., 417.

§ 208. The relief granted must always be consistent with the allegations of the bill. If a bill seeks to avoid a sale made by a trustee under a deed of trust, and does not ask for a decree for the surplus money in the hands of the trustee, arising from the sale after satisfying the debt, the plaintiff is not entitled to such a decree under the prayer for general relief. *Connolly v. Belt*, 5 Cr. C. C., 405.

§ 209. Equity acts on equitable rights by equitable remedies, and on legal rights for which the law provides no remedy, or none so adequate as equity. It does not administer legal remedies for legal rights. *Brent v. Bank of Washington*, 10 Pet., 613.

§ 210. When a court of equity holds that the complainant seeking to set aside a conveyance of certain property has no title to the property, it will not retain jurisdiction to settle controversies between the defendants with respect to their priorities in reference to such property, they being all residents of the state and district. *Smith v. Little*, 5 Biss., 490.

§ 211. A party who sets up an alleged fraud as a defense in an action at law is precluded from setting it up in a suit in equity between the same parties relating to the same subject-matter. *Blanchard v. Brown*, 3 Wall., 249.

§ 212. The description of a person as "executrix" is not material in equity where the person is clearly distinguished. *Gratz v. Cohen*, 11 How., 1.

§ 213. In investigating and decreeing on titles, the federal courts must deal with them as they find them, and accommodate their modes of proceeding in a considerable degree to the nature of the case and the character of the equities involved in the controversy, so as to give effect to state legislation and state policy, not departing, however, from what legitimately belongs to the practice of a court of chancery. *Clark v. Smith*, 18 Pet., 204.

§ 214. A court of equity will not relieve a party in a position which he has voluntarily assumed, with a full knowledge of its perils. *Camblos v. Phil. & Reading R. Co.*, * 4 Brewster, 563.

§ 215. Gross inadequacy of price may be sufficient to invalidate a bargain in equity. *Vint v. Heirs of King*, * 2 Am. L. Reg. (O. S.), 712.

§ 216. Where no answer is made to a bill in equity, the case is to be decided upon the title and equity apparent upon its face. *Terrett v. Taylor*, 9 Cr., 43.

§ 217. Equity cannot relieve where it is impossible to place the parties in the same situation, and when the real fault is imputable to the person praying the aid of the court. *Pratt v. Carroll*, 8 Cr., 471.

§ 218. A court of equity cannot decree to any plaintiff, whatever he may prove, more than he asks in his bill. *Simms v. Guthrie*, 9 Cr., 19.

§ 219. It is the province of a court of chancery to enforce contracts fairly entered into, but not to make contracts for parties where they have made none, nor enforce them when uncertain. It cannot enforce a contract which has been rescinded by the parties. *Oakley v. Ballard*, Hemp., 475.

§ 220. A court of equity cannot decree against the legal and express stipulation of the parties in their contract. *Hollingsworth v. Fry*, 4 Dall., 345.

§ 221. The rules of equity are as fixed as those of law, and the supreme court can no more depart from the former than the latter. Unless the complainant in a suit in equity shows a right to relief in equity, he can have no relief in the proceeding, however clear his rights at law may be. *Wright v. Ellison*, 1 Wall., 16.

§ 222. Concurrent jurisdiction.—Where courts have concurrent jurisdiction, and there is no special reason for the interference of equity rather than law, a court of equity will not dismiss a suit at law when the only result would be to require a new suit for the same cause in equity. *Gibbs v. Usher*, * 1 Holmes, 348.

§ 223. The fact that an assignee in bankruptcy may recover, by an action at law, money fraudulently paid by the bankrupt to obtain the signature of creditors to a composition agreement, does not prevent a remedy in equity, this being one of the cases of concurrent jurisdiction in which the remedy was originally in equity only. *Bean v. Brookmire*, 1 Dill., 151.

§ 224. Innocent purchaser.—The doctrine of purchaser for a valuable consideration, without notice, can only be used in defense of a legal title against an equity. It cannot be used as a substantial ground of relief for a plaintiff in equity against an equity. *Holbrook v. Fauquier and Alexandria Turnpike Co.*, 3 Cr. C. C., 425.

§ 225. It is a rule in equity that a purchaser of trust property without notice of the facts which constitute the breach of trust on the part of the vendor, to be entitled to protection, must not only be so at the time of the contract or conveyance, but at the time of the payment of the purchase money. *Wormley v. Wormley*, 8 Wheat., 421.

§ 226. Where a bill in equity to set aside a conveyance made by the plaintiff asserted that it had been procured by fraud and imposition upon the plaintiff, and one of the defendants pleaded that he was a *bona fide* purchaser, without notice, of a part of the premises, and that he had paid a part of the purchase money, and the residue was secured by a mortgage, it was held that to make the plea good it should assert that the whole consideration of the purchase had been paid before notice of the plaintiff's title. *Wood v. Mann*, 1 Sumn., 506.

§ 227. Where a deed is made directly to a purchaser at judicial sale, a purchaser from him without notice of any trust or equity must be regarded as an innocent purchaser. *Cushing v. Smith*, * 3 Story, 585.

§ 228. An innocent purchaser in good faith is protected in equity against one who has a prior equity, because a court of equity can only act on the conscience, and if a party has done nothing to taint it, no demand can attach upon it so as to give any jurisdiction. *Boone v. Chiles*, 10 Pet., 210.

§ 229. Improvements—*Bona fide* possessor.—Where the true owner of an estate, after a recovery thereof at law, from a *bona fide* possessor for a valuable consideration without notice, seeks an account in equity, as plaintiff, against the possessor, for rents and profits, equity will allow such possessor to deduct therefrom the full amount of all the meliorations and improve-

ments, which he has beneficially made upon the estate, and thus recoup them from the rents and profits. But whether courts of equity will grant active relief in favor of such a *bona fide* possessor, making permanent improvements and meliorations, by sustaining a bill brought by him therefor, against the true owner, after recovery of the premises at law, is not finally determined in this case, though the court is of opinion that such relief ought to be granted. *Bright v. Boyd*, 1 Story, 478.

§ 230. *Innocent purchaser from agent.*—A principal employed an agent to build for him a vessel, and furnished the means with which to build it. For purposes of his own, the principal concealed his own interest in the vessel, and the contracts for construction were made in the name of the agent, and the builder's certificate taken, and the enrollment at the custom house made, in the name of the agent as owner. On the completion of the vessel, the agent sold it to *bona fide* purchasers who had no knowledge of the equitable title of the real owner. *Held*, on a bill filed to recover the vessel, that the purchasers had a superior equity to the real owner. *Calais Steamboat Co. v. Scudder*, 2 Black, 872.

§ 231. Where a party purchases property from a fraudulent holder, he takes it subject to the same legal and equitable remedies that could be enforced against it in the hands of his vendor. *Rateau v. Bernard*,* 8 Blatch., 248.

§ 232. *Constructive notice—Possession.*—It is a rule in equity that where a tenant or other person is in the possession of an estate at the time it is sold, the purchaser is put on inquiry as to his title. But courts of equity in this country, where the registration of deeds as matters of title is universally provided for, are not inclined to enlarge this doctrine of constructive notice; or to follow all of the English cases on the subject, except with a cautious attention to their just application to the circumstances of our own country and the structure of our laws. *Flagg v. Mann*,* 2 Sumn., 486.

§ 233. *Penalties and forfeitures.*—A court of equity does not enforce forfeitures or penalties, unless expressly directed by statute to do so. *Stevens v. Cady*, 2 Curt., 200.

§ 234. Equity will relieve against forfeitures and penalties, but this relief will not be extended against the positive stipulation and understanding of the parties. *Longworth v. Taylor*, 1 McL., 395.

§ 235. Although a court of equity will not lend its aid to an illegal or unconscionable bargain, it will not add to the penalties declared by a law forbidding usury. *DeWolf v. Johnson*, 10 Wheat., 367.

§ 236. Equity never, under any circumstances, lends its aid to enforce a forfeiture or a penalty, or anything in the nature of either. *Marshall v. Vicksburg*, 15 Wall., 149.

§ 237. Where a railroad company, to secure certain bonds, made a deed of trust of all its property, the terms of which deed, on the failure to pay any part of the installment of interest, subjected the company to the payment of the whole debt, amounting to several millions of dollars, not payable except under default for many years, and also to a sale of the property at auction on short notice; and the trustee, on default being made, filed a bill to foreclose instead of ordering a sale at auction, it was held that the jurisdiction of equity being thus invoked, the court would look into the facts and exercise an equitable discretion, and not enforce the penalty of the deed where it would be unjust and ruinous. *Williamson v. New Albany, etc., R. Co.*, 1 Biss., 193 (Conv., §§ 1514-18).

§ 238. The stipulation in a life insurance policy, for the forfeiture of the policy for default of punctual payment of the premiums, is of the very essence of the contract, and a court of equity will not relieve against the forfeiture by holding the company to its promise to pay the insurance, notwithstanding the default of the assured to make punctual payment of the premiums. *Klein v. Insurance Co.*, 14 Otto, 88.

§ 239. Courts of equity have power to give relief against a forfeiture for the nonpayment of rent reserved in a lease. They are governed by the same rules in the exercise of this jurisdiction as courts of law. All arrears of rent, interest, and costs must be paid or tendered. The grounds upon which the court proceeds are, that the rent is the object of the parties, and the forfeiture only an incident intended to secure its payment; that the measure of damages is fixed and certain, and that when the principal and interest are paid the compensation is complete. *Sheets v. Selden*, 7 Wall., 416.

§ 240. Where an insurance policy provided that the policy should cease on failure of the insured to pay annually in advance the interest on any unpaid notes or loans on account of premiums, it was decided that a court of equity would relieve against the forfeiture of the policy where it had been incurred. *Anderson v. St. Louis M. L. Ins. Co.*, 1 Flip., 559.

§ 241. Where a policy of insurance declares in unambiguous terms that the premiums must be paid on the day they fall due or the policy will be void, it seems that a court of equity will not relieve against the forfeiture, even if the nonpayment is occasioned by payment becoming illegal, or by impossibility arising from the act of God. *Tait v. New York Life Ins. Co.*, 1 Flip., 238.

§ 242. **Illegal transaction.**—Equity will not enforce a judgment recovered upon a prize ticket in a lottery drawn unlawfully, though by mistake and in good faith, in a jurisdiction where it was illegal and contrary to statute to draw such lottery. *Smith v. Chesapeake & Ohio Canal Co.*, * 5 Cr. C. C., 563.

§ 243. A court of equity will not refuse to deal with property and to dispose of it according to the rights of the parties because it has been acquired under an illegal contract. *Western Union Tel. Co. v. Union Pac. R'y Co.*, 1 McC., 558 (CORP., §§ 890-92).

§ 244. The directors of a railroad company executed a contract by which they transferred to a construction company substantially all the property of the corporation by way of mortgage, and employed it to construct its road. In order to secure the contract the construction company took two of the directors of the corporation into their firm, giving them an interest in the contract, and agreeing to pay each of the other directors a pecuniary consideration for making the contract. The contract was held to be so clearly illegal, against public policy, and vicious, that a court of equity would not enforce it or grant relief upon it. *Thomas v. Brownsville, etc.*, R. Co., 1 McC., 392 (CONTRACTS, §§ 575-77).

§ 245. The complainant, who had made a contract with a public agent, a deputy quartermaster-general, to an amount exceeding \$50,000, in the profits of which the agent was to participate, joined with the agent in attempting to impose false measures upon the government, and, after the discovery of the fraud by the accounting officers, filed a bill in equity to compel an alleged partner in the transaction to account for one-half of a loss sustained by an unsuccessful attempt to impose spurious vouchers upon the government. The bill was dismissed on the ground that a court of equity would not interfere in such a fraudulent transaction. *Bartle v. Nutt*, 4 Pet., 184 (CONTRACTS, § 548).

§ 246. Equity will not lend its aid to enforce an agreement made with intent that it shall operate as a fraud upon the private rights and interests of third parties. So one of several joint tortfeasors, who has entered into a secret agreement with the plaintiff, pending a suit against himself and the others, by which he is not to defend the suit, and his property is not to be subjected to levy, will not be allowed, in equity, to enforce the performance of the contract. *Selz v. Unna*, 6 Wall., 335.

§ 247. **Partnership.**—In equity real estate purchased by a partnership is considered as personal property for the purposes of paying the partnership debts. *Piatt v. Oliver*, 3 McL., 27.

§ 248. In equity it is immaterial whether the title to lands purchased by a commercial partnership for partnership purposes is taken in the name of one or all the partners, as equity considers the holder of the legal title in such a case as trustee for the other partners. *Lyman v. Lyman*, 2 Paine, 11.

§ 249. Where one of several partners engaged in a voyage on joint account, authorized by the others to draw bills of exchange on the credit of the firm, drew one directing it to be charged to the account of all the partners, but signed it in his own name only, on non-acceptance and protest and notice, it was held that equity would enforce payment in favor of the payee against all the partners, the money for which the bill was given having been taken up and actually applied for the joint account and benefit of all the concern. *Van Reimsdyk v. Kane*, 1 Gall., 630.

§ 250. Equity will enforce payment of a bill of exchange drawn by a partnership against the executors of a deceased partner, where the survivors are insolvent, the liability of the drawers having become fixed by protest and notice. The estate of the deceased partner is liable for the whole, and no decree need be made against the insolvent survivors. *Ibid.*

§ 251. A bill in equity lies to settle up the accounts of a partnership, and is a more suitable and convenient proceeding than the common law action of account. *Spear v. Newell*, 2 Paine, 267.

§ 252. Where a member of a firm had used partnership funds in the purchase of land for a residence for himself, under circumstances which would not support a resulting trust in favor of his copartners, but subsequently, on becoming indebted to them, agreed in writing to stand seized to their use, and also executed a deed of trust to the property for the benefit of other creditors, it was held, on a bill in equity by his copartners, that the promise made to the complainants and the conveyance to the trustees being both in consideration of pre-existing debts, the equities of each were equal, and that the court would not take from the trustees the legal advantage which they had secured by their vigilance. *Philips v. Crammond*, 2 Wash., 441.

§ 253. If one partner use partnership funds in the purchase of land which he procures to be conveyed to himself, he is treated in equity as a trustee for the firm. *Ibid.*

§ 254. Where, upon the formation of a partnership, an individual debt is assumed by the firm and made payable out of the partnership fund, it becomes in equity a debt of the firm. *Finley v. Lynn*, 6 Cr., 238.

§ 255. **Specific performance.**—For a court to grant a specific performance of a contract, it is imperative that the party required to perform, or who holds the legal title, should be before the court. *Preston v. Walsh*,* 10 Fed. R., 815.

§ 256. Equity will not decree the specific performance of unfair and unreasonable contracts. *City of Memphis v. Brown*, 1 Flip., 189.

§ 257. A bill for specific performance is addressed to the sound discretion of a court of equity. *Vint v. Heirs of King*,* 2 Am. L. Reg. (O. S.), 712.

§ 258. He who seeks equity must do equity; and where specific performance is sought, the court will require the party who seeks it to show a performance or readiness to perform on his part, or a default on the other side which utterly excuses him. *McNeil v. Magee*, 5 Mason, 244 (ARB., §§ 171-84).

§ 259. Equity will not do a vain and imperfect act, nor enforce a specific performance, when it will work injustice. *Tobey v. County of Bristol*, 3 Story, 800 (ARB., §§ 63-71).

§ 260. A court of equity cannot enforce specific performance of an agreement to submit matters to arbitration. But it can enforce awards when made. *Ibid.*

§ 261. That the claim of a creditor of the estate of a decedent for a part of the proceeds of a life insurance policy, on the ground that the policy had been pledged to the claimant by the testator to secure a debt, has been rejected by the probate court because the pledge had never been delivered, does not prevent the claimant from coming into equity to enforce a specific performance of the contract to deliver the pledge. *Myers v. D'Meza*, 2 Woods, 160 (BAILM., §§ 51, 52).

§ 262. On a bill to enforce specifically an agreement to iron and equip a certain part of a railroad, it was held to be a matter of discretion with the court whether it would decree a specific performance or leave the parties to their remedy at law, and that equity would always remit the parties to their remedy at law when such remedy is plain, adequate and complete. *Fallon v. Railroad Co.*, 1 Dill., 121 (CONTRACTS, §§ 1484-85).

§ 263. Although a contract be incapable of being enforced specifically, because such would require the performance of continuous duties involving the exercise of skill, personal labor and cultivated judgment, yet this will not prevent its negative enforcement by enjoining its breach. *Western Union Tel. Co. v. Union Pacific R'y Co.*, 1 McC., 558 (CORP., §§ 890-92).

§ 264. The purchaser of a horse agreed by bond to pay the seller £100 within twelve months; otherwise, in lieu thereof, he agreed to make over his title to certain land. Held, (1) that the land was not intended to operate as a penalty so as to prevent an enforcement in equity of the agreement to convey the land, nor as a security, but that it might be conveyed by the obligor in lieu of money at his election; and (2) that an election to convey the land having been made by the obligor, the contract must be enforced specifically by compelling a conveyance of the land. *Walton v. Coulson*, 1 McL., 120.

§ 265. It cannot be objected to the specific performance of a contract that the court cannot decree a specific performance of a contract by a husband to convey property of his wife, where it is not yet determined whether the property belongs to the wife as against the purchaser; nor that the court will not decree a performance which would be a breach of trust, where it is yet to be determined whether the trust is not void as against the complainant. *Robinson v. Cathcart*,* 2 Cr. C. C., 590.

§ 266. A representation of an opinion, upon a subject respecting which the purchaser is as competent as the seller to judge, such as of the value of the land, if honestly made, cannot, if it prove to be incorrect, be considered as such a misrepresentation of a material fact as should prevent a decree for specific performance of the contract. *Robinson v. Cathcart*,* 3 Cr. C. C., 377.

§ 267. Whenever a defendant in equity asks to be relieved from his contract, he ought to show that the contract was made in good faith on his part, and not claim relief on the very ground of his own fraud. It was so held where a vendee of land who had agreed to procure an assignment of a Spanish claim to the vendor to secure the payment of the purchase money, resisted a specific performance of the contract asked for by the vendor, on the ground that (unknown to the vendor) he had assigned the claim in trust for his wife before the making of the contract. *Ibid.*

§ 268. The statute of 27 Elizabeth, c. 4, receives the same construction in equity as at law; and a purchaser of an equitable estate for a valuable consideration, though with notice, is no more affected by a voluntary settlement than a purchaser of a legal estate. *Ibid.*; S. C.,* 2 Cr. C. C., 590.

§ 269. A purchaser of land agreed to procure an assignment of a Spanish claim to the vendor to secure the payment of the purchase money. Prior to this time the purchaser had, unknown to the vendor, made a voluntary assignment of this claim in trust for his wife. It was held that such voluntary settlement was void as against the vendor, under the statute of Elizabeth, and was no cause for refusing a specific performance at the instance of the vendor. *Ibid.*

§ 270. The parol evidence which is to control the plain legal import and construction of a written instrument, if admissible at all, which perhaps it may be in showing cause against a decree for specific performance, should be very clear, strong and explicit, and not dependent on mere inferences drawn from equivocal expressions recollected some years after the transaction. *Ibid.*

§ 271. A court of equity will not refuse specific performance on the ground of inadequacy of the price paid, except in a case of glaring hardship; for the court will not estimate the speculations of the parties, but will deem them the best judges of their own views, and will compel a specific performance, though they may be eventually disappointed in their expectations. *Ibid.*

§ 272. A failure in a speculation forms no ground to resist a specific performance. And the court will decree a performance, although the parties may eventually be disappointed in their expectations. The court will deem the parties to be the best judges of their own views, and the instances are rare in which the relief will be refused on the ground that the bargain is a hard one. *Robinson v. Cathcart*, * 2 Cr. C. C., 590.

§ 273. Loose averments as to representations by the vendor of land, not amounting to allegations of fraud, were held insufficient in this case to justify a refusal of a decree for specific performance asked for by the vendor. *Ibid.*

§ 274. A court of equity may decree specific execution of a contract to give collateral security. It was so held where a vendor sought the specific execution of a contract to purchase land, where the vendee had hypothecated a certain claim under a Spanish treaty for the payment of the purchase money, and an injunction granted against the payment of the claim to another was sought to be dissolved. *Ibid.*

§ 275. Suits by stockholders.—Whenever the course pursued by a corporate body would amount to a breach of trust, or be a violation of the chartered rights of stockholders, and there exists no adequate remedy at law, a court of equity will interfere at the suit of a single stockholder. *City of Wheeling v. Mayor of Baltimore*, 1 Hughes, 95. See CORPORATIONS.

§ 276. A bill was filed by a stockholder in a corporation, alleging that the stock held by him had been illegally issued, praying that the illegality might be inquired into, that a receiver be appointed, and that the company might be enjoined from disposing of so much of its property as would indemnify the plaintiff. It appearing that the money received by the company had been mingled with its general funds, and could not be traced, the prayer for an injunction and a receiver was refused. *Whelpley v. Erie R'y Co.*, * 6 Blatch., 271.

§ 277. In such cases the defrauded party must come in as a general creditor, and is not entitled to priority over other creditors. *Ibid.*

§ 278. To enable a stockholder in a corporation to sue in equity in his own name, on a cause of action existing in the corporation, and for which the corporation would be the proper plaintiff, there must be some action or threatened action by the directors which is beyond the powers conferred on them by charter, or a fraudulent combination among them, or with others, which will injure the corporate interests, or action by the directors which is destructive of the corporation or of the rights of other shareholders, or concerted action by a majority of the shareholders to oppress and defraud the minority. (*Dodge v. Woolsey*, 18 How., 331, examined.) *Haves v. Oakland*, 14 Otto, 460 (Corp., §§ 574-77).

§ 279. Where corporate rights or interests are affected in any way wrongfully or injuriously, they must, unless some special ground be shown, be asserted and defended both at law and in equity in the corporate name. Stockholders, therefore, cannot maintain a writ to enjoin a judgment against the corporation, on the ground that it is a fraud upon the company, no fraud or collusion between the judgment creditors and the company being shown. *Bradley v. Richardson*, * 2 Blatch., 848.

§ 280. The principle that a stockholder of a corporation cannot maintain a bill in equity against a wrong-doer to prevent an injury to the corporation, unless it shall be averred and appear that the corporation has refused to take measures to protect itself, does not extend to a bill which is in good faith filed by a creditor. *Lothrop v. Stedman*, 18 Blatch., 134.

§ 281. Where a bill in equity by a stockholder against the corporation to restrain the issue of stock and to enjoin certain officers from further exercising the powers of directors, for the commission of breaches of trust, sets out acts *ultra vires* in issuing stock, and breaches of trust which are frauds on the stockholders, such acts and breaches of trust being beyond the power of the corporation or its directors to affirm or sanction, or make good, it is not necessary that there should have been an application to the corporation or its directors to bring the suit. *Heath v. Erie R'y Co.*, 8 Blatch., 847.

§ 282. To enable a stockholder in a corporation to sustain in a court of equity in his own name, a suit founded on a right of action existing in the corporation itself, and in which the corporation itself is the appropriate plaintiff, there must exist as a foundation for the suit, some action or threatened action of the managing board of directors or trustees of the cor-

poration which is beyond the authority conferred on them by the charter or other source of organization; or such a fraudulent transaction completed or contemplated by the acting managers, in connection with some other party, or among themselves, or with other shareholders, as will result in serious injury to the corporation, or to the interests of the other shareholders; or it must be a case where the board of directors, or a majority of them, are acting for their own interest, in a manner destructive to the corporation itself, or to the rights of the other shareholders; or where the majority of the shareholders themselves are oppressively and illegally pursuing a course in the name of the corporation, which is in violation of the rights of the other shareholders, and which can only be restrained by the aid of a court of equity. But, in addition to these grievances, the stockholder must show to the satisfaction of the court that he has exhausted all the means within his reach to obtain, within the corporation itself, the redress of his grievances, or action in conformity with his wishes. *Hawes v. Oakland*, 14 Otto, 450 (CORP., §§ 574-77).

§ 283. Where a bill in equity is filed for the purpose of foreclosure of a mortgage upon a railroad, the court of equity may, in its discretion, permit a stockholder to become a party defendant for the purpose of protecting his own interests against illegal and unfounded claims against the company, where it is charged that the directors refused to appear and defend the bill for the fraudulent purpose of sacrificing the interests of the stockholders. *Bronson v. La Crosse R. Co.*, 2 Wall., 283 (CONTRACTS, §§ 1460-66).

§ 284. Where a stockholder of an insurance company which is in bankruptcy brings a bill in equity against the assignee in bankruptcy to set off his claims against the company for losses on policies of insurance against his liability on unpaid subscriptions to the capital stock, and his indebtedness to the company for money deposited with him, and to enjoin the prosecution of suits at law against him by the assignee, he should first do equity by making good his share of the capital stock, on the strength of which the company obtained its credit and was enabled to start in business. *Scammon v. Kimball*, 5 Biss., 431 (CORP., §§ 220-24).

§ 285. Vendor and vendee.—It is a principle well settled in chancery that where a person purchases a title known at the time by him to be defective, he cannot afterwards object to it on account of such defect. *McKay v. Carrington*, 1 McL., 50 (§§ 801-11). See LAND.

§ 286. Chancery will never interpose its powers to carry into effect a contract where it will give the purchaser the property greatly deteriorated from the value it bore at the time he should have received it. *Ibid.*

§ 287. It is only between equal equities that the rule, "*prior in tempore, potior in jure*," applies. And a vendor, to whom a claim in favor of the vendee has been pledged for the payment of the purchase money, has a superior equity to the wife of the vendee, for whose benefit the claim has been previously assigned in trust, voluntarily, without consideration, and without the knowledge of the vendor. Such a vendor stands, with reference to such voluntary conveyance, in the position of a subsequent purchaser for a valuable consideration without notice. *Robinson v. Cathcart*,* 2 Cr. C. C., 590.

§ 288. Where there had been a valid contract for the sale of lands and the purchaser had taken possession and made valuable improvements, but before the deed was made or the purchase money paid, a judgment was obtained against the vendor, it was held, on a bill filed by the purchaser to restrain the judgment creditor from proceeding on execution to obtain satisfaction out of the land, that equity would protect the equitable right of the purchaser against the strict technical legal right of the judgment creditor, since justice could be done to both. The sale having been for the full value of the land, and receipt of the purchase money being equally as beneficial to the judgment creditor as execution of his judgment against the land, an injunction was granted protecting the complainants against the judgment on payment of the purchase money into court. *Lane v. Ludlow*, 2 Paine, 591.

§ 289. Equity will not permit a person to purchase a piece of property for a purpose, and having held the title for several years without paying anything, and having accomplished that purpose, to avoid payment of the purchase money upon the pretense of defects of title, and throw the property back into the hands of the vendor. *Noonan v. Lee*, 2 Black, 500.

§ 290. Where there has been a valid agreement to sell lands, equity considers the seller as a trustee for the purchaser, until the deed is made. *Lane v. Ludlow*, 2 Paine, 591.

§ 291. Where, in a suit for specific performance, if the contract had been strictly performed by the vendor by making the conveyance, he would have stood in the character of a mortgagee, the vendee having stipulated to give a mortgage for the unpaid purchase money, equity, in treating that as done which ought to have been done, will treat the vendor as a mortgagee. *Taylor v. Longworth*, 14 Pet., 172.

§ 292. If a party has done all that could reasonably be expected of him to perform his part of an agreement, it will be considered in equity as having been done. Thus, where one purchases land from the agent of a foreign principal, and pays all the purchase money except a small sum, which the agent refuses to receive on account of rumors of the death of his prin-

cial, the purchaser cannot be deprived of his land on account of the failure to pay the balance due. *Dolton v. Cain*, 14 Wall., 472.

§ 298. Where a vendor sells two separate pieces of land to the same vendee, and retains the legal title, and the vendee comes into equity to obtain the legal title to the piece upon which he has paid the purchase money, he must do equity by paying the purchase money for the other lot also. *Bank of Columbia v. Dunlop*, 8 Cr. C. C., 414.

§ 294. A. conveyed the equitable title to certain lands to B., in consideration of a bond given by B. to convey to A. other unsurveyed lands to be chosen by A. A. afterwards acquired the legal title to the lands, the equitable interest in which he had conveyed, and permitted a portion of the lands to be lost by nonpayment of taxes. It was held that A. was not entitled to the aid of a court of equity to enforce the execution of the obligation of the bond, or to obtain satisfaction of a judgment at law founded thereon. *Skillem v. May*, 4 Cr., 140.

§ 295. If a purchaser in a contract of sale of timber lands relies on the representations of the seller with reference to that which constitutes the main object of the bargain, a court of equity will set aside the sale if the representations are false, whether they be wilfully and designedly so, or were ignorantly or negligently made. *Doggett v. Emerson*, 3 Story, 700.

§ 296. Incumbrances.—A second incumbrancer who has taken up the first incumbrance may maintain a bill in equity to indemnify himself by enforcing the lien of the first incumbrance upon property not covered by the second. The Union Bank having judgments against P. which bound all of his property, he conveyed all except eleven lots in trust to pay certain debts due the Bank of the United States and others. These creditors, not knowing of these eleven lots, with a view to clear the title so that the property would sell to the best advantage, agreed that the trustee should pay off the judgments of the Union Bank out of the proceeds of the sales of the trust fund. The property was sold with this understanding, and the existence of the eleven lots being afterwards discovered, it was agreed among these creditors that these lots should be conveyed to the trustee to discharge the judgments against P. according to their legal priorities. The trustee accordingly paid the judgments of the Union Bank and took an assignment of them to the Bank of the United States. This latter bank having recovered judgments against P., after the original conveyance to the trustee and before the conveyance of the lots to him, insisted that these judgments were a first lien on those lots, as the judgments of the Union Bank had been paid. But it was held that the trustee had the right to stand in the place of the Union Bank and use its judgments to indemnify himself for the amount paid in discharging them. *Peter v. Smith*,* 5 Cr. C. C., 388.

§ 297. Where one of two sureties on a bond given to the United States executes a mortgage of real estate to his co-surety to indemnify the latter against liability on the bond, and the United States, after obtaining judgments against all the parties separately, fails to obtain complete satisfaction, it is the province of a court of equity either to remove the incumbrance so that the United States may have an available remedy against the land covered by it, or to apply it towards the payment of the debt for which it was intended as collateral security. Where the mortgage is not given solely for the purpose of indemnity against the bond, but as security for whatever debts may be due from the mortgagor to the mortgagee, it would be inequitable to take from the mortgagee this security without inquiry into the state of accounts between the parties, and the case must be referred to a master. *United States v. Sturges*, 1 Paine, 525.

§ 298. It is a settled principle of equity that an incumbrancer upon various parcels of property must exhaust his remedy against that remaining with his debtor, before he resorts to those parts held by *bona fide* purchasers, or under junior incumbrances. *The Schooner Romp, Olc.*, 196.

§ 299. It is a well settled principle in equity that a subsequent incumbrancer may discharge prior liens, and be substituted to all the rights arising under such liens; and where two persons have a lien on the same property to secure different debts, and one of them has also a lien on other property, a court of chancery will direct such property first to be sold in satisfaction of the separate lien before that which is common to both liens. *Russell v. Howard*, 2 McL., 489.

§ 300. Legal and equitable titles.—Where one claiming the elder equitable title, though the junior legal title, filed a bill in equity to enjoin an action of ejectment brought by the owner of the elder legal title, it was held that it was in accordance with the principles of courts of equity to rebut the complainant's equity with anything that would impair it, and that the legal title could not be made to yield to the equity of the complainant, which was founded on a mistake of the register of the land office in issuing a warrant for military services in the Virginia continental line, on a certificate authorizing a warrant for services in the state line. *Miller v. Kerr*, 7 Wheat., 1.

§ 301. The vendor of land, who had assigned to one S. the bond taken by him for part of the purchase money, conveyed the land to the vendee upon the latter's representation that he had paid the bond. The deed was immediately recorded. S., who lived in the same county with

the vendor and vendee, and in which the land was situated, failed to assert his equity against the land for more than twelve years, during which time other equities attached upon the land equally as strong as that of S. On the attempt of S. to enforce his lien, it was held that, the equities being equal, the legal title must prevail. *In re Butler*, 2 Hughes, 247.

§ 302. Infringement of patent.—There being nothing in the statutes relating to patents, before the act of 1870, providing expressly for the recovery of the gains and profits of an infringement of a patent, by suit in equity, the right to such a recovery must be derived from the application of the general principles of justice, as administered in courts of equity, to the relations between the owners of patents and infringers, created by the patent laws. *Steam Stone Cutter Co. v. Windsor Manufacturing Co.*, 17 Blatch., 24. See PATENTS.

§ 303. A covenant, upon a valuable consideration, to desist from the further infringement of a patent, will be enforced in a court of equity, unless some equitable ground is shown why its performance should not be decreed. *Sargent v. Larned*, 2 Curt., 840.

§ 304. Where a patent expires pending a suit for infringement, there can only be a decree for an account. *Jordan v. Dobson*, * 7 Phil., 533.

§ 305. Weight of answer as evidence.—A court of equity cannot decree against a distinct and positive denial in the answer of the respondent, on the testimony of a single witness. The complainant is not entitled to relief, under such circumstances, unless he has the testimony of two witnesses, or one witness and corroborative circumstances. He cannot prevail if the balance of proof is not in his favor. *Voorhees v. Bonesteel*, * 16 Wall., 16. See PLEADING.

§ 306. Where a bill in equity is directly and fully denied by the answer so as to make a complete defense to the action, and the answer is verified by the oath of the respondent, it is incumbent on the plaintiff to disprove it. If he fails to offer any testimony, the bill is rightfully dismissed. *Jordan v. Updegraff*, McCahon, 108.

§ 307. It is a rule in equity that where the charge made in the bill is positively denied in the answer, a decree cannot be pronounced for the complainant, on the testimony of a single witness, without some corroboration either from the testimony of other witnesses or from circumstances proved in the case. *Clark v. Hackett*, 1 Cliff., 260.

§ 308. Relief against usurious interest.—A mortgagor who seeks relief in equity against a contract entered into as a cover to secure usurious interest on the mortgage which specified no rate of interest, will be compelled to pay legal interest as a condition of relief. *Gordon v. Hobart*, * 3 Story, 243. See INTEREST.

§ 309. A state statute which authorizes a borrower to obtain, on account of usury, a cancellation of securities without payment, cannot bind a court of equity in another state, though the transaction under consideration took place in the former state. *Matthews v. Warner*, 6 Fed. R., 461 (Conv., §§ 735-37).

§ 310. Where a bank, whose charter prohibited, without prescribing any penalty, the taking of greater than a specified rate of interest, loaned money at a greater rate than that prescribed, and received it back with the full interest contracted for, it was held that equity had jurisdiction of a bill to recover back the illegal interest, but that nothing more than the excess paid above the charter rate could be recovered back. *Darby v. Boatman's Saving Institution*, 1 Dill., 141.

§ 311. The rule in equity that a party complaining of usury can have relief only for the excess over the legal rate of interest, applies to a case where the party complaining of the usury is claiming a priority to a fund by a bill in equity, and charges the usury against another claimant to the same fund. *Spain v. Hamilton*, 1 Wall., 604 (ASSIGNMENTS, §§ 8-12).

§ 312. Conflicting claims to public lands.—Where, in pursuance of the act of congress of March 3, 1835, the holder of certain land warrants surrendered them as satisfied on receiving land scrip for an amount of land ten per cent. less than the amount called for by the warrants; and subsequently, notwithstanding this surrender, he sold the warrants and delivered the scrip issued in lieu thereof, and gave a power of attorney to the purchaser to secure the "ten per cent. of the warrants unsatisfied;" and subsequently still he again sold the "unsatisfied warrants" to a second purchaser; and after this congress, by the act of August 31, 1852, authorized the issue of scrip for these "unsatisfied warrants," by the secretary of the interior, to the then present proprietors, upon inquiry and satisfaction as to the proofs, it was held that the first purchaser, his power of attorney having mentioned no consideration, could not enjoin the issue of scrip by the secretary to the second purchaser, who had paid a consideration without any notice of plaintiff's claim, and had made his proofs and had the decision of the land office in his favor. *Walker v. Smith*, 21 How., 579.

§ 313. Where the government has twice sold land to different persons and received the money, and has issued no patent to either, and, although the legal title remains in the United States, it is not denied that the equitable title belongs to one of the purchasers, a suit in equity will lie to decide to which of the claimants it belongs. *Moore v. Robbins*, 6 Otto, 530.

§ 314. In controversies with respect to the title to lands claimed under patent from the gov-

ernment, courts of equity have jurisdiction to correct mistakes, to relieve against frauds and impositions; and where it is clear that the land officers have, by mistake of law, given to one man the land which on the undisputed facts belonged to another, to give appropriate relief. *Ibid.*

§ 815. **Equitable mortgages.**—A court of law may be compelled in many cases to say that there is no mortgage where a court of equity would not hesitate in pronouncing the transaction an equitable mortgage. For a court of equity looks at substance rather than form; and if the transaction resolves itself into a security, it is in equity a mortgage. *Flagg v. Mann*,* 2 Sumn., 486. See CONVEYANCES.

§ 816. A transaction, whether in the form of an absolute sale or a special contract, strictly to be fulfilled or treated as a nullity, will be treated in equity as a mortgage, if that is the substance of it. *Jewett v. Cunard*,* 3 Woodb. & M., 277.

§ 817. If, in securing a debt, the parties to the transaction provide for payment to be made on a particular day, equity will prevent a forfeiture or penalty by nonpayment at the day, if payment with interest be afterwards made within such reasonable time as the law allows to relieve debtors against accident or misfortune in not paying at the precise day, in case of pledges and mortgages. And if the parties stipulate to prevent redemption or to prevent an account, equity will relieve the party, if the transfer be clearly a security for a debt. *Ibid.*

§ 818. **Conditional sales and mortgages.**—Courts of equity lean against construing contracts as conditional sales and in favor of construing them as mortgages; and unless the transaction is clearly made out to be a conditional sale it is held to be a mortgage. *Flagg v. Mann*,* 2 Sumn., 486.

§ 819. Where a deed, absolute upon its face, was intended as security for a loan, equity will relieve against a fraudulent attempt to treat it as an absolute sale, and will decree a redemption. *Morris v. Nixon*, 1 How., 118 (Conv., § 488).

§ 820. **Foreclosure of railroad mortgage—Jurisdiction.**—A bill in equity to foreclose a mortgage upon a railroad gives the court jurisdiction of the whole subject matter of the litigation, to hear and determine all collateral issues involved in the controversy, to appoint a receiver and order him to make reparation for injuries sustained by persons by the negligence of servants. The court may also call a jury, or invoke the assistance of a master, or take such other steps as it may think necessary for a judicial ascertainment of the facts relating to the injury. *Kennedy v. Indianapolis, etc., R. Co.*, 2 Flipp., 704.

§ 821. A court of equity, having acquired jurisdiction of a cause to foreclose a mortgage, can not only award a decree of foreclosure and sell the mortgaged property, but can (being a federal court), under the ninety-second rule in equity, award a personal judgment against any one liable for the deficiency after the application of the proceeds of the sale. That jurisdiction is not lost by the fact that the subject matter of the mortgage has been sold by another decree to satisfy a prior incumbrance; and the court may still determine the question of the personal liability of one who has purchased the equity of redemption. *Hayden v. Drury*, 3 Fed. R., 782 (Conv., §§ 721-22).

§ 822. An equity is not subject to execution unless by some statute. *Lenox v. Notrebe, Hemp.*, 251 (§§ 772-76).

§ 823. The act of George II, which made lands in the American colonies liable to be sold under a *fi. fa.* issued upon a judgment at law, did not interfere with the established distinction between law and equity, and an equitable interest could not be seized under a *fi. fa.* in Maryland until it was so provided by the act of the assembly of that state of 1810. But this law does not convert the equitable interest into a legal one in the hands of a purchaser at a sale under execution. If he buys an equitable interest it remains an equitable one and must be enforced in equity. *Smith v. McCann*, 24 How., 898.

§ 824. **Right not denied on account of bad conduct.**—A right given by statute can not be denied by a court of equity on account of the reprehensible conduct of the party asserting it, where it can be asserted in no other court. Thus a wife's claim to a distributive share in the estate of her husband, given by statute, will not be rejected by a court of equity, because she has barred herself of her dower by adultery. *Stegall v. Stegall*, 2 Marsh., 256.

§ 825. A bill of review must be brought within two years. *Taylor v. Charter Oak Life Ins. Co.*,* 3 McC., 484.

§ 826. **Infringement of copyright.**—The forfeitures and penalties given by section 4965 of the Revised Statutes, for the infringement of a copyright, are not enforceable in equity, in the absence of an express statute to that effect. To compel a surrender of the copies made in violation of the plaintiff's right which are on hand, and the plates, as prayed in a bill in equity, would be an enforcement of these forfeitures and penalties in effect. *Chapman v. Ferry*, 12 Fed. R., 698.

§ 827. That a bill in equity charges a felony is not a reason in all cases why it should not be maintained, though it may constitute a good ground against compelling a discovery of the crime, by the defendant. *Ocean Insurance Co. v. Fields*, 2 Story, 59.

§ 328. **Equitable assets.**—The proceeds of a sale of an equitable estate are equitable assets. *Law v. Law*,* 3 Cr. C. C., 324.

§ 329. **Proceeds of lands sold by executors, under a will devising them to be sold to pay debts, are equitable and not legal assets.** *Dixon v. Ramsay*, 1 Cr. C. C., 496.

§ 330. **Legal rights—Equity follows the law.**—Equity cannot be invoked to assail or abrogate a perfect and independent legal right. In all such cases equity follows the law. Where a judgment creditor has extinguished his debt and lost all recourse to the lands, or chattels, or property of the debtor, by taking his body into custody on a writ of *ca. sa.*, and has afterwards released the debtor from imprisonment on the writ, equity cannot be invoked to enforce the judgment. *Magniac v. Thomson*, 15 How., 281.

§ 331. **Priority among creditors.**—In this case a creditor who sought in equity to set up a lost deed of trust as giving him an equitable priority, though not recorded in time to give him a legal preference, was held not entitled to priority over the other creditors. *Kurtz v. Hollingshead*, 4 Cr. C. C., 180.

§ 332. It is a principle in equity that he who pays a debt of a superior dignity is suffered to rank in the application of assets according to the dignity of the debt satisfied. And where the state law gives a protested bill of exchange, after the death of the drawer or indorser, the dignity of a judgment, one of two joint indorsers, who pays more than his proportion of the debt, has a right to satisfaction, to the amount of the excess of his proportion paid, out of the assets of the estate of the deceased co-indorser, as if he held a judgment for the amount. *Lidderdale v. Robinson*, 12 Wheat., 594 (BILLS AND NOTES, §§ 612-13).

§ 333. **Priority of United States.**—A stockholder of a bank died leaving a debt, which afterwards became due to the bank. A law gave the bank a lien on the stock for the debt, and the United States, to whom he was indebted, had a right to priority of payment as against general creditors. *Held*, that in order to enforce their claims against the stock the United States must come into a court of equity, and that they would be compelled to do equity and satisfy the lien of the bank. *Brent v. Bank of Washington*, 10 Pet., 613.

§ 334. **Loss of priority.**—Where a complainant seeking in equity to establish a legal priority loses such priority by failure to record his deeds of trust, and by the loss of the deeds, equity will not set up the lien thus lost against other creditors whose equities are equal to that of the complainant. *Kurtz v. Hollingshead*, 3 Cr. C. C., 68.

§ 335. **Trustee.**—It is an established rule in equity that no act of a trustee shall prejudice the *cestui que trust*. *Piatt v. Oliver*, 2 McL., 267.

§ 336. **Surplus of property devised in trust.**—Where the income of property is devised in trust for a certain primary object, and the surplus, after supplying its needs, to other secondary objects, the heirs-at-law of the testator cannot maintain a bill in the nature of a bill *quia timet* to have the surplus applied to them, when there is no present surplus or present prospect of any, on the ground that owing to changes taking place after the death of the testator the trustee is incapable of executing the secondary trust. *Girard v. Philadelphia*, 7 Wall., 15.

§ 337. **Trustee dealing with himself.**—The plaintiff leased certain premises to K., and subsequently E., claiming to be the owner, and reciting that it was done in pursuance of this lease, leased the same premises for the same term to a corporation in which K. was the owner of eleven-twelfths of the stock, the rental being \$4,650 per year. E. afterwards sold the premises to K., and a few days thereafter the plaintiff served on K. a written notice of his title. Subsequently, and after the plaintiff filed his bill asserting his equitable ownership in the premises, K. reduced the rent paid by the corporation to \$3,000 and taxes. It was held that the position of K. was that of a trustee dealing with himself, and that he was liable to plaintiff for the full rent with interest: and further, that as K. had not been guilty of gross misconduct, he was entitled to commissions as trustee. *Jenkins v. Eldredge*,* 3 Story, 325.

§ 338. **Impeachment of trust by parol.**—Where a plaintiff in ejectment introduced in evidence a deed which conveyed to the grantee a naked legal title as trustee for another, which same legal title the plaintiff held under a deed from the marshal under an execution sale, it was held that he could not set up by parol that the trust declared was fraudulent and that the beneficial interest was in the grantee whose interest he had bought at execution, since his remedy, if the trust was fraudulent, would be in equity. *Smith v. McCann*, 24 How., 303.

§ 339. **City carved out of a town—Rights of bondholders.**—In creating a city the legislature carved it out of a town which had issued bonds which were outstanding and unpaid, and it provided that the bonds should be paid when due by the city and town in the proportions in which the assessment roll of each bore to the total assessment of both, and that if either should pay more than its share it might recover the excess from the other. *Held*, that the bondholders might proceed in equity against the city and town to collect from them in proportion to their liability. *Morgan v. Beloit*, 7 Wall., 618 (CORP., §§ 2177-78).

§ 340. **Bill to compel payment of judgment by municipal corporation.**—A bill in equity will not lie against a municipal corporation to compel it to levy a tax to pay a judgment

against it where an execution thereon has been returned wholly unsatisfied. *Walkley v. City of Muscatine*, 6 Wall., 492.

§ 841. **Relief of creditor as against state treasurer.**—Where there is money in the treasury of a state, devoted by the constitution to the payment of a particular indebtedness, although equity might restrain the treasurer from misapplying it, yet, after he has paid it out wrongfully, equity has no power to give relief to a creditor against the general funds of the state. *Self v. Jenkins*, *1 Hughes, 23.

§ 842. **Municipal bonds.**—Where, under the authority of a valid act, a city has issued its bonds, and on the faith of it the plaintiff has purchased them, a court of equity will not allow a technical construction of the act to defeat the recovery of the debt thus honestly contracted. *Luling v. City of Racine*, 1 Biss., 314.

§ 843. **Suit by tax payers against county officers.**—Residents and tax payers of a county brought a bill in equity against the county commissioners, the county treasurer, contractors for the building of a county court-house, and certain holders of county orders issued to the contractors in payment for the building of the court-house. The bill sought to annul and avoid the contract for the building of the court-house, the cancellation of the orders issued to the contractors as having been issued without authority, and to restrain the treasurer from paying the orders. Assuming that the commissioners had exceeded their authority in entering into the contract in its precise terms, and even that the contract was void because the question of building the court-house was not submitted to the voters, it was held (1) that, as the commissioners had so discharged their duty that the tax payers had secured a court-house absolutely and indispensably necessary for the county, and on terms exceedingly advantageous to the tax payers, the plaintiffs would suffer no loss, present or prospective, by refusing the injunction, and the defendants on the contrary would suffer irreparable loss and damage by setting aside the contract and granting the injunction, and therefore the relief asked for should not be granted; (2) that the plaintiffs, having no interest except that which was common to all tax payers, could not join in a suit to set aside the acts of the county officials; (3) that the plaintiffs could not ask a court of equity for relief without first restoring to the defendants the services and money expended by them in building the court-house; and (4) that a complete and adequate remedy at law was given by a statute providing for an appeal from the action of the commissioners by any person aggrieved. *Wood v. Bangs*, *1 Dak. T'y, 179.

§ 844. **Relief of street contractors.**—Where contractors with a city who had expended large sums in the improvements of its streets, becoming embarrassed on account of the refusal of the property holders to pay their assessments, and the inability or unwillingness of the city to meet its engagements of guaranty, and discharge its indebtedness to the contractors, applied to the city, in their despair, for relief; and the city, instead of making payments, undertook a loan of its bonds in consideration of a release by the contractors of the city from certain of its obligations assumed in the original contract, and imposed upon the contractors harsh and severe conditions which nothing but their financial desperation could justify them in accepting, a court of equity refused to enforce the contract of release, because the city wilfully delayed in fulfilling its obligation to deliver its bonds and failed entirely to deliver a part of the same, which were applied in the payment of other debts. *City of Memphis v. Brown*, 20 Wall., 289 (CORP., §§ 2213-23).

§ 845. **Control over municipal corporations.**—Although a court of equity has jurisdiction over a municipal corporation in regard to its conduct concerning property and franchises held by it in trust for the inhabitants thereof, the same as in the case of a natural person, and will enjoin and prevent such corporation from disposing of its property and franchises fraudulently or for a mere nominal consideration—and this, although the forms of legislation are used to give the transaction the appearance of an exercise of political power for public purposes—it cannot, on the ground of a breach of trust, restrain a municipal corporation from issuing interest coupons to the bonds of a railroad company, and from levying and collecting a tax upon the property within its limits for the purpose of paying such interest coupons, when such is done in pursuance of an ordinance. In the passage of such an ordinance the corporation acts not as a mere trustee of property, but as a local government, exercising for that purpose a part of the supreme power of the state. *Coulson v. City of Portland*, Deady, 481.

§ 846. **Where a municipal corporation is legislated out of existence, and its territory annexed to other corporations, the remedy of its creditors is in equity against the successors.** *Mount Pleasant v. Beckwith*, 10 Otto, 527 (CORP., §§ 2191-2208).

§ 847. **Bill to compel levy of tax to pay municipal bonds.**—The holders of the bonds of a municipal corporation which was authorized to levy a tax for their payment, brought a bill in equity against its officers, alleging a failure to levy taxes for the payment of the bonds or interest thereon, that the officers had pretended to resign their office in order to evade their duty, and that the complainants had applied in vain to the judicial officer authorized to levy and collect the tax on the failure of the officers of the corporation to do so. The bill prayed that

the officers might be required to collect the tax and pay the bonds. It was held that there was no principle of equity on which the bill could be sustained; that the resignation of the corporation officers could furnish no ground for equitable relief since the bill in equity was brought against those very officers, that it was not a case where specific performance was required, and that the failure of all remedy at law gave equity no jurisdiction. *Heine v. Levee Commissioners*, 19 Wall., 655.

§ 348. Release of surety on note.—It seems that a surety on a note who has been discharged by time, given by the holder to the maker, may, by bill in equity, compel the holder to proceed against the maker as soon as the note becomes due. *Fuller v. Milford*, 2 McL., 74.

§ 349. No relief against surety whose liability is discharged at law.—Where there has been no fraud or mistake, equity will not give assistance as against a mere surety, who has received no personal benefit, when his liability is discharged at law. Thus where a suit in equity was brought against the executor of a deceased surety upon certain joint and several bonds executed under an act of congress declaring that the collector should prosecute them "by action or suit at law," and there had already been a joint judgment obtained against the obligors, the death of the surety after the judgment having discharged his assets so that no action at law lay against the executor, a remedy in equity against the executor was denied. *United States v. Archer*, 1 Wall., Jr., 178.

§ 350. Deed from principal to agent.—While a court of equity will not declare a deed from a principal to an agent absolutely void, yet it will, before allowing it to stand, subject it to a rigorous and suspicious examination. *Teakle v. Bailey*,* 2 Marsh., 43.

§ 351. Misconduct of agent.—A bill in equity alleged that one of the defendants, who was the agent of the complainants for the care and sale of property belonging to them as the widow and heirs of S., had bought a judgment against the estate of S., and caused the land to be sold under execution to the other defendants or their grantors for a price greatly less than he had previously privately contracted with them for. It appeared that the complainants had assented to the sales for the prices previously bargained for, that these prices had been actually paid, and that as the estate of S. was insolvent it was necessary that there should be a judicial sale to protect the purchasers from the claim of the creditors of the estate. *Held*, that a court of equity would protect the purchasers unless they were guilty of a fraud, or purchased with knowledge of a fraud; that if the sheriff's deed passed no title the remedy of the complainants was at law, and that except as against the agent the bill must be dismissed, and as to him an accounting would be ordered. *Andrews v. Solomon*,* Pet. C. C., 356.

§ 352. Deposit in bank by agent of money of principal.—An insurance agent opened an account with a bank in his own name as general agent. To the credit of this account he deposited from time to time premiums collected for the insurance company, and remitted to the company by check signed by him as general agent. The bank had knowledge of the source of these deposits. Moneys received from other sources were sometimes deposited to the credit of this account, and he drew checks against this account for money applied to his own use. On the closing of the account there was a balance on deposit which was shown to be the proceeds of collections of premiums made by the agent. The agent owed a sum to the insurance company larger than this balance. It was held that the company had a remedy in equity to recover this balance in the hands of the bank, for the satisfaction of the debt due them from the agent. *National Bank v. Insurance Co.*, 14 Otto, 54 (BANKS, NAT., §§ 172-80).

§ 353. Equity has no jurisdiction to affect or to set aside a patent, or to hold the patentee as a trustee for another, except upon the ground of an antecedent equity in the plaintiff, which was disregarded or overlooked in issuing such patent. And one claiming a settlement subsequent to the settlement, occupation, proof and entry of the patentee, has no standing in equity to question the validity of the patent, or the sufficiency of the grounds upon which it was issued. *Bear v. Luse*, 6 Saw., 148.

§ 354. Claims against a fund.—Where a receiver, appointed in a suit in equity in the United States circuit court, and to whom certain land had been conveyed, and by final decree in which suit he had been directed to sell the land and bring the proceeds into court, instituted, in aid of the main suit, a suit in the same court to have the rights of certain defendants, who had set up a lien on this land in a state court, determined, and, if found valid, paid out of the proceeds of the sale of the land, it was held that the court, sitting as a court of equity, having the parties before it and the fund in its hands, would administer the fund according to the rights of the parties, and would give the defendants all the rights against the fund which they could, under any circumstances, have against the real estate; and that the plaintiff was entitled to such relief as would enable him to sell the real estate free from the liens claimed by the defendants, and to have so much of the proceeds as should be sufficient to pay the defendants' claims, if established, set apart to represent the real estate. *De Visser v. Blackstone*, 6 Blatch., 235.

§ 355. When a court of equity has control of a fund and the parties entitled to it, it will, to avoid circuity of action, at once place it where it ultimately must go. It will not remand it to the assignees in bankruptcy of the estate from which it arises, and then direct them to pay it to the party entitled to it, or remand the latter to an action at law to recover it. *Thompson v. Bradford*, 7 Biss., 351.

§ 356. Distribution of fund—Absent parties.—A decree in chancery for the distribution of a common fund among the several parties interested, whether the proceeding be instituted on the application of the trustee of the fund or that of any party in interest, will not conclude a person who was absent, who had no notice of the proceedings and whose interests were not represented in the litigation, from asserting his right either against the trustee or the distributees where the distribution has already been made, provided that he has not been guilty of any wilful laches or unreasonable neglect. *Williams v. Gibbes*,* 17 How., 239; *Gooding v. Oliver*,* 17 How., 274.

§ 357. The remedy of a creditor against a corporation, when the assets are of such a nature that they cannot be levied upon and sold under execution, is by proceeding in equity to marshal and distribute the assets. *Irons v. Manufacturers' Nat. Bank*, 6 Biss., 301 (BANKS, NAT., §§ 13-17).

§ 358. Suits by pledgees of stock to enjoin increase of debt.—Persons to whom certificates of stock in a corporation had been assigned by way of pledge, as collateral security, brought a bill in equity to restrain the corporation and its officers from calling a meeting for the purpose of increasing the debt of the corporation; from increasing such debt until the stock should be transferred to the complainants on the books of the company; and their assignors from voting upon the stock assigned to them. *Held*, that the relief could not be granted, the increase of debt not being *ultra vires*, or shown to be improper as tending to render the corporation insolvent, and there being no fraud or conspiracy on the part of the defendants to injure the complainants. *Becher v. Wells Flouring Mill Co.*, 1 McC., 62 (CORP., §§ 502-506).

§ 359. Enforcing liability of stockholders of national bank.—The filing of a creditors' bill to enforce the individual liabilities of stockholders of a national bank under the second section of the act of congress of June 30, 1876, does not preclude a remedy in equity against the bank itself. *National Bank v. Insurance Co.*, 14 Otto, 54 (BANKS, NAT., §§ 172-80).

§ 360. Bill to establish title to shares of stock.—Gould filed a petition in equity alleging that certificates representing stock in a corporation to the amount of more than three hundred thousand shares were delivered by the owners thereof to Heath and Raphael, as agents, to have such stock transferred to and registered in the names of such agents, such agency being a power revocable at the will of the grantor. To enable this to be done, a blank power of attorney was signed by the holder upon the back of each certificate. For the stock so received, Heath and Raphael delivered to the shareholders receipts, reciting that the stock was to be forwarded to America for registration in the names of Heath and Raphael. About sixty thousand shares were thus registered in their names. The receipts did not specify or identify, by number or otherwise, the particular certificates received; or on their faces represent any particular certificates, but it did not follow that they did not in fact do so. The petitioner, claiming to stand in the place of the original grantors of such powers of attorney and depositors of certificates, sought to have proof taken of his title to about twelve thousand of the certificates, the amount for which he held receipts, and to have the same delivered to him, averring that he had no means of identifying them. The petitioner stated that the certificates represented by his receipts were either a part of the sixty thousand which had been registered in the names of the defendants, or of the balance which the company had refused thus to transfer. It was held that the court could, out of the sixty thousand shares which were in its custody, deliver certificates for shares to no other person than Heath and Raphael, on a petition of that character, unless such person showed himself affirmatively to be the depositor, or the assignee of the depositor, of particular certificates which had been replaced by, or were directly represented by, particular certificates forming part of such sixty thousand shares. *Erie Railway Co. v. Heath*,* 9 Blatch., 226.

§ 361. Suit by bondholder—Removal of trustees.—Railroad company A. made a deed of trust to secure bonds wherewith the road was built. Afterwards the road was united with that of company B., and the latter company ran and managed the two, received the income, but refused to pay the bonds. Upon a bill in equity by a holder of the bonds for a removal of the trustees of A., and the appointment of a receiver, it was decided that the complainant was not the proper party to claim the relief prayed for; that the trustees of A. were the proper parties to seek redress against B. for the grievances alleged in the complaint; and that the complainant, suing for himself and others having a like interest, was the proper party to maintain the suit against the trustees of A. for the removal of those trustees for misconduct, and the appointment of others. *Stevens v. Eldridge*,* 4 Cliff., 848.

§ 362. **Lien of corporation on stock — Priority of United States.**— Where the charter of a corporation gives it a lien on his stock, for any debt due to it by a stockholder, and forbids a transfer of the stock until the debt is paid, the executors of a stockholder, whose debt matured after his death, cannot, in a court of equity, compel a transfer of the stock, without paying the debt, on the ground that the testator died insolvent, and the United States are given a priority in such a case, by the 5th section of the act of 1797. *Brent v. Bank of Washington*, 10 Pet., 596.

§ 363. **Contract — Motion to remove trustees, etc.**— The complainant having a contract with the government, for the construction of certain ships for the mail service, entered into a contract with the respondents, whereby in consideration of the assignment of the government contract to certain trustees, the respondents undertook to build the ships in compliance with such contract. The complainant, on account of certain alleged infractions of the contract by the respondents, brought a bill in equity for a rescission of the contract, and a specific performance if the court should refuse to rescind. By a motion in the cause making charges and grounds of complaint against the trustees, it was prayed that they should be removed, that a receiver should be appointed, and that the defendants should be enjoined from interfering with the receiver. The relief asked by this motion was refused upon the ground that the duties and powers in respect of which a breach and misfeasance were charged against the trustees, had not been conferred upon them by the contract under which they were appointed. *Sloo v. Law*,* 1 Blatch., 512.

§ 364. **An assignee of a chose in action may maintain an action therefor in equity in his own name.** *McCay v. Lamar*,* 12 Fed. R., 367.

§ 365. **Equity will protect and enforce the assignment of a chose in action.** *Brashear v. West*, 7 Pet., 608 (DR. AND CR., §§ 275-78).

§ 366. **Assignment of title bond as security.**— Where a title bond is assigned by way of security (title bonds being assignable under the laws of the state), a court of equity will, on a bill filed by the creditor thus secured, direct a sale of the interest assigned, providing in the decree that the interest be ascertained and made known at the time of the sale; and it is no objection that the bill does not aver that the condition of the bond has been performed. In chancery whatever interest the assignor may have can be sold. *Westcott v. Cole*,* 4 McL., 79.

§ 367. **Assignee of an equity.**— A mere naked equity, which is set up upon the ground of a constructive trust created by equity because there has been some fraud, mistake, or accident, or other claim acting upon the conscience of a party, is not assignable and will not be enforced by a court of equity in favor of the assignee, and therefore the assignment of such a claim by the holder thereof will not prevent its enforcement in a court of equity notwithstanding the assignment. *Dunlap v. Stetson*, 4 Mason, 349 (§§ 2049-58).

§ 368. **Suit by assignee — Privity of contract.**— W. employed K. to conduct some litigation for him as counsel, the latter to receive therefor one-fourth of the avails. K. engaged M. and H. to assist him, they to share equally with him in the one-fourth part of the avails; and the litigation was conducted by them with the knowledge of W. The share of H. was paid, and M. having assigned his to the plaintiff, the latter brought suit against W. and K. therefor. There was a demurrer upon the ground that there was no privity between either W. and M. or W. and the plaintiff; and that the remedy of the plaintiff, if he had any, was at law. It was held that the share of M., if payable to K., was payable to him for M.; that M. had a right to proceed for it against both — against K. as his trustee, and against W. as a debtor to his trustee for him; that he had a right to sell and assign this right, and that his assignee had a right in some manner to enforce it; that the proceeding was properly upon the equity side of the federal court; and that the remedy was none the less equitable because it might not be so classed in the state court from which the cause was removed. *Benedict v. Williams*,* 11 Fed. R., 347.

§ 369. **Proceeds of cotton — Suit by assignee — Acts by assignor in aid of rebellion.**— The defendant's testator was the owner of, interested in, and connected with a large amount of cotton in the south, which was seized by the United States during the rebellion, and sold, and the proceeds paid into the treasury. He recovered these avails in a suit in the court of claims. This recovery embraced a claim for one hundred and twenty-six bales which, subject to some claim for advances in which the testator of the defendant was interested, belonged to a Virginia corporation. The right to these one hundred and twenty-six bales and their proceeds, having been assigned by the corporation to the plaintiff, he brought a bill for the recovery of their avails. This corporation was formed for a lawful purpose, but had been engaged in running the blockade, and thus indirectly aiding in the rebellion; but it not being shown that either the defendant or his testator had received this cotton under any arrangement that it should be used in aid of the rebellion or in any such unlawful manner as would prevent a recovery for it in the hands of either, these acts of the corporation were held to furnish no objection to the recovery sought by its assignee. It was not questioned that the plaintiff as

the assignee of a right of action might maintain the suit in equity in his own name. The bill alleged that the defendant had received this cotton as executor and held it as such, when it was seized. The answer denied this, and the proofs sustained the answer showing that he had received and held it as surviving partner. It was held that the failure of the proofs to sustain the bill in this particular was not fatal to the right of recovery, as it was wholly immaterial how the cotton came into the hands of the defendant. It was therefore decided that the plaintiff should recover the amount received for this cotton after deducting the expenses belonging to it and the recovery for it, but not interest, unless the avails were so invested as to bear interest. *McCay v. Lamar*,* 12 Fed. R., 367.

§ 370. Title settled in supreme court.—Where a judgment at law as to the title to land has been affirmed by the supreme court upon a writ of error, a court of chancery will refuse to pass upon the relative merits of the titles involved. *Ballance v. Forsyth*,* 24 How., 183.

§ 371. Defective conveyance of land.—An assignment not sufficient in point of law to convey land, because not recorded, may form a sufficient title in equity to authorize the court to decree a conveyance. *West v. Randall*, 2 Mason, 181.

§ 372. Bill to set aside a patent.—Where a bill in equity is brought to quiet the title to land by annulling and setting aside a patent wrongfully issued, the decree should not set aside or annul the patent, for that would leave the title in the United States, but it should provide for the transfer of the title on the theory that the patentee took the title for the benefit of the real owner. *Silver v. Ladd*, 7 Wall., 226.

§ 373. Pre-emption.—Contested claims.—A court of equity has power to examine a contested claim to a right of entry under the pre-emption laws, and to overrule the decision of the register and receiver, confirmed by the commissioner, in a case where they have been imposed upon by *ex parte* affidavits, and the patent has been obtained by one having no interest secured to him in virtue of the pre-emption laws, to the destruction of another's right, who had a preference of entry, which he preferred and exerted in due form, but which right was defeated by false swearing and fraudulent contrivance brought about by him to whom the patent was awarded. *Garland v. Wynn*, 20 How., 6.

§ 374. Legal title obtained by fraud.—Where a party by false and fraudulent means acquires the legal title to property to which another has a better right, equity will compel the holder of the legal title to transfer it to the party who is justly entitled thereto. *White v. Cannon*, 6 Wall., 449.

§ 375. Kentucky land laws.—Although the land law of Kentucky, under which the titles claimed by both the plaintiff and the defendant originate, gives a remedy by which rights under entries previous to the emanation of a patent may be decided, yet a court of equity has jurisdiction in such a case on the ground that an entry is considered as a record of which a subsequent locator may have notice, and therefore must be presumed to have it; and consequently, though he may obtain the patent first, he is liable, in equity, to the rules which apply to a subsequent purchaser with notice of a prior equitable right. *Bodley v. Taylor*, 5 Cr., 191.

§ 376. Under the land law of Kentucky it is a settled principle that courts of equity will sustain a bill brought for the purpose of establishing a prior title by entry, and of obtaining a conveyance from the person holding under a senior patent issued on a junior entry. The courts of the United States have conformed to this principle. *Finley v. Williams*, 9 Cr., 164.

§ 377. Prior entry—Elder patent.—A prior entry, in order to overcome an elder patent in equity, must describe the place with sufficient accuracy to be found and known by others, and in terms which will not fit other places equally well with that intended to be appropriated. *Taylor v. Owing*, 11 Wheat., 226.

§ 378. Where it has been the notorious and general custom in selling entries or surveys of land in a military district, that the purchaser takes his chance of surplus, and the hazard of losing a part of the land by other entries, to entitle the vendor to the surplus, in equity, he must show a special contract, either in writing or very clearly proved. *Dunlap v. Dunlap*, 12 Wheat., 574.

§ 379. Land claim—Relief against fraud.—Where a grant of lands was made by the governor of California to three sisters, and subsequently the husband of one of them erased their names from the grant and inserted his own in the same; and upon this and other fabricated papers the sons of the husband obtained a confirmation of their claim by the commissioners, and upon this decree of confirmation obtained a patent from the United States, it was held, on a bill in equity by the grantee of the three sisters, that equity had full jurisdiction to relieve against the fraud, and that the proceedings under the act of congress of March 3, 1851, in which the claim of the defendants was confirmed by the commissioners, and the subsequent patent from the United States, did not conclude the rights of the complainant in equity. *Meador v. Norton*, 11 Wall., 442.

§ 380. Sale of lands under decree—Relief of heirs.—A decree of sale of the lands of a decedent was, while the heirs were infants, set aside upon a bill of review and restitution

awarded. It was held that the heirs could maintain jointly a bill in equity against the purchaser who had been in possession for an account and payment of the rents and profits, and were entitled to a discovery, if necessary. *Ritchie v. Bank of United States*,* 5 Cr. C. C., 605.

§ 381. Ejectment.—An action of ejectment cannot be maintained on an equitable title in Maryland. The remedy of the holder of such a title is in equity; and in such a case the local law will govern in a federal court. *Smith v. McCann*, 24 How., 398.

§ 382. Validity of title to land.—Where a creditor of a land company instituted a suit at law against them in a territory in which none of the members resided, and without notice, and a judgment was obtained and execution levied on land in which the company had an equitable interest, and the agent of the company, who held the certificates of purchase necessary to obtain the legal title from the government, surrendered these certificates to the judgment creditor, and thus enabled him to obtain a legal title, which otherwise he could not have obtained except by bill in equity making all the members of the company parties, in which suit an examination into the validity and merits of the claim might have been had, it was held that a court of equity would not hold such title to be valid. *Oliver v. Piatt*, 3 How., 333.

§ 383. Recovery of land with profits.—It is a rule of equity that where the true owner of real estate recovers against a possessor in continuous bad faith, he shall recover the profits from the time his title accrued, and not from the filing of the bill only. *New Orleans v. Gaines*, 15 Wall., 624.

§ 384. Bill to recover possession of lands.—A bill in equity cannot be maintained for the recovery of the possession of lands, when the complainant asserts no equity against the defendant in possession, except that he is in possession without title to the land, which belongs in equity to the complainant, the legal title to which is in the United States. *Fussell v. Hughes*, 8 Fed. R., 384.

§ 385. Sale of land under decree—Deficiency in quantity.—Land was sold under the decree of a court of chancery by commissioners therein appointed. The land was composed of three tracts which had been purchased of three different persons by the deceased, of whose estate the defendant was the administrator. At the sale, the commissioners exhibited the title papers, which expressed a certain number of acres, and sold the land contained in the deeds by the acre, declaring that they undertook neither for quantity nor title, and that the purchaser would buy at his own risk. It afterwards appeared that under one of the deeds the defendant's intestate was not entitled to, nor was never in possession of, a single acre; that part of the land contained in another deed had been surrendered by one of the executors in an adjustment of boundary made with a third person; and that there was also a deficiency under the third deed. By consent, the quantity specified in the deeds had been substituted for the quantity which the tracts might contain on a survey. A judgment against the purchasers on their bond for the purchase money was enjoined to the extent of the deficiency in the land. *Strodes v. Patton*, 1 Marsh., 238.

§ 386. Master's sale—Relief against purchaser and surety—Remedy at law.—Where certain lands were sold by a master under a decretal order of a court of equity, and, in conformity with another like order, the purchaser entered into a covenant with the master with a surety to pay the purchase money within a certain time, on default of payment within the appointed time, it was held (1) that the court might, by attachment, compel the purchaser to complete his purchase by paying the purchase money, and that the court possessed the same jurisdiction over the surety; (2) that a court of law could not afford adequate redress in such a case; (3) that no damages could be given in a court of law upon a covenant or security given or taken by the direction of a court of equity to enforce its own decretal orders; (4) that a court of law would not entertain jurisdiction upon such a security; (5) that it made no difference that the order provided that there might be a resale in case of default in payment; and (6) that the surety could not make any objection to the title when the purchaser had made none. *Wood v. Mann*, 8 Sumn., 318.

§ 387. Where public lands are by law made a trust fund for the payment of certain bonds, and trustees appointed to control the fund, they are subject to the power of a court of equity to raise therefrom the money due on the bonds. The court may employ its own accustomed machinery for this purpose. It may appoint commissioners, receivers or special masters or agents to effect sales of the lands, and compel those holding the legal estate to execute proper conveyances. *Vose v. Trustees of Internal Improvement Fund*, 2 Woods, 647.

§ 388. Conveyance of land before patent.—B., a settler upon a lot of one hundred acres, belonging to the state, conveyed one acre to M., and afterwards conveyed the whole lot to P., expressly excepting the acre conveyed to M. P. afterwards conveyed the lot in undivided moieties to other parties with the same exception. A patent was finally issued by the state for the whole lot, to P.'s grantees as the assignees of B. Held, that M. had an equitable title to the acre conveyed to him, and that such title would be protected in equity. *Dunlap v. Stetson*, 4 Mason, 379.

§ 389. **Refusal to convey as agreed.**—A., being indebted to B., gave him a mortgage on his lands, which was foreclosed in due time. Other parties desiring to obtain possession of the land, though fraudulently, as A. asserted, A. and B. agreed that the time of sale of the land might be hastened, and at the sale B. should buy the land and hold it for A. This was done, but B. refused to convey back to A. *Held*, that A. could have no relief in a court of equity. *Randall v. Howard*, 2 Black, 586 (CONV., §§ 1075-76).

§ 390. **Adjustment of title to land—Trust relations—Equitable mortgage.**—In 1823 Frye, as guardian for his minor children, sold, under an order of court, certain land belonging to them to Luther Richardson. In 1825 the latter conveyed the land to his brother, Prentiss Richardson, by a quitclaim deed and with a secret parol trust in his own favor. In 1826 the two joined in a quitclaim deed to Walker and Fisher, who on the same day bound themselves to reconvey to Luther upon a redemption within five years. In 1831 the heirs of Frye set up a claim to the land on account of the alleged invalidity of the sale by their father, and soon after a parol agreement was made between Flagg and Mann to buy Luther's interest in the land, and extinguish the claims of Walker and Fisher and the Frye heirs. In accordance with this agreement they purchased the interest of Luther by quitclaim deed. But afterwards Mann obtained a conveyance from Walker and Fisher on his own account, and the Frye heirs conveyed their interest to Adams. Mann and Adams, by several quitclaim deeds, conveyed to each other one moiety of the whole land, and still later Mann conveyed his moiety to Fuller. Flagg filed a bill to set aside these deeds as made in fraud of his rights, and claiming one-half of the property. It was held (1) that if, at the time of the purchase from the Frye heirs, any title was vested in Flagg and Mann under their deed from Richardson, or if that deed, connected with the agreement between Flagg and Mann, *per se*, created a fiduciary relation between them, which would make the purchase by Mann, by operation of law, a purchase in trust for their benefit, then the relief ought to be granted; (2) that the deed to Walker and Fisher was an equitable mortgage, and that Luther Richardson had an equity of redemption in the land, at the time he conveyed to Flagg and Mann, sufficient to create a fiduciary relation between them; and (3) that Flagg was entitled to a decree entitling him to one moiety of the land. *Flagg v. Mann*, * 2 Sumn., 486.

§ 391. **Bill by bond creditor against heir or devisee.**—If a bond creditor, after the death of the debtor, comes into equity to proceed against the heir or devisee, he must conform to the rules of equity. He must join the executor as a party, in order that the latter may contest the claim, and in order that the personal fund out of which a reimbursement would be decreed to the heir may be applied in the first instance to the payment of the debt. He must exhaust the personal estate in the hands of the legal personal representative, but he is not compelled to pursue it into the hands of others. As to the creditor, the personal estate may be said to be exhausted when there are no longer assets in the hands of the executor. Where two executors had been appointed, both of whom had qualified, and one of the executors died intestate and indebted to the estate, and the other died subsequently, and his executor became the executor of the estate of the debtor, it was held that the creditor was not obliged to join the representatives of the executor who first died. *Corbet v. Johnson*, 1 Marsh., 77.

§ 392. When a bond creditor comes into a court of equity, after the death of the debtor, to proceed against the heir or devisee, he is not bound to pursue the personal assets into the hands of others than the representative of the debtor, if such pursuit threatens to be tedious, intricate and unproductive. *Murdock v. Hunter*, 1 Marsh., 135.

§ 393. **Legatees—Debts paid from personality—Claim on realty.**—Legatees have no legal claim on the real estate to be reimbursed moneys paid by the personal property in discharge of debts for which both are bound; and their right to the aid of a court of equity to enforce such reimbursement is coextensive only with their equity. The court will not interfere in behalf of the legatees beyond the amount actually advanced. Where such debts have been paid in depreciated currency out of the proceeds of sales of legacies, the reimbursement must be the whole actual loss to the personal estate, and not necessarily the value of the money at the time of the payment. *Byrd v. Byrd*, 2 Marsh., 169.

§ 394. **Distribution of intestate's property.**—A federal court, in equity, has power to order distribution of intestate property collected under an administration granted here, the intestate having died domiciled abroad, and the distribution having to be made according to the law of his foreign domicile. *Harvey v. Richards*, 1 Mason, 409.

§ 395. **Estate converted into personality.**—When an estate is sold, equity considers it as converted into personality. And this is the case, although the election to purchase rests solely with the purchaser. The purchase money, therefore, goes to the personal representatives of the vendor, and the interest of the vendee descends to his heirs. *McKay v. Carrington*, 1 McL., 50 (§§ 801-11).

§ 396. **Interference with probate of will.**—There is no sufficient ground for equitable interference with the probate of a will, or for establishing a trust as against the purchasers of the

estate in favor of the complainants, where every objection to the will or the probate thereof could have been raised, if it was not raised, in the probate court during the proceedings instituted for proving the will, or at any time within a year after probate was granted; where the relief sought by declaring the purchasers trustees for the complainant would have been fully compassed by denying the probate of the will, and where the entire rights of the parties depended on the establishment or non-establishment of the will, and that question was exclusively within the jurisdiction of the probate court. Equity has no jurisdiction in such a case. It will not help the complainants that they did not know of the death of the person whose will was thus forged until after the expiration of the time for contesting the will in the probate court, no fraudulent concealment of the facts being alleged. (CLIFFORD and DAVIS, JJ., dissented.) Case of Broderick's Will, 21 Wall., 503.

§ 396a. If any error has been committed by the probate court in admitting a will to probate, it should be corrected by appeal; and an original bill in equity will not lie for that purpose, where the law provides for an appeal. *Tarver v. Tarver*, 9 Pet., 174.

§ 397. Wife cannot impeach her mortgage, when.—Although, under the law of Louisiana, a mortgage given by a wife to secure a loan made to her husband, or to her covertly for his benefit, is void, yet where the party advanced the loan in good faith and in full confidence that the loan was made to the wife, and the mortgage was executed under her most solemn declaration that the money was borrowed for her benefit, the wife has no standing in equity to set aside the mortgage. *Bein v. Heath*, 6 How., 223 (DOM. REL., §§ 98-102).

§ 398. Joinder of husband and wife.—The name of the husband may be used as the *prochein ami* of the wife in a bill in equity in which he asks no relief. *Ibid.*

§ 399. Settlement on wife.—Where a settlement made by a husband, while free from debt, upon his wife, is induced by no fraudulent motive, when it makes no more than a reasonable provision for her, and confers any benefit on her, there is no reason why a court of equity should decline to uphold it. Though the grant may not contain every provision which a chancellor would direct to be inserted in a settlement ordered by himself, and although it contains the reservation of a power of revocation and new appointment, yet if it confers any substantial benefit on the wife, so long as she is in the actual enjoyment of that benefit, a court of equity should and will protect her. *Jones v. Clifton*, 2 Flip., 191. See DOM. REL., §§ 865-68.

§ 400. Property of married women.—Where the legal title to property is in the wife, as against her husband, it cannot be subjected in equity to the satisfaction of his debts, without proof that her title is merely colorable and fraudulent as against his creditors. *Voorhees v. Bonesteel*,* 16 Wall., 16.

§ 401. Divorced wife may sue husband.—A wife divorced, *a mensa et thoro*, may, by her next friend, sue her husband in equity to enforce a decree for alimony made by a court having jurisdiction of the subject-matter and the parties. *Barber v. Barber*, 21 How., 582 (COURTS, §§ 903-12).

§ 402. Compromise and substitution of securities — Liability of receiver.—Bass was indebted to the Bank of Mississippi, the debt being evidenced by notes and secured by a mortgage upon real estate; and the bank was indebted to Brown Brothers & Co. The latter filed a creditors' bill against the bank, and obtained an injunction, and the appointment of a receiver with authority to collect the debts due the bank. When suit was brought by the receiver to foreclose the Bass mortgage, Mrs. Bass had become the owner of the equity of redemption; and an arrangement was agreed upon between her and the receiver and Brown Brothers & Co., by which the Bass notes and mortgage were given up to her, in consideration of which she and her husband made to Brown (of Brown Brothers & Co.) certain notes secured by mortgage. In making this arrangement, the receiver obtained a credit on a judgment of Brown Brothers & Co. against the bank for the whole amount of the indebtedness of Bass to the bank. After some thirteen years of litigation, the creditors' bill was dismissed for want of jurisdiction, because a judgment at law had not been obtained, and execution issued and returned before bringing the bill. After the dismissal of the bill the cause was ordered to be retained in court for the purpose of proceeding against the receiver, and he was ordered to render an account, and to bring into court all the property which came into his hands, including all substituted securities. He reported that this would be impossible, as he had parted with most of the property in settling the affairs of the bank, and stated that his bond would protect from injury all persons interested in the said assets. Having failed to pay into court the sum adjudged against him as property which had come into his hands and which he had not accounted for, a decree was entered directing a *scire facias* against his sureties. The sum adjudged against him and his sureties included the assets surrendered on compromises and settlements, embracing the indebtedness of Bass to the bank. Brown brought suit to foreclose the mortgage given by Bass and his wife in substitution for the one to the bank. The defense was that the dismissal of the bill rendered all the acts of the receiver void; that the adjustment of the Bass debt and the taking of the new securities to Brown was without authority and

illegal, or if legal, that the new securities belonged to the bank and not to Brown. The question presented for decision was therefore whether the bank was entitled to a remedy against the receiver and his sureties for the old indebtedness of Bass, thus compromised and satisfied by the new and substituted securities, and also against the estate or legal representatives of Bass (deceased) upon the original securities. It was held that, assuming that the compromise and surrender of the old securities and the substitution of the new ones were unauthorized, the bank, having elected to charge the receiver with this indebtedness, had thereby affirmed the transaction, and left the parties to the arrangement as they stood when it was entered into; that another reason for holding the bank concluded by the election was its failure to give notice to the debtors of an intention to look to them for payment, and forbidding payment to the holders of the new securities, Mrs. Bass having already paid more than half of her indebtedness upon the new securities; and that the defendant had failed to establish the want of title in Brown to the mortgage and notes, or a title in the bank by force of which she might be subjected to a second payment of the same indebtedness. *Brown v. Bass*,* 4 Wall., 262.

§ 403. If a security founded upon a prior one be fatally tainted with usury, and the prior one was free from usury, but was given up and canceled, and the latter one is thereafter adjudged void, the prior one will be revived in equity, and may be enforced as if the latter one had not been given. It is a rule in equity that an incumbrance shall be kept alive or extinguished as shall most advance the justice of the case. *Burnhisel v. Firman*, 22 Wall., 170.

§ 404. When two or more persons have a common interest in a security, equity will not allow one to appropriate it exclusively to himself, or to impair its worth to the others. Thus where a railroad corporation makes a mortgage upon its property to secure the payment of its bonds, one of the bondholders, though he has the right to make use of the mortgage to enforce the payment of the bonds which he holds, has no right so to use it as to obtain an advantage to himself over the other bondholders. He has no right to employ it as an instrument by which he may become the owner of the property mortgaged at the lowest possible price at which it can be obtained, leaving the bonds held by the other bondholders unpaid. *Jackson v. Ludeling*, 21 Wall., 616 (Conv., §§ 1636-40).

§ 405. Mortgagee — Adverse possession.— A mortgagee will not be permitted, in equity, to set up an adverse possession to bar the title of his mortgagor, or of purchasers under him, to redeem, unless that possession has been for twenty years, and thus has constituted an equitable bar from lapse of time. *Gordon v. Hobart*,* 2 Sumn., 408.

§ 406. Although a mortgage is absolute upon its face, a court of equity may inquire into the real purpose for which it was given, and apply it to that purpose. *United States v. Sturges*, 1 Paine, 525.

§ 407. Enjoining sale under power in mortgage.— A mortgagor seeking to restrain the sale of the property under a power of sale contained in the mortgage, on the ground that he wishes to redeem, alleging that the mortgagee is not disposed to execute the power fairly, should bring the mortgage money into court and tender it, or at least make certain that the mortgagee can have it. *Bowen v. Kendall*,* 23 Law Rep., 538.

§ 408. Deficiency on mortgage sale.— In the absence of a rule of the supreme court authorizing it to be done, it is not competent for the circuit court of the United States, on a bill in equity for the foreclosure of a mortgage, to enter a decree for the balance which may remain unsatisfied after exhausting the proceeds of the mortgaged premises. *Noonan v. Lee*, 2 Black, 500.

§ 409. Deed of trust with power of sale — Conflicting claims.— Although a deed of trust to secure a debt authorizes the trustee to sell on default of payment, where the trustee attempts to sell property which is subject to conflicting liens, and it is questionable whether the deed covers part of the property, it is the right of the other parties interested to bring the matter before a court of equity for the purpose of deciding the mutual rights of the parties, and administering the fund accordingly. *Draper v. Davis*, 14 Otto, 347 (Conv., § 1129).

§ 410. Foreclosure of deed of trust pursuant to agreement.— Where the holders of bonds secured by a deed of trust bring a bill in equity seeking a strict foreclosure, the court may, under a prayer for general relief, decree a sale, in enforcement of an agreement contained in the deed of trust. *Sage v. Central R. Co.*, 9 Otto, 342 (Conv., §§ 1674-80).

§ 411. Putting purchaser in possession of mortgaged premises.— The power of a court of chancery to put a purchaser of mortgaged premises into possession, by summary process, extends only to the parties to the suit, or those coming into the possession under the parties to the suit, subsequent to the commencement of the same. The wife of the mortgagor, capable of acquiring title to land under the law, who was in possession of the land prior to the commencement of the foreclosure suit, under color of a title derived from one of the defendants, cannot be dispossessed by such a summary proceeding as a writ of assistance in equity. *Thompson v. Smith*, 1 Dill., 458.

§ 412. *Mortgage—Innocent purchaser—Estoppel.*—In 1830, Spring, to secure a debt, made a mortgage to the bank of his mansion-house and a separate three acre tract. In 1833 he conveyed his right to redeem this three acre tract to Shepley, and in 1848 the latter conveyed it to the complainant. In June, 1838, the bank, through Shepley, their attorney, entered the mansion-house to foreclose the mortgage, but did not go upon the three acre tract, and left Spring in possession of all of the mortgaged premises. On the last day for redemption, Spring applied to the bank to settle the amount due. But as most of the payment was proposed to be made in a check drawn by one Webster on another bank, and payable at a future day, the business was postponed until such future day; when the check was paid, and the balance in money, the mortgage was given up to Spring and a release made by the bank to Webster of all their interest in the premises. This was done at the request of Spring, and the deed was drawn by and acknowledged before Shepley. In 1838 Webster conveyed the premises to B., and the latter conveyed them to the respondent; and in 1839 the respondent extended an execution on the same premises for a judgment against Webster. A few days subsequent to the transaction in which the debt was paid to the bank, Spring took back a writing from Webster by which the latter agreed to convey to him on being repaid the sum advanced within three years. The bill of the complainant alleged that the mortgaged premises, independent of the three acre tract, were worth more than the money due to Webster for his advances, and prayed that the three acre piece might stand discharged from the mortgage, and the levy of the respondent, and that the respondent might be compelled to release the said tract to the complainant. It was held that the transaction in which the claim of the bank was satisfied was not a mere discharge of the mortgage; that Webster acquired an absolute estate, and not merely an assignment of a mortgage, so far as the respondent as a purchaser without notice was concerned; and, as the complainant had stood and looked on in silence while others perfected their prior rights, that there was no equity which required the court to interfere. *Shapley v. Rangeley*,* 1 Woodb. & M., 218.

§ 413. *Foreclosure of mortgage—Agreement under sanction of court.*—In a proceeding to foreclose certain mortgages upon a railroad, a petition was filed praying an order of court granting permission to the plaintiffs and the receiver to become parties to an agreement by which certain capitalists were to build and maintain a certain bridge on the line of the road, and charge certain tolls for the use of the same, the net earnings to be appropriated as dividends on certain special stock to be issued for the amount advanced by the capitalists, and that such order be made a part of the final decree in the action, so that all rights acquired under said mortgages, through final decree in the action, should be subject to such agreement. All the parties to the record having consented to the contract as made, except certain bondholders under the mortgages, who represented \$100,000 of the \$5,000,000 of bonds, and who were made parties on their own petition, and heard in opposition to the motion, the court consented to the contract, annexing, however, to its approval thereof certain conditions and modifications of its own. *La Crosse Bridge*,* 2 Dill., 465.

§ 414. *Agreement between debtor and creditors—Acts by creditors in fraud of the agreement.*—A debtor firm, being unable to meet its obligations, its trade dull and its property unavailable, and a sale being likely to result in a great sacrifice, a syndicate, composed of the principal creditors, in order to save themselves and enable the firm to prosecute their business, advanced them money, upon the execution of a judgment note, payable in ten days after default by the debtors to meet their paper, and upon a promise of a statement of the real estate of the firm. Two of the creditors who joined in this syndicate secretly obtained a judgment note for themselves, in violation of the agreement between the syndicate and the debtors, that there should be no other judgments, and that notice should be given if any other judgments were likely to be obtained. The syndicate being about to issue execution on their judgment on account of the existence of some small judgments against the debtors, which they regarded as a violation of the agreement, were induced to withhold it for forty-eight hours by the creditors holding the secret judgment note and the debtors, upon the promise that the small judgments complained of should be paid, and the promised statement furnished. Instead of making good this promise, the promisors had execution issued on the secret judgment, covering more than twice the value of the property owned by the debtors. It was held, under these circumstances, that the lien of this execution must be postponed to that of the syndicate afterwards issued. *Gaskill v. Benton*,* 8 Fed. R., 746.

§ 415. *Debtor and creditor.*—A court of equity will never interfere merely to settle equities between a debtor and his debtor, upon a bare possibility that resort may ultimately be had to the latter; but where there is a trust for the benefit of the creditor, he has a right to call for an account of the trust subject in the hands of whomsoever it may be. Especially is this so where the person in possession of the subject of the trust took upon himself the management of it as an agent, with full notice of its connection with the rights of the *cestui que trust*. *United States v. Myers*, 2 Marsh., 516 (§§ 983-41).

§ 416. **Conveyance to defraud creditors.**— A court of equity will not aid a party with reference to a conveyance which he has made for the purpose of defrauding his creditors. *Kinney v. Consolidated Virginia Mining Co.*, 4 Saw., 383.

§ 417. **Assignment to defeat a judgment.**— Where real estate has been assigned by a judgment debtor to defeat the judgment lien or hinder the satisfaction of the judgment, it is competent for chancery to order the assignee to reconvey it to the assignor in order that an execution may act upon it; or to order him to convey it to the proper officer of the court of chancery, or otherwise, so as best to effect its application in satisfaction of the judgment debt. To that end it may order that the assignee join with the receiver in executing conveyances to purchasers under a sale ordered by the court. *McCalmont v. Lawrence*, 1 Blatch., 232.

§ 418. **Relief of assignor for benefit of creditors.**— A debtor, who has made an assignment for the benefit of creditors, being entitled to the residue of the estate after the debts outstanding at the date of the deed are paid, may come into a court of equity and pursue the trust estate where it has been improperly or fraudulently parted with by the assignee. It is immaterial that all the debts have not been paid, where the fraudulent conveyance is made not in the payment of debts but to another. *James v. Atlantic Delaine Co.*, * 3 Cliff., 614.

§ 419. **Relief of non-residents.**— A non-resident complainant can ask no greater relief in the courts of the United States than he could obtain by resorting to the state courts. If in the latter courts equity will afford no relief, neither will it in the former. *Ewing v. City of St. Louis*, 5 Wall., 418 (§§ 2059-60).

§ 420. **Speculating contracts.**— Chancery will not aid what may be called a speculating contract, but a fair purchase of land, with a view of selling at a profit, does not come within the objection. *McKay v. Carrington*, 1 McL., 50 (§§ 801-11).

§ 421. **Lease of railroad — Guaranty — Remedy at law — Injunction.**— Certain railroad companies, being desirous of procuring and controlling a through line from Indianapolis to St. Louis, made an agreement with the complainant, by which the latter was to lease its road to a certain company, as lessee for that purpose, the companies first mentioned agreeing to guaranty the payment by the lessee to the complainant of a certain minimum rental. The guarantor companies were holders of the bonds of the lessee company. The lessee company having failed to pay the rental, the complainant brought suit in equity, to enforce the agreement of the guarantors, and to restrain the payment of interest on the bonds of the lessee company, held by the guarantors before payment of the rental guarantied by them, and also to enjoin the guarantor companies from disposing of the bonds. It was held that it would be inequitable to allow the guarantor companies to collect interest on their bonds, out of the earnings of the road, while the rental which they had agreed to pay, in case the lessee did not, remained due and unpaid; that a court of equity would regard the substance of the transaction, and treat the guarantors as the real owners and lessees; that an action at law on the guaranty, as often as there should be default in the payment of the rent, would render the lease of little value, and would not afford such adequate and complete relief as to prevent equity from taking jurisdiction; and that the injunction asked should be granted, especially as no damage to the guarantors would be caused thereby, as it would only be requiring them to perform their contract. *St. Louis, Alton & Terre Haute R. Co. v. Indianapolis & St. Louis R. Co.*, * 9 Biss., 99.

§ 422. **Administrator required to account for property.**— An administrator, having admitted that he has property in his possession, belonging to the estate, may be called on in equity, for that property, in any state. *Bryan v. McGee*, 2 Wash., 337.

§ 423. **Statute of frauds not a protection to fraud.**— In cases of fraud by an agent upon his principal, it is a rule in equity, that the statute of frauds will not be allowed as a protection of fraud. *Jenkins v. Eldredge*, 3 Story, 181.

§ 424. **Dedication for use of a church — Vague designation — Relief against heirs of donor.**— Where the proprietor of certain lands, at the time of laying them out into lots, "distinguished and set apart" one lot "for the sole use and benefit of the German Lutheran Church," and caused the same to be so entered and designated in the plat of the town, it was held that, although the designation was too vague an appointment to be carried into effect by a court of equity upon general principles, the heirs of the donor would be perpetually enjoined from interfering with the possession, the church having for many years used the lot as a church lot and burying ground, and the donor and his heirs having often declared that the lot belonged to the church, and that they were willing to convey it for this use. *Kurtz v. Beatty*, 2 Cr. C. C., 609.

§ 425. **Relief of a state as against one making claim to certain bonds.**— Where the United States had issued to the state of Texas certain bonds, and the persons in control of that state during the rebellion had unlawfully transferred a part of these bonds to certain persons, who had in turn negotiated them to the defendant, it was held, on a bill filed by the state of Texas praying for an injunction against the defendant (who was affected with knowledge of the prior equities), restraining him from asking or receiving payment of the bonds from the

United States, and that the bonds might be delivered to the state, and for other and further relief, that the state was entitled to relief. The bonds having been paid to the defendant in the interval between the filing of the bill and the service of the process, on the delivery by the defendant of certain other bonds to the comptroller as indemnity for the secretary of the treasury against any personal loss which he might incur by reason of the payment, it was further held that this so-called payment did not affect the equities of the complainant, except by transferring them from the original bonds to the bonds substituted in their place, so far as might be necessary to satisfy to the complainant the amount due on the former. *Texas v. Hardenberg*, 10 Wall., 68.

§ 426. *Loss of deed of manumission.*—A slave who has been set free by her master, and who has lost her deed of manumission, and who is claimed as a slave by another, may have relief in equity, to compel the defendant to execute to her a deed of manumission, and to enjoin him from asserting any claim upon her. *Negro Alice v. Monti*, 2 Cr. C. C., 485.

§ 427. *Charities.*—The equitable jurisdiction of the supreme court of Massachusetts is established over charities in its broadest application. The statute of Elizabeth is a part of the common law of that state, and a devise to charitable uses is upheld. *Loring v. Marsh*, 2 Cliff., 469.

§ 428. *Original chancery jurisdiction over charities existed and was exercised in England before the passage of the statute of Elizabeth, and although that statute has no force in Ohio, the judges of that state have applied its principles to all cases of charitable devises as a part of chancery jurisdiction. And it has now become an established principle of American law that courts of chancery will sustain and protect a devise of property to public charities, provided the same is consistent with local laws and public policy, where the object of the gift is a dedication specific and capable of being carried into effect according to the intentions of the donor.* *Perrin v. Cary*, 24 How., 465.

§ 429. *Rights of aliens to take by descent.*—The rule at common law that, though an alien can take land by purchase, he cannot take by descent, prevails also in equity. It is a principle in equity that equitable estates shall be subject to the same modes and conditions as corresponding legal estates. *Cross v. DeValle*, 1 Cliff., 282.

§ 430. *Declaring future rights.*—Equity will not maintain a bill merely to declare future rights. A remainder-man may have a decree to protect the estate from waste, and have it so secured by the trustee as to protect his estate in expectancy; but such cases do not come within the category of mere declaratory decrees as to future rights. There is also a class of cases in which recommendations or requests in a will to a devisee or legatee have been construed as cutting down an absolute fee into an estate for life, with an equitable remainder to the person indicated by the testator in his request. In such a case a court of equity will entertain a bill during the life of the first taker to have the right of the claimant in remainder established. Nor do these cases infringe upon the rule. There is also a class of cases which are exceptions to the rule, as where bills are filed by executors or trustees for their protection, and that they may have a construction of the will and the direction of the court as to the disposition of the property. In such cases, from necessity, and to protect the trustee, the court is compelled to settle questions as to the validity and effect of contingent limitations in a will, even to persons not in case. *Cross v. De Valle*,* 1 Wall., 5; *Cross v. De Valle*, 1 Cliff., 282.

§ 431. *A testator devised to trustees for the benefit of his married daughter, an alien, during her life, and after her death for her children, if they should, within five years after being informed of his decease, become residents of the United States and adopt and use his name. In default of this the estate was to be conveyed to the complainant. The daughter had six children born abroad, and one after her removal to the United States. The complainant filed a bill against the trustees and the beneficiaries of the trust, setting forth that the trust had failed as to the daughter and her children on account of their alienage, and claiming that the estate should be conveyed to him, or to the heirs at law, or to the state. The heirs at law filed a cross-bill for the purpose of asserting their rights as against the daughter, the complainant and the other devisees, and for the purpose of having the limitations on the life estate of the daughter declared void as tending to a perpetuity, and having the rights of the heirs at law declared and protected by the court in its exercise of equitable jurisdiction. It was decided that the daughter took an equitable life estate by the will, defeasible only by the action of the sovereign; and that the court could not, either upon the original or the cross-bill, declare the future rights of the parties and of the children of the daughter, born and unborn.* *Ibid.*

§ 432. *Title to vessel.*—The real owner of a vessel may maintain a bill in equity to have the title conveyed to him, and for the profits thereof during the time she has been in the possession of the defendant, where she has been conveyed to the defendant by one who held her in trust for the plaintiff, the defendant having purchased with notice of the trust. *Scudder v. Calais Steamboat Co.*, 1 Cliff., 870.

§ 483. **Restraining use of corporate name.**—In an action in equity to restrain the wrongful appropriation of a corporate name, the corporation whose name is wrongfully assumed by the defendant must be a party, even if the suit is instituted by a bondholder. *Newby v. Oregon Central R. Co.*, Deady, 609.

§ 484. It seems that a bondholder of a corporation, whose bonds are secured by a mortgage on the lands of the corporation, or a bondholder without such security, may maintain a suit in equity to restrain another corporation in wrongfully appropriating the corporate name of the maker of such bonds for the purpose of obtaining its lands, provided the corporation refuses on request to bring such suit. *Ibid.*

§ 485. **Bill against corporation and officers.**—Where a bill in equity is filed against a corporation and its officers, and no relief is asked for in respect of any defendant that is not prayed for against the corporation, and no relief is prayed against any officer except in his official capacity, the officers are mere nominal parties. *Hatch v. Chicago, Rock Island & P. R. Co.*, 6 Blatch., 105.

§ 486. **Decree of dismissal a bar.**—Where a bill has been dismissed upon its merits, and the decree passes upon all the points, that decree is a good plea in bar to a second bill varying from the first only in immaterial points. *Case v. New Orleans & Carrollton R. Co.*, * 3 Woods, 286.

§ 487. **Procuring a conveyance for security of heirs of grantor.**—Comfort Wheaton, when seventy-five years old, became severely palsied, the soundness of his understanding being thereby much impaired. Contrary to his former habits he became intemperate and very wasteful of his means. His children and friends contemplated placing his person and estate under guardianship under the Rhode Island law. To avoid this necessity, Handy, one of defendants, a son-in-law of Comfort, and the other defendant, Caleb, a son of Comfort, agreed that Handy should procure a conveyance of all the estate to himself for the benefit of Comfort, and of his heirs after his death, and that Handy should execute an instrument declaring these purposes for the security of the heirs. Handy procured the conveyance duly executed for the nominal consideration of \$2,178, and took possession of real and personal estate, but never executed the acknowledgment of the trust, and refused to do so, or to render any account of his management, claiming the estate as his own. Upon Comfort's death, one Burgess took administration of his estate, which was declared insolvent. The real estate conveyed to Handy was afterwards sold as the estate of Comfort under an order of the court, and was bought in by Caleb for the benefit of the heirs. On a bill filed by the heirs to compel the defendants to account, and to exonerate the estate from the deeds to Handy and Caleb, it was held that equity had jurisdiction, there being no adequate remedy at law; and that these conveyances should stand for no other purpose than as security for the amounts due the defendants, and should be set aside for all other purposes. *Harding v. Wheaton*, * 2 Mason, 378.

§ 488. **Mixture of legal and equitable matters—Multiplicity of suits.**—A testatrix by her will bequeathed a plantation to the Baptist church of Vicksburg, for the education of young men for the ministry, giving to her executor seizure of the estate for the purpose of carrying out the trust. The church filed a bill in equity alleging that the executor was unfit to manage the estate, and that he had let it go to waste, and asking for his removal and the appointment of a receiver. It further alleged that one claiming to have been a partner of the testatrix, and that a large sum was due him as such, had instituted a suit in a state court with a view of absorbing the succession by a judgment, and that the executor was colluding and combining with him, and asked that they be enjoined from continuing such combination. It further stated that certain persons claiming to be heirs of the testatrix had instituted a suit in a state court to have the bequest to the church declared void. And it further alleged that certain persons claiming to be heirs of the husband of the testatrix had also commenced a suit in a state court claiming that the property bequeathed belonged to him. The bill claimed equity on the ground that the case would prevent a multiplicity of suits, and also alleged that full and adequate relief could not be had unless the court would take cognizance of all the questions presented by the said suits, and of the whole matter of the succession. It prayed an accounting by the executor, a reference to a master to ascertain and settle all claims against the estate; that the will might be declared valid; that the complainants might be put into possession of the plantation, and that the suits at law might be enjoined. The court decided that, while the bill presented some matters of equitable consideration, they were so mixed up with others of a different character, or which could not be entertained by the circuit court of the United States, as to make it essentially bad on demurrer; and further, that the claim of the bill to equity on the ground of preventing a multiplicity of suits was unfounded, as only three suits were specified for this purpose in the bill, each of which had a distinct object, was founded on a distinct ground, and was instituted by a distinct class of claimants who had a perfect right to institute the suit. *Haines v. Carpenter*, * 1 Otto, 254.

§ 439. **Contest between donee and devisee.**—In the absence of fraud, a court of equity will not interfere between a donee of land by deed and a person claiming the same simply as devisee under the will of the grantor. *Viers v. Montgomery*,* 4 Cr., 177.

§ 440. **Claim to bonds deposited by national bank.**—A person claiming title, by assignment from a national bank, to the bonds of the United States deposited by it with the treasurer of the United States under the act of June 3, 1864, for the purpose of securing circulating notes, can have no relief in equity against the comptroller and the treasurer who refuse to recognize his alleged rights. *Van Antwerp v. Hulburt*, 8 Blatch., 282.

§ 441. **Champerty.**—A court of equity should lend no countenance to an agreement which partakes in any manner of champerty, although it may be barely valid at law. *Gregerson v. Imlay*, 4 Blatch., 505 (CHAMPERTY, §§ 8-10).

§ 442. **Mistakes by surveyors.**—When mistakes committed by surveyors and chain carriers, especially in an unsettled country and wilderness, are shown by satisfactory proof, courts of law as well as courts of equity will look beyond the patent to correct them. *Conn v. Penn*, Pet. C. C., 497.

§ 443. If a mistake is apparent on the face of a survey, taken in connection with the natural and artificial marks on the ground, if the reputation of the neighborhood has assigned to the tract of land, so surveyed, boundaries different from those delineated in the survey returned, a subsequent location is so far affected with notice of the real boundaries of the tract on which it would adjoin, that a claimant under it cannot, even in a court of equity, set up his posterior equitable title against the legal or equitable title of the first locator. *Ibid*.

§ 444. **Transaction between father and son upheld as a settlement.**—A father, in consideration of love and affection, conveyed land to his son, taking back a life lease. The deeds were kept from record during the father's life, according to his wish, and the deed to the son was delivered to a third person for the use of the son. This third person becoming old, the father took the deed from him for safety, and died having it in his possession. *Held*, that equity would uphold the transaction as a settlement upon the son. *Brown v. Brown*, 1 Woodb. & M., 826 (Conv., §§ 47-50).

§ 445. **Application of payments.**—A court of equity will not permit a creditor to appropriate a payment by his debtor, in discharge of a certain debt, for the mere purpose of leaving an apparent indebtedness at a certain date, in order to raise a presumption against the *bona fides* of a certain transaction of the debtor. *Offutt v. King*,* 1 MacArth., 812.

§ 446. **Use not raised by implication.**—Equity will not, by implication, raise a use for a person who, by law, is incapable of holding. *Philips v. Crammond*, 2 Wash., 441.

§ 447. **Bill retained for further proceedings.**—In suitable cases bills in equity may be retained after a decree for further proceedings. But a bill for an abatement of a nuisance to the mills of the plaintiffs, caused by the raising, by the defendant, of a dam lower down the stream, ought not to be retained for the purpose of having the dam still further lowered, if upon future trials and proofs they can establish that there is a necessity for so doing, since the same privilege would have to be given to the defendant to show that it was already lowered more than necessary, and this would open the door to interminable litigation. *Mann v. Wilkinson*, 2 Sumn., 278.

§ 448. **Auction—Secret bidders.**—Where all the bidders at an auction sale, except the purchaser, are secretly employed by the seller, and yet apparently are real bidders, and the purchaser is misled thereby, and is induced to give a larger price in consequence of their supposed honesty and exercise of judgment, a court of equity ought to relieve against the purchase. But where there are real bidders, as well as secret bidders for the seller, if the last bid before the purchaser's bid is a real one, and no intentional deceit has been practiced by decoy bids, the sale should be upheld. *Veazie v. Williams*, 3 Story, 611.

§ 449. **Insurance—Over-valuation.**—A fraudulent over-valuation and misrepresentation of the value of the subject-matter of insurance will avoid a policy of insurance; and if unknown at the time of the trial and judgment upon the policy, is a proper case for equitable interference. *Ocean Insurance Co. v. Fields*, 2 Story, 59.

§ 450. **Defective execution of a power.**—Although courts of equity may relieve against the defective execution of a power, created by an individual, they cannot relieve against the defective execution of one created by law, or dispense with any of the formalities required thereby for its execution. Thus where a sale of real estate is made by an administrator without having previously obtained the approval by the probate judge of his bond and filed it in the probate office, such bond being a necessary prerequisite to the validity of the sale, a court of equity cannot remedy the omission. *Bright v. Boyd*, 1 Story, 478.

§ 451. **Preferential payments.**—Where an insolvent national bank is making preferential payments in violation of the bankruptcy act, it furnishes a ground for the interference of a court of equity, and a receiver may be appointed: *Irons v. Manufacturer's Nat. Bank*, 6 Biss., 301 (BANKS, NAT., §§ 13-17).

§ 452. Party not relieved against his contract.—A court of equity will not give relief to an individual against his own contract, entered into in good faith, without mistake and for a valuable consideration. Thus where the members of a religious society relinquished their individual property for a common interest in the whole, and appointed agents to manage the concern, expressly agreeing to receive in consideration for their property and labor, a support for themselves and their families, no withdrawing member having a right to demand anything for his property or labor contributed, it was held that equity would not grant relief to a withdrawing member against his contract. *Goesele v. Bimeler*, 5 McL., 223.

§ 453. Dower interest.—Where land has been sold, a court of equity cannot allow a sum in gross, in lieu of dower in the land itself, or of the interest on one-third the purchase money, unless the parties consent. *Herbert v. Wren*, 7 Cr., 370 (DOM. REL., §§ 493-95).

§ 454. A court of equity will exercise a concurrent jurisdiction with courts of law in assigning dower, where partition must be made, and where, on account of the fact that the lands are in the possession of a purchaser who has not paid the purchase money, a court of law can adjudge to the widow only one-third part of the land itself. The widow should not be driven into a court of law when she is willing to affirm the sale and take a compensation for her dower. *Ibid.*

§ 455. Regulating charges on railroads—Bill by bondholders.—The holders of the bonds of a railroad company, and the trustees in the mortgage securing those bonds, being citizens of foreign countries and other states, may file a bill in equity in the United States circuit court to restrain the railroad company from submitting to or accepting, and the railroad commissioners of a state from enforcing, the provisions of an unconstitutional act of the legislature limiting the rate of charges for transportation. They need not wait until the commissioners have put the law in operation, and its effects upon the railroad company have become complete, before invoking the aid of equity. *Pick v. Chicago & N. W. R. Co.*, 6 Biss., 177.

§ 456. Intersection of railroads.—Where the legislature has not declared in what particular way one railroad shall cross or intersect another, but has only referred to it in general terms, it is competent for a court of equity to control the railroads as to crossings. *Chicago & N. W. R. Co. v. Chicago & P. R. Co.*, 6 Biss., 219 (CORP., §§ 1556-58).

§ 457. Arbitration and award.—A court of equity will not grant relief an award on the ground that the arbitrators did not act on part of the matters submitted to them, when it is not shown that the complainant was injured by the omission. *Davy v. Faw*, 7 Cr., 171 (ARB., §§ 145-48).

§ 458. In a suit for partition, where complainant stands upon an equitable title, equity will apply its powers for the detection of latent frauds and concealments. *Vint v. Heirs of King*,* 2 Am. L. Reg. (O. S.), 712.

§ 459. Equity will not decree a partition while complainant's title is in dispute. *Barney v. Mayor and City of Baltimore*,* 1 Hughes, 123.

§ 460. War interest being held inequitable in Virginia, the district court, as a court of equity, may require creditors of a bankrupt to abate such interest when embraced in judgments obtained by default, and this regardless of the statutory provision of 1873. *Fowler v. Dillon*,* 1 Hughes, 236.

§ 461. To correct a judgment at law so as to conform the amount recovered to the real intention of the parties, and render it consistent with justice and equity, is not to impair the obligation of contracts. *Ibid.*

§ 462. Sale of equity of redemption—Assignment for creditors.—Where an equity of redemption was sold under execution at the suit of an assignee for creditors, it was held that the burden was on such assignee and creditors to show that the purchaser bought the property for the benefit of the creditors, especially as the only deed made was made to such purchaser, and the creditors had acquiesced in a foreclosure of the mortgage by such purchaser. *Cushing v. Smith*,* 3 Story, 582.

§ 463. Letters of guaranty.—As to whether certain letters constitute a guaranty, the construction must be precisely the same at law and in equity, and any explanatory facts which can be received in the one court can be admitted in the other. *Russell v. Clark*, 7 Cr., 69 (CONTRACTS, §§ 272-77).

§ 464. Extraterritorial jurisdiction.—A decree of a court of equity in another state cannot transfer lands in Ohio. A deed executed under such a decree is of no greater effect than the decree, notwithstanding the law of Ohio that deeds of land in that state should have full force and effect though executed in another state if legal and valid where they were executed. *Watts v. Waddle*, 6 Pet., 400.

§ 465. Joint proprietor.—A court of equity can protect the interests of a joint proprietor in property that is being injuriously affected. *Chicago & N. W. R. Co. v. Chicago & P. R. Co.*, 6 Biss., 219 (CORP., §§ 1556-58).

§ 466. **Judicial sale — Inadequate price.**— Where a purchaser at a judicial sale, by his misrepresentations, obtains the property for a totally inadequate price, the owner may have the sale declared void by a court of equity, and is not confined to his right of summary redress in the court ordering the sale. *Cocks v. Izard*, 7 Wall., 562.

§ 467. **Remedy against deceased surety.**— A court of equity will not interfere to give a remedy against the personal assets of a deceased surety when the remedy at law has been lost by the election of the obligee to take a joint judgment on a joint and several bond. (*McLEAN* and *WOODBURY, JJ.*, dissenting.) *United States v. Price*, 9 How., 83 (BONDS, §§ 540-49).

§ 468. **Compelling delivery of insurance policy.**— Resort may be had to a court of equity to compel the delivery of an insurance policy in performance of a contract of insurance, even after the loss has happened, in order to facilitate proceedings at law. And the party being properly in court after the happening of the loss, the court of equity may proceed to give such final relief as the circumstances of the case demand. *Taylor v. Merchants' Fire Ins. Co.*, 9 How., 390 (CONTRACTS, §§ 167-74).

§ 469. **Loan of slave, with a reversion of the slave and her increase — Bill for injunction and discovery.**— The owner of a slave, having loaned her to B. and his wife, made a deed conveying her to them for life, with a reversion to himself and his heirs of her and her increase, prohibiting any alienation under penalty of forfeiting the loan. The person to whom this property was devised, upon the death of the original owner, brought a bill in equity, alleging that B. and his wife were claiming the slave and her increase as their absolute property; that the complainant feared that they would be secreted or conveyed out of the state to places unknown; that he was unable to prove the identity of the said slaves, and prayed that the respondents might be compelled to discover their number and names, and to give security for their forthcoming when the life estate should determine. An injunction was awarded against their removal. An amended bill alleged a sale of the slaves by B. and wife, prayed that they might be decreed to the complainant, and asked an extension of the injunction to the purchasers. The injunction was so extended. The lower court having dismissed the bill, it was held by the supreme court, that equity would not enforce the forfeiture by decreeing the slaves to the complainant; but that the complainant had a right to apply to a court of chancery for a discovery in order to enable him to proceed at law, either immediately or on the death of B. and his wife, and also for an injunction to prevent the removal of the slaves out of the state; that the bill ought not to have been dismissed unless the plaintiff failed to show any title which might be litigated in a court of law; that the title was sufficient to authorize the prayer for discovery, and the fear of the removal of the property sufficiently reasonable to obtain security for its forthcoming, if the title should be determined in plaintiff's favor; and that, as the discovery had been made, and the plaintiff died, the bill might have been properly dismissed as to the relief asked on the ground of forfeiture, but without prejudice to the rights of the plaintiff, an absolute dismissal being considered as a decree against the title. *Horsburg v. Baker*,* 1 Pet., 282.

§ 470. **Fraud — Defect of parties — Money decree in lieu of specific performance.**— May and Le Claire, who had been engaged in business together, and had mutual demands against each other, entered into an agreement by which they were to be settled by an exchange of property. By fraudulent schemes and devices on the part of Le Claire in carrying out this agreement he became the possessor, not only of what was to be conveyed to him under it, but also of what was to be conveyed to May. Le Claire being dead, May filed a bill against his executors and as many of the devisees as he could reach, praying for a specific performance of the contract, or alternatively for compensation in money by way of substitution. The court, being unable to decree a conveyance of the real estate by way of specific performance, more than one-half of the devisees of Le Claire being resident abroad and not before the court, made a money decree against the executors embracing the value of the property which might otherwise have been decreed to be conveyed. *May v. Le Claire*,* 11 Wall., 217.

§ 471. **Bills of review and revivor — Want of jurisdiction — Amendment — Waiver of objections — Assignment for creditors — Lapse of time.**— Shultz and McKinne were the owners of a bridge, which together with other property formed the partnership stock of a banking institution run by them under the name of the Bridge Company. To secure a loan from the Bank of Georgia, they mortgaged the bridge to that bank. The bridge having been directed to be sold by a state court, under foreclosure proceedings upon this mortgage, Shultz and others obtained an injunction against the sale in the circuit court of the United States in Georgia on a bill against the bank praying that the property might be sold to pay the creditors of the Bridge Company, and particularly judgment creditors. The bridge was sold under an interlocutory decree, in 1822, to the bank, and the bank issued scrip for the amount and deposited it in court. On a certificate of division to the supreme court, the cause was dismissed because the record did not show the required citizenship to give jurisdiction; but that court subsequently reinstated the cause upon the consent of counsel to the necessary amend-

ment. The cause having been remanded as not properly certified, the circuit court, in 1830, rendered a final decree, by consent of the counsel for both parties, affirming the sale to the Bank of Georgia, and directing the scrip issued by it in payment to be canceled and delivered up to the bank. In 1828, Shultz assigned all his property under the insolvent law in another state, but his trustee never connected himself with these proceedings. Fifteen years after the decree was entered, the trustee of Shultz, as trustee and for the creditors, and Shultz in his own right, filed a bill in the same court, which they said was "in the nature of a bill of revivor and supplement," praying that the original bill be reinstated and the whole matter re-investigated. By way of supplement, Shultz stated that the bridge had been originally pledged by him and his partner for the redemption of the bills issued by them, and the lien still remained; that, the bridge never having been sold under the mortgage, the Bank of Georgia and those claiming under it occupied the position of mortgagees in possession, and were bound to account for the rents and profits; that his trustee, out of his individual property, had paid bridge bills and judgments on such bills to a large amount, and that the unsatisfied creditors had the equity of requiring a like amount of the copartnership property of the Bridge Company to be applied in payment of their individual claims; and that he had also paid out of his private means a large sum for the redemption of the bridge bills. The complainants also alleged that the decree on the original bill was void as to the creditors of Shultz, as the counsel in consenting to it did not represent them, and as all the right of Shultz had passed out of him before that by the assignment for creditors; that the sale was void as to McKinne because he never assented to it; and that, if the sale was valid, the bank was bound to account for the purchase money and interest, and the tolls received. The bill prayed that the decree might be opened, reviewed and reversed; that the mortgage might be declared void; and that the sale might be set aside. It was held (1) that this could not be considered as a bill of review, having neither the form nor substance of such a bill, and that if it were it would be barred by the analogy it bears to a writ of error, which must be prosecuted within five years from the rendition of the judgment; (2) that it could not be called a bill of revivor or a supplemental bill, but must be treated as an original bill, having for its objects the prayers specially set forth; (3) that the proceedings on the original bill were not before the court, and the court could not correct errors therein, or set them aside by a reversal of the decree; (4) that the supreme court had power to make the amendment of the record when the case was before them on the certificate of division; (5) that, if no amendment had been made, the orders and decrees of the circuit court would not have been nullities; (6) that, as the amendment by the supreme court making the record show the necessary citizenship was before the circuit court when the final decree was entered, it removed the objection to the jurisdiction of the court, and after this the decree could not have been reversed for want of jurisdiction; (7) that all objection to the sale, by the parties on the record, must be considered as having been waived by the consent decree; (8) that the assignment of Shultz, made in another state, could not affect property in Georgia, which was in the custody of the law, which had been sold with his consent under authority of the court of chancery, and the proceeds of which were kept subject to the distribution of the court; (9) that the trustee of Shultz could not, after so great a lapse of time, without excuse, be heard to object to a decree which was entered by consent; (10) that the time which had elapsed was also an answer to the claims of the creditors of the Bridge Company, which did not appear to be a specific lien on the bridge, and also to the claims of the creditors of Shultz; and (11) that the validity of the mortgage to the Bank of Georgia was settled by the consent decree, and the question was not open to examination. *Kennedy v. Georgia State Bank*, * 8 How., 586.

§ 472. *Compromise and settlement.*—Where a settlement of unadjusted demands has been made in a spirit of peace and compromise, it is the duty of a court of equity to uphold the agreement, and protect and enforce the rights of the parties under it, and to carry it out as far as the subsequently occurring facts and the settled principles of jurisprudence will permit. *May v. Le Claire*, * 11 Wall., 217.

§ 473. *Estoppel — Acquiescence in sale of land.*—If parties claiming an interest in land look on and see it conveyed, or take part in the transaction without complaint or objection, they are usually estopped in equity from afterwards setting up a title against the grantees and those holding under them. *Shapley v. Rangeley*, * 1 Woodb. & M., 213.

§ 474. *Money paid into court — Dismissal of bill.*—The plaintiff was the licensee of three sewing machine companies of a certain patent right. The license contained a provision that said companies should not license the making of the machine to any one else at a less rent without a corresponding reduction in the rent to be paid by the plaintiff. And the licensors reserved a right to terminate the license at their option for any breach of the agreement. The plaintiff brought a bill in equity alleging that the licensors had given such a license to a third party as operated to reduce the plaintiff's rent, and that he had paid a large amount of rent in ignorance of this fact. The bill prayed a decree establishing the right to a reduction, and di-

recting repayment of the sums overpaid, and that the defendant be enjoined from giving notice of an option to terminate the license, and from attempting to collect the sums reserved as rent. An injunction *pendente lite* was granted upon condition of the plaintiff's depositing in court such sums of rent as should fall due, at the times specified, during the pendency of the suit, to await the final decree. Upon the hearing the court dismissed the case as not within the jurisdiction of equity and for want of necessary parties, without passing upon the merits of the controversy. Before a final decree had been settled and entered, the plaintiff applied for an order that the money paid into court be repaid to him. The defendant also claimed the sum as rent money. It was held that, as the paying of the money into court for the security of the defendant gave him an equitable lien, the plaintiff ought not to be permitted to withdraw it; and that the defendant could not claim it until the merits of the controversy were in some way passed upon. *Florence Sewing Machine Co. v. Singer Manufacturing Co.*, *8 Blatch., 177.

§ 475. It was also held (1) that the suit involved legal questions purely; (2) that the licensee had the remedy in his own hands by refusing to pay the extra fees, and did not need the aid of equity; (3) that the bill showed that the facts sought to be discovered had already been found out; (4) that there was nothing to sustain the suit on the doctrine of bills *quia timet*; and (5) that the suit was, in substance, an endeavor to obtain advice from the court, and could not be sustained. *Florence Sewing Machine Co. v. Singer Manufacturing Co.*, *8 Blatch., 118.

§ 476. Want of privity.—The vendors in a sale of certain timber lands agreed among themselves in dividing the notes which were a part of the proceeds of the land, that they would share equally the losses arising from the insolvency of the purchasers. Upon a rescission of this sale at the suit of one of the purchasers, he sought to have the benefit of this agreement for contribution, to enable him to recover from any of the vendors, the purchase money paid by him, in case he was not able to make the same out of the parties directly liable to him. *Held*, that the agreement for mutual indemnity of the vendors was strictly *res inter alios acta*, from which he can claim no benefit. *Daniel v. Mitchell*, *1 Story, 172.

§ 477. Miscellaneous.—Congress having provided, in an act confirming certain land grants, that all claimants (the original grantees and those claiming under them) should "establish their claims to the satisfaction of the register and receiver of the proper land district," it was held that a bill by a claimant, alleging that the commissioner of the general land office has refused to hear an appeal by the complainant from a decision of the register and receiver against his claim, and that the decision of those officers was procured by fraud of the defendant, that the defendant's title rested on that decision, and that in consequence of the issue of the plats the executive department had disabled itself from hearing the appeal, made out a *prima facie* case for equitable relief. *Leitensdorfer v. Campbell*, 5 Dill., 419.

§ 478. A plaintiff, in a civil action under the code for the recovery of money, alleged that he was induced to sell goods to the defendant A., on the false representations of the defendant B., that a farm, which B., as a part of the transaction, loaned to A., as a basis of credit, and which was mortgaged to the plaintiff by A., to secure the purchase money for the goods, was worth \$25,000, when in fact it was only worth \$7,000; and that subsequently B. obtained a judgment against A. on judgment notes given to B. by A. for the transfer of the farm, and had levied execution on the goods sold to A. by the plaintiff. On affidavits that the debt was contracted fraudulently, he obtained an attachment on the goods. At the same time the petition was filed, the plaintiff filed a petition for equitable relief, and obtained an order restraining the sheriff from applying the goods in satisfaction of the execution of B., and that he deliver the proceeds of the goods into court to await the judgment of the court on the question raised by the allegations of the bill, as to the priority and validity of the execution. The case was removed into the federal court, and, by consent of the parties, the injunction was modified so far as to permit a sale by the sheriff under the levies, the proceeds to be retained subject to the further order of the court. It was held, on a motion to dissolve the injunction, that the plaintiff had a right in equity to detain the fund in the hands of the sheriff to await the final hearing, and that he had no adequate remedy at law to avoid the levy and execution as against his claim. *Perry v. Sharpe*, 8 Fed. R., 15.

§ 479. Where an assignee in bankruptcy had resisted the allowance of a claim against the estate, and joined with a creditor in contesting the claim before a referee, and in taking exceptions to the referee's report allowing the claim, and the report was confirmed by the district court on review, it was held, on a bill in equity filed by the creditor in the circuit court to reverse the decree, averring no collusion between the assignee and the claimant, or the existence of any new evidence, and insisting only that the claim was not sustained by the evidence, that no equity was exhibited against the assignee for not appealing, or against the claimant, the court declaring that equity would not interfere with a judgment obtained in another court, on the allegation, without more, that it was erroneously given. *Bank v. Cooper*, 20 Wall., 171.

§ 480. The complainants and the defendant were co-executors and trustees in a will. The

defendant borrowed a portion of the trust funds, and executed his bond and mortgage therefor, being named as one of the obligees in the bond, and one of the mortgagees in the mortgage. The mortgage was foreclosed, but the proceeds of the sale of the mortgaged property failed to pay the whole debt. The bill of the complainants alleged that the decree of the surrogate had finally settled the accounts of the executors and trustees, and that they were entitled to retain out of the funds in their hands a certain sum as commissions; also that the defendant's share remained undrawn, and that he refused to apply such sum toward the payment of his indebtedness to the estate. It was held that the complainants were rightfully in court to recover the deficiency, and, being in possession of the fund out of which the defendant's commissions were payable, they could apply his share in payment of his indebtedness to the estate. *Ransom v. Geer*, 12 Fed. R., 607.

§ 481. Where a harbor board was created by the legislature of Alabama, and authorized to make contracts for a public work in which the county of Mobile was specially interested, and to require the obligations of the county to meet the expenses incurred, the board having bound the county by their contracts, it was held that the contractors could maintain a suit in equity for a delivery of the bonds, or their equivalent in money, and that if, for any cause, the repeal of the law creating the harbor board, or the refusal of its members or other officials to act, the contracts could not be specifically enforced, a court of equity would order compensation in damages from the party ultimately liable. *County of Mobile v. Kimball*, 12 Otto, 691 (CONST., §§ 1177-82).

§ 482. Where a life tenant, who was also the owner of one undivided third part of the premises in fee, procured a policy of insurance upon the premises which ran in terms to him alone, but was in fact procured as additional security in pursuance of the terms of a mortgage jointly executed by the life tenant and the reversioners, and the policy was held to inure to the benefit of all the mortgagors, it was held that the rules of equity were sufficiently flexible to direct a proper application of the insurance money in case of loss. *Connecticut Mu. L. Ins. Co. v. Scammon*, 4 Fed. R., 268 (CONV., §§ 572-75).

§ 483. It appearing on a bill filed by the owner of the equitable interest in certain lands, that the defendant had the better right to a part of them, the complainant was directed to release the same to the defendant, although the answer did not contain a prayer for such relief. This was imposed on the complainant as a condition to the relief granted him, to effect justice between the parties. *Walden v. Bodley*, 14 Pet., 156.

§ 484. A bill in equity lies by a debtor against a creditor to compel the latter to deliver up certain notes executed to him by the former, in pursuance of an agreement for the extinguishment of the notes by a composition. Such relief is distinguishable from relief by specific performance of an executory agreement. The court, having jurisdiction of so much of the cause, may also decree that the creditor repay the amount which the debtor has been obliged to pay on some of the notes which, notwithstanding the payment of the composition, the creditor has negotiated to *bona fide* holders for value. If the debtor has induced the agreement of composition by a promise to pay the full amount of the debt when able, and has become able to pay the full amount, the creditor is entitled to have the bill dismissed, so that he may enforce the contract at law for the balance due, or to have administered to him in equity the same relief by a decree for the balance. *Clarke v. White*, 12 Pet., 178 (DR. AND CR., §§ 184-87).

§ 485. The holder of a certificate of stock in a corporation, the shares named in which are subject to assessment, cannot ask, in equity, to have full paid stock in place of his mere subscription, without showing the payment of anything for the subscription, or offering to pay anything. *Dakin v. Union Pacific R'y Co.*, 5 Fed. R., 665.

§ 486. Where a conveyance was made, in 1828, to T. in trust for J., and T. died in 1845, and J. conveyed to C., in 1848, it was held that a court of equity would find some way to protect the purchase of C. against a conveyance by the heirs of T., made in 1864. *Dolton v. Cain*, 14 Wall., 472.

§ 487. Where the legislature passes an act for the relief of a private person with reference to a particular estate, and empowers a trustee to sell a part of it with the consent of the chancellor, and provides that the chancellor may act upon the subject summarily upon the petition of the person for whose relief the act is passed, and states precisely what the chancellor may do, the chancellor cannot deviate from the letter of the act, nor make any order partly founded upon his original jurisdiction as chancellor, and partly upon the statute. Where such an act makes the person to be relieved a trustee, and provides that no sale of any part of the estate shall be made by the trustee without the assent of the chancellor; that the chancellor shall direct the mode in which the proceeds of the sale shall be vested in the trustee; that the trustee shall annually account to the chancellor, or such person as he may appoint, for the principal of the proceeds of such sale, the interest to be applied by him as he may think proper for the maintenance and education of his children; and authorizes the trustee either to sell or mortgage the premises which the chancellor may permit to be sold or mortgaged, and apply

the money so raised to the purposes required by the chancellor, under the act, the chancellor exceeds his jurisdiction under the act, by allowing the trustee to convey part of the estate in payment of his debts upon a valuation agreed to between him and his creditors, or by allowing him to apply the money arising from a sale of the estate in payment of his debts, investing the surplus only in such manner as he may deem proper to yield an income for the maintenance and support of his family. *Williamson v. Berry*, 8 How., 495.

§ 488. Certain customs bonds were deposited with a bank for collection, and the principal obligor procured certain notes to be discounted at the bank, and the proceeds were placed to the credit of the United States in payment of the bonds. It was afterwards discovered that the notes were forgeries. *Held*, on a bill filed, praying that notes be decreed not to be a payment of the bonds, and that the debt is still due and ought to be paid out of the estate of the principal obligor, or that the bonds be delivered up to the plaintiffs, and be paid by the obligors, etc., that the bill had not a shadow of right to sustain it. *United States v. Rousmaniere*,* 2 Mason, 875.

§ 489. B., the owner of certain lands, by power of attorney under seal, appointed G. to lay them off into town lots, and convey the title to trustees to sell them. One claiming under B., as purchaser from his devisees, brought a bill in equity charging that the trustees had conveyed certain of the lots fraudulently, and in violation of the powers under which they acted, and for a nominal consideration, to purchasers with notice of all this, and with notice of the claims of B. and his heirs and assigns; that many of the lots had been sold, the proceeds of which had never been paid to B. or his devisees; and that there remained lots unsold, which the plaintiff prayed might be conveyed to him. It was held that a demurrer to the bill for want of equity could not be sustained. *Burnley v. Town of Jeffersonville*, 8 McL., 386.

§ 490. Where, after the death of a member of a mutual assurance society, his executor sells the land chargeable with assessments, the sale being without notice of the incumbrance, the remedy by which to subject the proceeds in the hands of the executor to the payment of the assessments, is by bill in equity. *Mutual Assurance Society v. Watts*, 1 Wheat., 279.

§ 491. The vessel of the plaintiff having been captured by a Portuguese frigate for a supposed violation of the law of nations, and finally condemned, he sought restitution from the Portuguese government, and subsequently gave to the defendant, who was his agent in other transactions, and who had already applied to the United States in his favor, an irrevocable power of attorney to demand and recover his claim from either government, agreeing to pay him almost one-third of the sum recovered. At the time of this agreement, unknown to both parties, the claim had already been allowed by the Portuguese government by treaty stipulation with the United States, so that nothing remained to be done by the defendant. The plaintiff was held entitled to a decree in equity that the agreement be delivered up to be canceled, and the defendant be enjoined from asserting any title at law or in equity under the same; and that the defendant was only entitled to compensation for services previously rendered. *Hammond v. Allen*, 2 Sumn., 887.

§ 492. Opening settlement.—After the dissolution of a mercantile firm and a final settlement of its accounts, one of the members who had sanctioned and approved the account died, and his executor brought a bill in equity for a resettlement, alleging errors in the settlement already made. Deceased being of sound mind when he made the settlement, it was held that a court of equity would not permit the settlement to be opened as to any point agreed to by him, without proof of mistake or omission, or fraud or misrepresentation in obtaining the agreement. *Brydie v. Miller*, 1 Marsh., 147.

§ 493. An assignment by one of two partners of all the property of the firm to the other, made at a time when the firm is insolvent, cannot be sustained in equity, since it defeats the right of the partnership creditors to be first paid out of the partnership assets; the court, at the instance of the partnership creditors, will decree a cancellation of such an agreement of dissolution, and direct the distribution of the proceeds of the partnership property as if no dissolution had taken place. *Collins v. Hood*, 4 McL., 186.

§ 494. *Ne exeat*.—The very object of the writ of *ne exeat* being to secure the presence of the party in order that the judgment may be executed, the right to this remedy does not expire upon the determination of the suit and the entry of judgment. It should continue in force until the judgment is satisfied, or until the writ is dissolved or proper security given. *Lewis v. Shainwald*, 7 Saw., 403 (§§ 1820-26).

§ 495. It is no objection to a writ of *ne exeat* that no limit is placed by the decree upon the length of time which it shall continue in force, the court having power to control that matter. *Ibid.*

§ 496. Tender of performance.—Where a lease of water power provides for a reduction of rent for a failure of the water, and a recovery in ejectment is had upon the ground of forfeiture for the nonpayment of the rent reserved, and the tenant brings a bill in equity for relief from the forfeiture, he should at least tender payment of the difference between the amount

of rent due and the amount of reduction he is entitled to on account of failure of water. *Sheets v. Selden*, 7 Wall., 416.

§ 497. Infants cannot be prejudiced by the misstatements or omissions of their guardian in his answer, and a court of equity will decree according to the facts of the case. *Lenox v. Notrebe*, Hemp., 251 (§§ 772-76).

§ 498. A court of equity converts any one who intermeddles with an infant's property into a trustee for such infant. *Lenox v. Notrebe*, * Hemp., 225.

§ 499. A court of equity will always guard the rights of infants. It will not permit their interests to be sacrificed, by its sanction, though the consent of the guardian be given. Before it divests an estate from infants and vests it in others, the court must be satisfied that the principles of justice and the rules of equity authorize the proceeding. *Walton v. Coulson*, 1 McL., 120.

§ 500. The jurisdiction of the English courts of chancery which originated in the prerogative of the crown, arising from its general duty as *parens patriæ* to protect the persons and estates of infants, is more frequently exercised in this country by the courts of the states than the courts of the United States. It is the state and not the United States which stands, with reference to the persons and property of infants, in the relation of *parens patriæ*. And the authority of the federal courts, within the limits of a state, can only be exercised for the appointment of guardians, where the property of the infant is involved in legal proceedings before them, and needs the care and supervision of an officer of that kind. Where, therefore, a suit is brought in a federal court, which does not concern any property, real or personal, but seeks to cancel a contract of insurance made with the father of the infant defendant, and the infant possesses no property within the state, nothing is gained by a reference to the general power of courts of equity over the persons and property of infants. *Insurance Co. v. Bangs*, 13 Otto, 435 (Dom. REL., §§ 892-97).

§ 501. Waste.—A court of equity has jurisdiction to stay waste, and may restrain the cutting of young timber by a tenant under a lease for ninety-nine years, renewable forever, and with a right to purchase the reversion, where the timber constitutes the chief value of the land, and the cutting of such young timber will be an injury to the inheritance. *Thruston v. Mustin*, 3 Cr. C. C., 335.

§ 502. Set-off.—Equity follows the law in regard to matters of set-off, unless there is some intervening natural equity going beyond the statutes of set-off which constitutes the general basis of set-off at law. *Howe v. Sheppard*, 2 Sumn., 409.

§ 503. The jurisdiction of courts of equity in matters of set-off is very narrow, and closely follows that of the law. The mere fact of the existence of mutual demands constitutes no ground in equity for a set-off; there must be some original or intervening equity between the parties. Mere insolvency, it seems, will not constitute a ground for interference. *Gordon v. Lewis*, * 2 Sumn., 638; *Gordon v. Lewis*, 2 Sumn., 143.

§ 504. The rule of the common law that no set-off can be made of several debts against joint debts of the contracting parties is followed in equity, unless some peculiar equities intervene in the particular case, the rule being that, on this subject, equity follows the law. *Vose v. Philbrook*, 3 Story, 335.

§ 505. Courts of equity will set off distinct debts where there has been a mutual credit, to avoid circuity of suits. But the mere existence of distinct debts without mutual credit does not give a right of set-off in equity. And in a state not recognizing any set-off by its statutes, except of judgments and executions, it is doubtful whether a court of equity should assume a broader jurisdiction. No equity of set-off attaches to the debt itself, so that a set-off may be enforced between the *bona fide* assignees of the original parties. *Greene v. Darling*, 5 Mason, 201.

§ 506. The doctrine is clear in equity as well as at law that joint debts cannot be set off against separate debts; or separate debts against joint debts. It seems that a court of equity will not entertain a set-off of a separate debt of one partner against a joint debt due the partnership upon the mere ground of the insolvency of that partner. *Howe v. Sheppard*, 2 Sumn., 409.

§ 507. In equity a partnership debt cannot be set off against a separate debt due one of the partners except in cases of dormant partnership. *Vose v. Philbrook*, 3 Story, 335.

§ 508. Limitations—Laches—Stale demand.—A court of equity applies the rule of laches according to its own idea of right and justice. *Brown v. County of Buena Vista*, 5 Otto, 159. See LIMITATIONS.

§ 509. Courts of equity are very reluctant to sustain a demurrer to a bill on the ground of staleness alone, unless it is such that the delay would be a bar to a suit at law on the same claim, or unless there is a clear and strong analogy between the case in chancery and a case at law on which the statute of limitations would operate. *Putnam v. New Albany*, * 4 Biss., 365. See BONDS, §§ 1134-36; CORP., §§ 182-86.

§ 510. A court of equity will not give relief upon the ground of a delay on the part of the respondent in executing a contract with the complainant, where the complainant has assented to and acquiesced in the delay. *Sloo v. Law*,* 1 Blatch., 512.

§ 511. Lapse of time may constitute a bar to relief in equity in case of a trust, where the trust is denied, or the character and nature of the trust are obscured by lapse of time and long acquiescence. *Livingston v. Proprietors of the Ore Bed in Salisbury*,* 16 Blatch., 549.

§ 512. The rule that equity will not enforce a stale claim should never be applied in cases of trust where the means of knowledge are wholly or chiefly on one side. And when fraud, consisting of concealments and misrepresentations, is charged and proved, courts of equity are reluctant to apply this rule, unless the rights of innocent third parties will be injuriously affected if the defense is overruled. *James v. Atlantic Delaine Co.*,* 3 Cliff., 614.

§ 513. Courts of equity are never active in lending their aid to stale and neglected claims. The maxim of such courts is *vigilantibus, non dormientibus leges subveniunt*. *Lupton v. Janney*, 13 Pet., 381.

§ 514. A court of equity is bound to apply the statute of limitations only in cases where courts of law and equity have concurrent jurisdiction. In a great variety of cases courts of equity act only upon the analogy of the limitation at law, and not in obedience to the statutes. In still another class of cases equity courts disregard both the statute of limitations and the principle of analogy, and act upon considerations peculiar to themselves. Equity follows the analogy of the statute of limitations in cases in which, though exclusively cognizable in equity, the reason of the law of limitation applies as cogently as in suits at law. *Etting v. Marx*, 4 Fed. R., 673.

§ 515. In equity as well as at law, a statute of limitations is a bar when the conflicting titles are adverse in their origin, and the one equitable and the other legal. *Fussell v. Hughes*, 8 Fed. R., 384.

§ 516. Among the cases in which a court of equity has been held not to be affected by the statutes of arbitrary limitations, or the rule of analogy to them, are, (1) those in which public convenience requires that there shall be a speedy end of strife; (2) others, in which some of the principal parties in the transactions sought to be reviewed are dead and their vouchers lost; (3) others in which the court could not be certain, from lapse of time, that relief, apparently proper, would certainly be just; (4) others where the disturbance of purchasers or transactions acquiesced in for a greater or less time would prejudice the vested rights of third persons. *Etting v. Marx*, 4 Fed. R., 673.

§ 517. Where a complainant is compelled to resort to a court of equity because the corporation in whose name the action at law could be sustained no longer exists, he is subject to the same rules of prescription as if he were in a court of law. *Bacon v. Howard*, 20 How., 32.

§ 518. At law, time is an essential part of the contract, but in chancery it is considered in connection with the circumstances of the case. Chancery will not disregard time as immaterial, but if the party can show that he has been prevented by inevitable accident, or by any justifiable excuse, from performing his part of the contract, at the time stipulated, and the other party has suffered no material injury by the delay, the court will not withhold its aid. *Longworth v. Taylor*, 1 McL., 395.

§ 519. A court of equity refused to set aside a deed for duress, where the bill was not filed until twelve years after the date of the giving of the deed under the duress alleged, where this delay was not satisfactorily explained, where the evidence was conflicting and engendered doubt as to the real character of the circumstances under which the deed was made, and where the defendant had during the delay made expensive and permanent improvements on the land; although the court declared it to be probable that the plaintiff might have had a decree, if he had made the same case upon a suit brought recently after the transaction. *Murphy v. Payntner*, 1 Dill., 333.

§ 520. Where property of a judgment debtor has been taken upon execution, a bill in equity will not lie to restrain proceedings thereon on the ground of misconduct and delay on the part of the creditors in not proceeding in garnishment proceedings resorted to for the collection of the debt, unless it is shown that loss to the judgment debtor has resulted from such delay. *Boyle v. Zacharie*, 6 Pet., 645.

§ 521. Where a party has failed to execute his part of a contract without sufficient excuse, and there has been no acquiescence in the delay by the other party, a court of equity will not decree a specific execution of the contract. The party who asks the court to aid him must show reasonable diligence in doing, or attempting to do, what he agreed to perform. *Longworth v. Taylor*, 1 McL., 395.

§ 522. The proprietors of an ore bed were organized into a corporation, their respective shares in the land being represented by proportional stock in the corporation. The plaintiff brought suit against the defendants to recover a certain number of shares of this stock growing out of this real estate. His deviser, under whom he claimed, had not enjoyed this prop-

erty, in either form, for fifty years prior to his death, and for more than thirty years the defendants or their assignors had openly claimed and enjoyed the stock as their own. The plaintiff's ancestor was, during these fifty years, in a position to know the history of the property, but had never made a demand for it. *Held*, that the plaintiff could not recover, because of laches and the staleness of his claim. *Livingston v. Proprietors of the Ore Bed in Salisbury*, * 16 Blatch., 549.

§ 523. Where proceedings were instituted to set aside a judicial sale six years after it was made, it was held that courts of equity would not look with favor upon a proceeding instituted so long a time after the property had passed into the hands of other and subsequent purchasers without notice. *Johns v. Slack*, * 2 Hughes, 467.

§ 524. The complainant brought his bill against the defendants as survivors of four trustees to whom his ancestor had conveyed real and personal estate for the payment of his debts, and to hold the surplus in trust for himself, seeking a discovery and account. The original conveyance had been made in 1792. There had been an assignment of the bond for reconveyance to one of the defendants in 1801, which was recorded in 1809. The original grantor had died in 1814; and the bill was not filed until 1816. No attempt was made during the life-time of the original grantor to set aside the assignment or procure a settlement of the claims urged by the bill. *Held*, that this lapse of time and acquiescence should be considered as an objection to the bill. *West v. Randall*, 2 Mason, 181.

§ 525. Claim of title to land, staleness, obviated by amendment. *Copen v. Flesher*, * 1 Bond, 440.

§ 526. Presumption of payment is not the only ground upon which a court of equity refuses its aid to a stale demand. There must appear to have been reasonable diligence to call its powers into action. If, therefore, the complainant, by his own showing, has been guilty of laches, he is not entitled to the aid of the court, though the debt be still unpaid; and the objection may be taken by demurrer. *Maxwell v. Kennedy*, 8 How., 210 (§§ 1817-19).

§ 527. Where the transactions out of which the suit arose had occurred sixty-five years ago, the subject of the suit, the estate of a decedent, having been in litigation in some form during all that time, and the particular suit had been commenced thirty-six years ago, the court expressed itself as not inclined to add to the length of the litigation by looking after mere form in order to avoid substance. *Crosby v. Buchanan*, * 23 Wall., 420.

§ 528. Account.—A court of equity exercises a sound discretion in decreeing an account, whenever the subject matter cannot be well investigated in an action of *assumpsit* or *indebitatus assumpsit*. *Blank v. The Manufacturing Co.*, 3 Wall., Jr., 196. See ACCOUNTS.

§ 529. Relief by account, when prayed for, is incidental to relief by injunction, and may be decreed by a court of the United States, under its power to enjoin the infringements of copyrights and patents, though there is no express grant of power by congress to take an account in such cases. But the account must be prayed for. *Stevens v. Cady*, 2 Curt., 200.

§ 530. A bill for an account will not lie where an account of the matters in controversy has been rendered and received without objection and no fraud is charged. *Baker v. Biddle*, Bald., 394 (§§ 884-96).

§ 531. Where a bill states a case proper for an account, one may be ordered under a prayer for general relief. *Stevens v. Gladding*, 17 How., 447.

§ 532. A bill for an account will not lie to recover a mere debt; as, to compel a corporate body to pay its bonds. *Heine v. The Levee Commissioners*, * 1 Woods, 252.

§ 533. Extensive and complicated accounts of long standing between a principal and his factors may be opened by a court of equity for the purpose of correcting the errors of either party, notwithstanding they may have been settled and a note given for the balance. *Dunbar v. Miller*, 1 Marsh., 85 (AGENCY, §§ 581-86).

§ 534. A decree for an account in equity against an executor, at the suit of a legatee, is a matter of course. *Pulliam v. Pulliam*, 10 Fed. R., 23.

§ 535. The jurisdiction of a court of equity to decree an account in patent and copyright suits is not dependent on the right to an injunction. Where the patent expires before the final hearing and an injunction cannot therefore be granted, an account may nevertheless be decreed. *Blank v. The Manufacturing Co.*, 3 Wall., Jr., 196.

§ 536. A bill in equity to recover profits resulting to the defendant from his use of an invention in violation of the plaintiff's patent right, cannot be maintained as a bill for an account, when the profits do not consist in specific sums of money received by the defendant in so using the invention; but in the advantage and convenience which the defendant has derived from using the invention, which advantage is a matter of practical estimation as due in a lump, and there is no mutuality of accounts. *Sayles v. Richmond, etc., R. Co.*, 3 Hughes, 172.

§ 537. A bill in equity stated the formation of a partnership to buy and sell lands; that through an agent, sundry lands of the firm had been sold, and others were still held by or on account of the partnership; that one of the partners had assigned his interest in the firm to one

who had assigned it to the complainants. It made the other partners and the agent parties, and prayed for an account. *Held*, that there was equity in the bill. *Pendleton v. Wambirsie*, 4 Cr., 73.

§ 538. A creditor of a partnership may, on the death of one of the partners, go into equity against the representatives of the deceased partner, for an account of the assets. The surviving partner and the representatives of another deceased partner may be joined. No previous proceedings at law are necessary. *Nelson v. Hill*, 5 How., 127.

§ 539. One becoming interested in a partnership engaged in a series of voyages with a vessel, but who is not a partner, the consent of all the partners to his admission not having been given, may, after the dissolution of the partnership, maintain a bill in equity against the members for an account. *Mathewson v. Clarke*, 6 How., 122.

§ 540. Where one partner retires from the firm under an agreement by which the remaining partners are to take the assets upon trust to collect them and pay the debts of the firm, and pay over to him a certain sum as soon as they collect enough for that purpose after the payment of the debts, he is entitled to an account in equity; and if upon that account anything is found to be due him, he is entitled to a decree for the payment thereof. *Kelsey v. Hobby*, 16 Pet., 200.

§ 541. Where a bill is brought to correct errors in a stated account, and the stated account is pleaded in bar, the plea will be sustained unless the complainant shows clearly that the errors complained of have been committed. *Chappedelaine v. Dechenaux*, 4 Cr., 306 (ACCOUNTS, § 21).

§ 542. While a court of equity has a concurrent jurisdiction over the accounts of executors and administrators, in behalf of distributees as well as creditors, yet this cannot be exercised upon a bill in respect to matters which are regularly pending between the same parties in the probate court. *Mallett v. Dexter*, 1 Curt., 178.

§ 543. Where a mortgagor filed a petition for an account against the holder of the mortgage, charging usury against the original mortgagee, the assignor of the defendant, and the defendant had nothing to do with the usury or the receipt of it, the court refused to require from him an account in order that he should charge himself with such a penalty. *Bowen v. Kendall*,* 23 Law Rep., 538.

§ 544. Commissioners appointed under the Maryland law of descents to sell real estate of an intestate are liable to account in equity for the money which they have received. *Shaw v. Shaw*, 4 Cr. C. C., 715.

§ 545. The circuit court of the District of Columbia, as a court of equity, has no jurisdiction of a bill by a residuary legatee to surcharge and falsify the accounts of an executor, stated, settled and allowed in the orphans' court, the bill not being connected with any other ground of equitable jurisdiction. *Lupton v. Janney*, 5 Cr. C. C., 474.

§ 546. Where in an equity suit an account is taken of the net earnings of a railroad company applicable under a mortgage to the payment of coupons as they fall due, the account is not limited to the time of the commencement of the suit, but must include coupons falling due and earnings accruing during the pendency of the suit. *Morgan v. Union Pacific R'y Co.*,* 11 Fed. R., 602.

§ 547. A bill in equity will not lie against an agent to recover the proceeds of notes put in his hands, and which he refuses to account for, where no discovery is requested or necessary. It is not a case for an account, for there was but one payment and receipt, and not a series of mutual accounts. *Blakeley v. Biscoe*,* Hemp., 114.

§ 548. In general a court of equity will not take an account between partners during the continuance of the partnership, but when the object and purpose of the accounting is to ascertain whether one of the partners has an interest subject to attachment by a personal creditor, and not to settle the affairs as between the partners, the accounting may be had. *Cropper v. Coburn*,* 2 Curt., 465.

§ 549. The complainant having entered into a contract with the defendant, a corporation, for the building of a factory for the latter, subsequently made an assignment of his property in trust for creditors. The assignee proceeded with the work, and on its completion made a settlement with the corporation, mutual releases being executed. It appearing that this settlement was obtained by fraudulent representations and concealments on the part of the corporation, it was held that the complainant was entitled to a decree that the releases be set aside and for an account. *James v. Atlantic Delaine Co.*,* 3 Cliff., 614.

§ 550. The complainant entered into a contract with the defendant, a corporation, for the building of a factory for the latter, taking a certain amount of stock in the company, and also borrowing a certain sum of money from the other stockholders, for payment of which he executed to the treasurer of the corporation a mortgage on his stock and other property. Having subsequently failed, he made an assignment of his property in trust for his creditors, and his assignee completed the building of the factory. A settlement between the assignee and

the corporation was had, and mutual releases executed. The court, being satisfied that this settlement was erroneous as based on false and fraudulent statements furnished by the company, held that the complainant, being entitled to the residue of the estate after the payment of debts, had a right to come into equity to pursue the trust estate, and was entitled to have the releases declared void and to have an account against the company. *James v. Atlantic Delaine Co.*,* 8 Cliff., 622.

§ 551. Liens.—A court of equity has general jurisdiction of liens. *Heine v. The Levee Commissioners*,* 1 Woods, 252. See LIENS.

§ 552. In a court of equity a lien or other equitable claim, constituting by agreement of the parties a charge *in rem*, either upon real or personal estate, or money in the hands of a third person, may be enforced against the party himself, or his personal representatives, or against any person claiming under him voluntarily, or without notice, or against assignees in bankruptcy, who are treated as volunteers. For every such agreement for a lien or charge *in rem* constitutes a trust and is accordingly governed by the general doctrine applicable to trusts. *Fletcher v. Morey*, 2 Story, 555.

§ 553. The complainant brought a bill to set aside a conveyance of land procured from him by the principal respondent without consideration and by threats of personal violence and of taking his life. The other respondent had, subsequent to this conveyance, loaned money to the grantee in the conveyance, the principal respondent, and recovered a judgment against him for the same. It was held that the lien of this judgment, being no right in the land, was not superior in equity to the equity claimed and proved by the complainant. *Baker v. Morton*,* 12 Wall., 150.

§ 554. The lien of a judgment creates a preference over subsequently acquired rights, but in equity it does not attach to the mere legal title to the land as existing in the defendant at its rendition, to the exclusion of a prior equitable title in a third person; and a court of equity will protect the equitable rights of third persons against the legal lien, and will limit that lien to the actual interest which the judgment debtor had in the estate at the time the judgment was rendered. The complainant, who had acquired the title to a piece of land under the pre-emption laws of the United States, brought a bill to set aside a conveyance procured from him by the principal respondent by duress and threats to take his life. The other respondent had, shortly after this, loaned money to the principal respondent, the grantee in the deed, for which he had recovered a judgment, although the complainant, the grantor, was then in possession. It was held that the lien of this judgment was not an equity superior to that set up and proved by the complainant. *Brown v. Pierce*, 7 Wall., 205 (§§ 798-800).

§ 555. Whenever parties by their contract intend to create a positive lien or charge, either upon real or personal property, whether owned by the assignor or contractor or not, or, if personal property, whether in existence or not, the contract attaches in equity, as a lien or charge upon the property, as soon as the assignor or contractor acquires a title thereto. *Barnard v. Norwich & Worcester R. Co.*,* 4 Cliff., 351.

§ 556. Where levee commissioners were required by law to issue bonds and levy a tax on the levee district for their payment, a holder of such bonds had no lien on the lands of the district subject to taxation. *Heine v. The Levee Commissioners*,* 1 Woods, 252.

§ 557. If settlers on unsurveyed lands of the United States covenant to purchase those lands and mortgage to a creditor to secure a debt, it is a specific lien which will be enforced in equity. *Wright v. Shumway*, 1 Biss., 23 (Conv., §§ 435-39).

§ 558. One who pays the purchase money into the land office for a settler on public lands entitled to a pre-emption, and takes an assignment of the certificate of location as security, and gives a bond to reconvey on repayment of the purchase money, holds an equitable mortgage upon the land; and the settler may redeem by payment of the purchase money within the time mentioned in the bond. *Ibid.*

§ 559. Whenever parties by their contract intend to create a positive lien or charge, either upon real or personal property, whether owned by the assignor or contractor or not, or if personal property, whether it is then in being or not, the contract attaches in equity, as a lien or charge upon the particular property, as soon as the assignor or contractor acquires title thereto. A railroad company made a mortgage, including any property of a certain description which it should afterwards acquire, to secure its bonds. It subsequently leased another road, and during the lease became bankrupt. The assignee in bankruptcy filed a bill to compel the trustees under the mortgage to pay over to them all the profits received by them from the leased road and deliver over the leasehold. It was held that, as the lease was within the description of after-acquired property in the mortgage, it passed as such to the trustees as soon as it was acquired by the company, and could not be claimed by the assignees under subsequent proceedings in bankruptcy against the company. *Barnard v. Norwich & Worcester R. Co.*,* 4 Cliff., 351.

§ 560. A railroad company made a mortgage of all its property, including property there-

after acquired, to secure the payment of certain bonds. The mortgage indenture provided for the issue of the bonds, and for their sale to raise funds to retire all existing mortgage debts and prior liens and to equip, complete and improve the road. It also provided that the mortgage should be the first and only lien on the property of the company; and that the expenditure of all sums of money realized from the sale of the bonds should be made with the approval of at least one of the trustees in the mortgage, whose assent in writing should be necessary to all contracts made by the company before the same should be "a charge upon any of the sums realized from such sales." The complainant having constructed a piece of road for the company under a contract assented to by two of the trustees under the mortgage, and under the expectation that he would be paid out of the sums realized from the sale of the bonds, brought a bill in equity to set up and enforce a lien on such proceeds, and to pursue them into other property upon which they had been expended. There had been no act of appropriation on the part of the company depriving itself of control of any of these funds and conferring upon the complainant the right to have them applied in payment for his work; and the complainant based his claim upon the construction of that part of the mortgage indenture providing for the assent of one of the trustees before any contract should become a "charge" upon such funds. It was held that the terms of the mortgage indenture gave the complainant no lien; that in the transaction between him and the corporation the elements necessary to give him a lien were wanting; and that the case on the part of the complainant was simply one of disappointed expectation, against which misfortune equity furnishes no relief. *Dillon v. Barnard*,* 21 Wall., 480. See CONV., §§ 226-28.

§ 561. The complainant agreed with the defendant to prosecute the latter's claim against the government for five per cent. of the amount realized. This constituted a lien on the fund, and the complainant looked to the fund and not to the personal responsibility of the defendant. If the bill had been filed under the act to carry into effect the Mexican treaty providing for the settlement of such claims, such act would have authorized an injunction for the amount claimed. It was held that, independent of this act, the lien gave a court of equity jurisdiction to enforce payment. *Wylie v. Coxe*,* 15 How., 415.

§ 562. A bill in equity lies to enforce a lien upon the tolls and water rents of a canal company given by the company as security for money borrowed. *Vallette v. Whitewater Valley Canal Co.*,* 4 McL., 192.

§ 563. **Receivers.**—An application for the appointment of a receiver is always addressed to the sound discretion of the court; and as a general rule such appointment will be made in all cases where the interests of the parties seem to demand it. *Crane v. McCoy*,* 1 Bond, 422. See RECEIVERS.

§ 564. An application for the appointment of a receiver is addressed to the sound discretion of the court, regulated by legal principles, and is particularly serviceable when there is danger that the subject matter of the controversy may be wasted and destroyed, impaired, injured or removed during the progress of the suit. Where one party has a clear right to the possession of property, and when the dispute is as to the title only, the court will be very reluctant to disturb that possession. But when the property is exposed to danger and loss, and the party in possession has not a clear legal right to the possession, it is the duty of the court to interpose and have it secured. *Lenox v. Notrebe*,* Hemp., 225.

§ 565. The appointment of receivers is in the discretion of the court, and when the court appoints a receiver of a railroad in foreclosure proceedings at the instance of bondholders and mortgagees, it may require the receiver to pay "back" claims for materials, labor and supplies, and even hold the property subject to them: not as a lien on the road, but in the equitable discretion of the court. It has been usual to include among such claims all that may be fairly regarded as actual operating expenses of the road. The public character of railroad enterprises, and the better security afforded the bondholders and mortgagees by the labor done and the supplies and materials furnished, are given as among the reasons for this practice. In fixing a reasonable time within which such claims would be allowed, the court may adopt as by analogy the rule of the statute of the state in relation to liens on railroads for work done and supplies and materials furnished. *Turner v. Indianapolis, B. & W. R. Co.*,* 8 Biss., 313. See *Fosdick v. Schall*, 9 Otto, 235 (CONV., §§ 1547-49).

§ 566. In the progress and growth of equity jurisdiction it is usual to clothe receivers with much larger powers than were formerly conferred. And a court of equity may, in the exercise of its undoubted authority, authorize the receiver of a railroad to maintain a bill in his own name, auxiliary to the original suit, to enjoin the doing of illegal acts which would render the rights and title of the company to an immense property, of greatly diminished value, if not wholly worthless. *Davis v. Gray*, 16 Wall., 208 (§§ 1354-62).

§ 567. A decree of reference on a petition against the receivers of a railroad company for damages for their negligence in operating the road is technically an adjudication that dam-

ages have been sustained for which the receivers are liable. *Ward v. Paducah & Memphis R. Co.*, 4 Fed. R., 863.

§ 568. Hamilton being indebted to Notrebe gave him a mortgage on two slaves for \$500. His entire property was afterwards sold by the sheriff and bought in by Notrebe for \$220, he afterwards agreeing that Hamilton could have it back upon the payment of all balances due. Hamilton died and a relative gave Mrs. Hamilton, then Mrs. Lenox, the money to her sole and separate use to pay the debt, desiring to secure the property to the children of Hamilton. The deed was made to the *legal representatives* of Hamilton. Mr. and Mrs. Lenox filed this bill to divest the title to the property out of the Hamiltons, four in number, and vest it in themselves. The Hamiltons, by their *guardian ad litem*, they being minors, filed their cross-bill, alleging title in themselves and asking that Lenox be required to give bond not to remove the property and to keep it forthcoming. Lenox died pending the suit, and his representatives refused to claim this property as a part of his estate, though he had possession of it at his death. It appearing that the Hamiltons were entitled to the possession, a motion for the appointment of a receiver asked for by them was granted, as the only effect would be to preserve property which seemed to have been cast upon the world without a legal protector. *Lenox v. Notrebe*,* *Hemp.*, 225.

§ 569. *Mistake.*—A mistake or ignorance of law forms no ground for relief in equity from contracts fairly entered into with full knowledge of the facts, and under circumstances repelling all presumptions of fraud, imposition, or undue advantage. *Bank of United States v. Daniel*, 12 Pet., 82 (*BILLS AND NOTES*, §§ 1683-88). See *MISTAKE*.

§ 570. A mistake of law, that is, that the party did not understand the legal import of the instrument which he signed, does not give ground for relief in equity. Thus it is no objection to the specific performance of a contract at the instance of the vendor that the vendee understood that he could dissolve the contract on paying the penalty stipulated therein. *Robinson v. Cathcart*,* 2 Cr. C. C., 590.

§ 571. Where, by fraud or mistake, the terms of an order for insurance are departed from in the policy, so that the two are materially variant, equity will treat the order as containing the contract of the parties. As, for example, where the risk stated in the policy is *from* such a place, instead of *at and from*; or where the policy contains a warranty not authorized by the order. In such cases, the variance itself would, without contradictory proof, be evidence of the mistake. But the order can only be resorted to so far as it varies from the policy. *Dela-ware Ins. Co. v. Hogan*, 2 Wash., 4.

§ 572. A. conveyed interests in a mining claim to B. by a conveyance which was defective because not stamped as required by act of congress. B. conveyed to C., by a conveyance good in form. A. afterwards released his remaining interest in the claim to C., and subsequently filed a bill in equity against C. to correct a mistake in the conveyance to him. In order to make out the mistake it became necessary to repudiate his defective conveyance. It was held, on the principle that he who seeks equity must do equity, that the court would require him to perfect the title by making good the defective conveyance, and that he could not therefore have relief. *Kinney v. Consolidated Virginia Mining Co.*, 4 Saw., 382.

§ 573. Where money was advanced on a general stipulation to give security for its repayment on a specific article, and the parties deliberately, on the advice of counsel, agreed on a power of attorney to be given to the lender to sell the article, which instrument from a legal quality inherent in its nature, that was unknown to the parties, became extinct on the death of the constituent, and a bill in equity was filed praying that a new security of a different character be directed to be given, or that directed to be done which the parties supposed would be the effect of the instrument, and it was admitted by the demurrer to the bill that the power was given and accepted under the belief and with the intention that it should create a specific lien or security on the article, the court were unwilling to say that a court of equity was incapable of affording relief, and reversed the judgment below sustaining the demurrer, directing that the defendant be permitted to answer over. *Hunt v. Rousmanier*, 8 Wheat., 174.

§ 574. Where a release of a joint debtor is executed under a misapprehension as to its effect, equity will not relieve. *Joy v. Wurtz*,* 3 Wash., 266.

§ 575. It seems that where two parties, intending to effect a permanent collateral security on a vessel, for a loan made by one to the other, by mistake execute a power of attorney to sell, which fails to have the effect of a permanent security on account of the death of the grantor of the power, equity will relieve from the mistake and direct a sale of the vessel to repay the loan. *Hunt v. Rousmaniere*, 2 Mason, 244.

§ 576. Where, in carrying out an agreement for a loan, to be evidenced by note, and secured by collateral security, the parties executed and accepted a power of attorney to sell certain vessels as the security for the repayment of the money, under a mistake of law as to the effect of the death of the constituent in such a power, and the power became extinguished by

this cause, it was held that a court of equity would not relieve against the mistake of law, and create a new security against other creditors of the insolvent estate of the debtor. *Hunt v. Rousmanier*, 8 Mason, 294.

§ 577. A railroad company, having already given a mortgage on its property to secure certain bonds, made two other mortgages, one on its road and one on its land grants, to secure certain other bonds. On a sale by the trustee in the second mortgages, the trustee purchased for the benefit of the second mortgage bondholders, who (under a law authorizing it to be done) organized a new company and thereafter conducted the business of the road. Afterwards, to prevent a sale of the road under a foreclosure of the first mortgage, the new corporation discharged the first mortgage debt. On a creditor's bill, filed prior to this payment, the sale under the second mortgages was afterwards set aside as fraudulent as to certain judgment creditors. It was held that a bill would not lie by the new corporation against the holders of the first mortgage to recover back the amount paid in discharge of the first mortgage debt, on the ground that the payment was made under a mistake. *Railroad Company v. Soutter*, 18 Wall., 517 (Corp., §§ 1055-57).

§ 578. Where by a mistake the name of the seller in a contract of sale is not correctly given, it is the business of a court of equity to see that the purchaser is not harmed by the mistake. *Dolton v. Cain*, 14 Wall., 472.

§ 579. Where A. and B. agreed to run a horse race, and stipulated in writing that if "either should fail to run agreeable to the obligation, the same for six cows and calves was to be in full force and virtue *against the other*," the court refused to rectify the mistake or enforce the contract. *Lemmons v. Flanakin*, Hemp., 82.

§ 580. A mistake in the legal import of a written agreement, as a mistake as to the jurisdiction of a court of equity to enforce a specific performance of a contract, notwithstanding the insertion of a penalty, is no ground for relief in equity, where no fraud is charged. *Robinson v. Cathcart*,* 3 Cr. C. C., 377.

§ 581. *Maxims*.—O., in 1825, purchased a share in the Baltimore Company for a price equal to its full value at the time. The purchase was made from an insolvent trustee of W., whom all parties concerned believed had the power to sell and transfer the title. W., during his lifetime, set up no claim to the share, nor did the representatives, after his death, till 1852, when they filed a bill to recover the proceeds of the share. During all this period O. and his executors were in undisturbed possession, so far as respected any claim under the right set up in the bill, and had, in good faith, expended their time and money in recovering the claim of the company against the government of Mexico, and afterwards in defending it against a long and expensive litigation. It was held, on the principle that he who seeks equity must do equity, that the complainant could enforce his title only on making compensation to the purchaser. *Williams v. Gibbes*, 20 How., 535.

§ 582. The rule that he who seeks equity must do equity applies with equal force to both parties to a contract sought to be enforced specifically. *Longworth v. Taylor*, 1 McL., 395.

§ 583. It is a general principle in courts of equity that, where both parties claim by an equitable title, the one who is prior in time is deemed the better in right, and that, where the equities are equal in point of merit, the law prevails. *Boone v. Chiles*, 10 Pet., 210.

§ 584. In equity, that is deemed to be done which the parties intended to do, and which ought to be done. *Fletcher v. Morey*, 2 Story, 555; *Longworth v. Taylor*, 1 McL., 395.

§ 585. Thus in a suit for the specific performance of a contract to convey land, where the execution of a mortgage by the purchaser, stipulated for in the contract, had been prevented by the failure of the seller to execute the deed, the court treated the parties as if the mortgage had been made. *Longworth v. Taylor*, 1 McL., 395.

§ 586. The above rule applied to a case where the bill asserted an equitable lien against certain shipments, and the proceeds thereof, under an agreement stated in the bill and admitted in the answer, as security for advances made by the plaintiffs under the same agreement, and the acceptances and advances had, in fact, been made after the time stipulated for the continuance of the credit, but the parties on both sides had acted upon the supposition that the agreement covered the advances and acceptances. *Fletcher v. Morey*, 2 Story, 555.

§ 587. Where, by an agreement between a husband and wife, the wife's separate estate has been changed from one form of investment to another, but the title to the substituted property has not been made to the separate use of the wife according to the agreement, and the legal title outstands in a third person, the bankruptcy court will, on the bankruptcy of the husband, decree a settlement upon the wife according to the principle that a court of equity in such a case will consider that as done which ought to have been done. *In re Campbell*, 8 Hughes, 276.

§ 588. Courts of equity, regarding the substance, and not the mere form of contracts and other instruments, consider things directed, or agreed to be done, as having been actually performed. So where in a will, land is directed to be converted into money, or money into land, a

court of equity will consider the property to be of that kind into which it was directed to be converted. *Peter v. Beverly*, 10 Pet., 563.

§ 589. The maxim that equity looks upon that as done which ought to have been done has no application to errors and omissions in the record of judicial proceedings, and cannot be invoked to support an execution which is void because issued before the entry of the judgment in the judgment book. *King v. French*, 2 Saw., 441.

§ 590. Though equity will consider that as done which the parties intended should be done, yet it will not exercise this power when it would injure third persons who have incurred detriment, and acquired consequent rights by the acts that are done. It will not consider a transaction as a pledge when there has been no delivery of the thing pledged, although the parties intended the transaction as such, where credit has been given to the pledgor by third persons which might not have been given if he had not remained in possession of the thing intended to be pledged. *Casey v. Cavaroc*, 6 Otto, 467 (BAILL., §§ 38-47).

§ 591. Jury trial.—No rule of law imperatively requires a chancellor to take the verdict of a jury upon any question; and when the case is tried without any application for such an order, no ground of complaint exists because it was not made. *Parrish v. Stephens*,* 1 Or., 73. See PRACTICE.

§ 592. It rests in the sound discretion of a chancellor to award a feigned issue; and where the truth of the facts can be satisfactorily ascertained by the chancellor without the aid of a jury, it is his duty to decide as to the facts, and not subject the parties to the expense and delay of a trial at law. *United States v. Sampersac*, Hemp., 118.

§ 593. A chancellor directs a feigned issue upon the ground that the evidence produced before him in the record is not sufficient to enable him to arrive at a satisfactory conclusion. He directs the facts to be tried by a jury for the purpose of collecting additional evidence. *Ibid.*

§ 594. The verdict of a jury upon a feigned issue is not conclusive upon the chancellor; he may have it tried again and again if the verdicts are not agreeable to his sense of justice; or he may even decree contrary to the verdict if he thinks proper. *Ibid.*

§ 595. In a suit in equity for the infringement of a patent, if the witnesses differ as to whether there has been an infringement, the question will be submitted to a jury, either by an action at law or issue directed out of chancery. *Brooks v. Bicknell*, 3 McL., 250.

§ 596. Although the question whether a reissued patent is for the same invention as an original patent is one of fact, a court of equity need not send it to a jury when it is put in issue by a bill and answer. That the fact is involved in considerable doubt may be a reason why it should be sent to a jury. *Poppenhusen v. Falke*, 4 Blatch., 493.

§ 597. Where one injured by a railroad, which is being operated by a receiver, petitions the court of which the receiver is an officer for appropriate relief, the case is one of equitable cognizance, and the petitioner is not entitled to a jury as a matter of right. *Kennedy v. Indianapolis, etc., R. Co.*, 2 Flip., 704.

§ 598. The plaintiff, owning and possessing a certain meadow with all the rights and privileges of a spring and watercourse situated thereon and passing through and flowing over the same, brought a bill to restrain the defendant from diverting the water from the spring and stream by a well which he had made in an adjoining field. The determination of the case turned upon the question whether the plaintiff's water had in fact been diverted by the digging of the defendant's well; and the evidence was contradictory and conflicting, its weight depending on the comparative credibility of the respective witnesses. The court framed an issue to be tried by a jury, as to the fact of diversion and the damages. *Dexter v. The Providence Aqueduct Co.*,* 1 Story, 387.

2. *Fraud.*

[See FRAUD.]

SUMMARY—*Fraud in the settlement of an estate; payment in Confederate currency; cancellation of mortgage*, § 599.

§ 599. A testator died in South Carolina in 1856, leaving a widow and two minor sons. He directed all of his property to be sold on such terms as his executors should deem proper, the proceeds, after payment of debts, to be divided into three equal parts, to be held in trust by the executors. The interest of one-third was to be paid to the widow, and the interest of the other two-thirds to the children until of age, when the principal was to be paid to them. In 1857, the executors sold the real estate to B. for \$50,000, receiving \$15,000 down, and taking bonds for the balance, secured by mortgage on the premises. B., in 1863, sold the premises to a firm for \$100,000 in Confederate currency, and in the same currency paid his bonds to the executors, who delivered them up and discharged the mortgage, and invested the currency so received in Confederate bonds. After the close of the war, the children became of age and

transferred their entire interest in the estate to their mother. She then brought a bill in equity to set aside the cancellation of the mortgage as fraudulent and void and to enforce the bonds, and obtained a decree accordingly, which was affirmed in the supreme court. *McBurney v. Carson*, §§ 600-608.

[NOTES.— See §§ 604-637.]

McBURNAY v. CARSON.

(9 Otto, 567-573. 1878.)

APPEAL from U. S. Circuit Court, District of South Carolina.

Opinion by MR. JUSTICE SWAYNE.

STATEMENT OF FACTS.— This case was before us at a former time. 19 Wall., 94. The decree of the circuit court was reversed, and the cause remanded for further proceedings. Such proceedings have been had, and it is again before us by appeal. A brief statement of the facts and of the further history of the case is necessary.

William Carson, of South Carolina, died in August, 1856, leaving a widow, Caroline, and two minor sons, William and James. He left considerable personal property, and a plantation known as Dean Hall. By his will he appointed Robertson and Blacklock his executors, and directed all his estate to be sold on such terms as they should deem proper. The proceeds, after the payment of his debts, were to be divided into three parts, to be held in trust by his executors. The interest of one-third was to be paid to the widow. The interest of the other two-thirds was to be devoted to the education and support of the two sons until they should come of age. The principal was then to be paid over to them.

The executors sold Dean Hall to Elias N. Ball, and took his bonds and mortgage for a part of the purchase money. In 1863, Ball sold the property to Hyatt, *McBurney & Co.*, a firm consisting of Hyatt, *McBurney*, Gillespie, Hazletine and McGhan. The conveyance was made to Gillespie and *McBurney*. The firm paid for the property in Confederate treasury notes. Out of the proceeds Ball paid his bonds to Robertson, and took them up and discharged the mortgage. Blacklock, the other executor, was then absent from the country, and upon his return refused to recognize the transaction. Hyatt sold his interest in the plantation to the other members of the firm, and Gillespie and *McBurney* gave him a lien upon it to secure the payment of the purchase money. When the executors sold this property to Ball, they sold to him also a considerable amount of personal property on credit, and took his bond, with W. J. Ball as surety, for the price.

As the sons of the testator came of age they transferred their entire interest in the estate of their father to their mother. She filed the bill to set aside the cancellation of the mortgage upon Dean Hall as fraudulent and void, and to charge Elias N. Ball and his surety with the amount due upon their bonds given for the personal property. The bill did not make any member of the firm of *McBurney & Co.* a party, except *McBurney*. Hyatt, it appeared, was a resident of New York, of which state the complainant was also a resident and citizen. Elias N. Ball was made a party, but was not served with process. The circuit court decreed in favor of the complainant. This court held that Hyatt was not an indispensable party, as the decree would not affect his rights; but that Ball and Gillespie were such parties. The decree was therefore reversed, and the cause remanded for further proceedings.

§ 600. *When a party not found may be brought in by amended bill.*

After the cause was reinstated in the circuit court, the complainant filed an amended bill. In the mean time Elias N. Ball had removed to the state of New Jersey, had there gone into bankruptcy, and Elias N. Miller had been appointed his assignee. Ball afterwards received his discharge and died. The defendants named in the bill were McBurney, McGhan, Gillespie and Hazletine, being all the members of the firm of Hyatt, McBurney & Co., except Hyatt, Robertson and Blacklock, the executors, and Elias N. Miller, the assignee in bankruptcy of Ball. We hold, as we held before, that Hyatt is not an indispensable party. Hazletine could not be found. He was thereupon notified pursuant to the act of congress of June 1, 1872 (17 Stat., 198, sec. 13). It is objected that the act could not apply to a suit pending when it was passed. It was not applied retrospectively, but only as to parties sought to be brought into the case more than a year after its passage. Such a result is consistent with its terms. There is no reason why it should not be so applied. It is a remedial statute, and should be liberally construed to accomplish the end in view. This construction is abundantly supported by well-considered authorities. *Southwick v. Southwick*, 49 N. Y., 510; *Ex parte Lane*, 3 Metc. (Mass.), 213; *Holyoke v. Haskins*, 9 Pick. (Mass.), 259; *Rader v. Southeasterly Road*, etc., 36 N. J. L., 273; *Tilton v. Swift & Co.*, 40 Ia., 78; *People v. Mortimer*, 46 Cal., 114; *Cooley*, Const. Lim., 381.

§ 601. *When objection for want of parties cannot be made.*

But as we held before, and still hold, that Hazletine was not an indispensable party, we forbear to pursue the subject further. He is sufficiently represented by his copartners, Gillespie and McBurney, in whom is vested the legal title of the Dean Hall property. Both of them appeared and answered. Miller, the assignee in bankruptcy of Ball and Gillespie, was ordered to appear and plead, answer or demur to the bill. Both acknowledged service of the order. This brought them effectually before the court. In McBurney's answer he insisted that Miller, as assignee, and the facts of Ball's bankruptcy, discharge and death, could be brought into the case only by a supplemental bill. The court thereupon ordered such a bill to be filed for that purpose, and it was filed accordingly. It made Miller alone a defendant. Here it has been insisted that all the other defendants to the amended bill should have been made parties to the supplemental bill also. To this objection it is a sufficient answer that it does not appear to have been taken below. It cannot, therefore, be taken here. Were we to hold otherwise, we should in this respect exercise original instead of appellate jurisdiction. There are other answers equally conclusive, but it is needless to consume time by adverting to them.

It is also objected that William Carson and James Carson, the sons of William Carson, deceased, had only a right of action, and that this right could not be transferred to the complainant. This is an inverted view of the subject. The bill charges fraud, conspiracy and spoliation. If the charge is untrue, the bill should be dismissed. If otherwise, there is a recoil upon the wrong-doers, and those intended to be despoiled are unaffected. Their rights are just what they would have been if the scheme had been neither conceived nor executed. A different result would be a legal solecism.

All the obstructions are thus removed from our way to the examination of the merits of the case.

The last amended bill is silent as to the sale of the personal property, and the decree relates only to the bonds of Ball for the purchase money of the

plantation and the mortgage securing them upon that property. The decree charges upon the property the amount due on the bonds, and directs the mortgage to be enforced in all respects as if the bonds had not been surrendered and the mortgage had not been canceled. McBurney and McGhan are the only appellants. Our further remarks will be confined to the subject of the decree.

The executors sold the property to Ball in the spring of 1857 for \$50,000. He paid \$15,000 down, and gave his bonds for the balance, secured by a mortgage upon the premises, as before stated. The property was valuable, and the amount due was well secured. The debt was payable only in lawful money of the United States, and the executors had no right to take any thing in payment but such money or its equivalent. Such was the condition of things in the spring of the year 1863.

§ 602. *Payment in Confederate money, received by an executor or trustee, is a nullity.*

The civil war was then flagrant in South Carolina. McBurney says, that having a large quantity of cotton on hand, and the city being blockaded, his firm "were willing to change some of their investments into real estate until peace should be restored." This was shrewd and wise. The sole currency there was Confederate money. The Dean Hall property lay invitingly before them, but was incumbered by a heavy mortgage for the benefit of the widow and the orphans. The plan was conceived of acquiring the title and getting rid of the mortgage, both by means of Confederate currency. They thus executed it: They gave Ball \$100,000 in Confederate notes for the property, and took a conveyance from him. They placed a part of the Confederate money in his hands, as McBurney says, "to enable him to pay off his bonds to said executors and to satisfy said mortgage." Robertson received payment in this paper and thereupon gave up the bonds, and as soon as he could get access to the record entered satisfaction of the mortgage. He invested the notes in Confederate bonds, which became utterly worthless, at the close of the war.

McBurney & Co. and the Carsons thus changed places. The former still hold the broad acres, while the latter have lost every dollar of their investment, so well secured at the outset upon the property. They became, as it were, the insurers of the fate of battles, and of the result of war. There was evidently a plot. McBurney & Co. were its contrivers, Ball was their instrument, Robertson was their dupe, and the Carsons were the victims.

If the case stopped here, we could not hesitate as to what our judgment should be. But in its strictly legal aspect it is equally free from doubt.

In *Ward v. Smith*, 7 Wall., 451 (Bonds, §§ 26-28), this court held that a valid payment could not be made to an agent in the Confederate States, during the rebellion, in anything but lawful money of the United States, or bank notes of the current value of their face, without the consent of the creditor.

In *Horn v. Lockhart*, 17 Wall., 570, an executor had sold property, invested the proceeds in Confederate bonds, and his conduct had been approved and ratified by a decree of the probate court. It was held by this court, that the investment was void, that the decree of the probate court was a nullity, and that the executor was liable to the distributees in good money, for the full amount involved.

Fretz v. Stover, 22 Wall., 198 (Agency, §§ 375-79), in its most prominent features, is not unlike the case before us. There, a citizen of Pennsylvania, just before the breaking out of the war, took the bond of a citizen of Virginia,

secured by a deed of trust upon real estate. The attorney of the creditor was the trustee in the deed. During the war the attorney received payment in Confederate notes, and Virginia bank notes of no greater value, the entire capital of the bank having been converted into Confederate bonds. After the close of the war, the creditor sued for his debt. This court adjudged that the transaction between the attorney and the debtor was illegal, fraudulent and void, and decreed the enforcement of the bond and deed of trust.

§ 603. *When it is the duty of an executor to act as trustee.*

The question has been raised whether Robertson acted, touching the bonds and mortgage of Ball, as executor or trustee. The matter is immaterial in this case. An executor guilty of a *devastavit*, whereby assets are diverted from their proper application, and a trustee guilty of a breach of trust, and their accomplices, if they have any, are held liable upon the same principle and to the same extent. *Field v. Schriefferlin*, 7 Johns. (N. Y.), Ch., 150; *Hill v. Simpson*, 7 Ves., 152.

There can, however, be no doubt upon the point suggested. "Where the will contains express directions what the executors are to do, an executor who proves the will must do all which he is directed to do as executor, and he cannot say, that though executor he is not clothed with any of those trusts." 3 Williams, Executors, 1796.

Proving the will is an acceptance of the trust. *Mucklow v. Fuller, Jacob*, 198. Where a trust is created by a will, and no trustee appointed, "the executor is bound to act as such trustee." *Holbrook v. Harrington and others*, 16 Gray, 102. In such case, the sureties in the bond of the executor are liable for his defaults, whether in one sphere of duty or the other. *Newcomb v. Williams*, 9 Metc. (Mass.), 525; *Prior v. Talbott*, 10 Cush. (Mass.), 1; *Door v. Wainright*, 13 Pick. (Mass.), 328; *Towne v. Ammidown*, 20 id., 535.

Decree affirmed.

§ 604. *Equitable jurisdiction.*—Equity always has jurisdiction of fraud, misrepresentation, and concealment, and it does not depend on discovery. *Jones v. Bolles*, 9 Wall., 369. And where the relief sought is the removal of a fraudulent title upon land of which plaintiff is in possession under title. *Briggs v. French*,* 1 Sumn., 504. But if it is evident that the fraud is of such a nature that an action at law will afford a complete remedy, and the proof of fraud can be made as clear at law as in equity, a court of equity will not take cognizance of the case. *Gindrat v. Dane*, 4 Cliff., 283.

§ 605. If, in a sale of land, the vendor has been overreached in a material degree by the imposition, concealment, or misrepresentations of the vendee, he is entitled to relief in a court of equity. Nothing should prevent the relief, but great and unexplained delay in seeking it, or an adequate and ample remedy at law, or a condition of the property in controversy which renders it impracticable for the court, on any sound principle, to grant redress. *Warner v. Daniels*, 1 Woodb. & M., 90.

§ 606. Where parties, seeking to set aside a fraudulent sale of real estate, come into a court of equity for discovery and relief, and have obtained the former when it could not be had at law, if third persons have since become interested in the property, so that the fraudulent sale cannot be set aside and a reconveyance made of the whole, a relief for damages becomes necessary and proper in order to make the redress perfect. And a court of equity may relieve as to a part of the land or contract, if the fraud does not reach the whole. *Ibid.*

§ 607. — *concurrent with courts of law.*—Courts of equity possess a general concurrent jurisdiction with courts of law in cases of fraud cognizable in the latter; and exclusive jurisdiction in cases of fraud beyond the reach of courts of law. *Flanders v. Abbey*, 6 Biss., 16 (Dom. Rel., §§ 242-43).

§ 608. But courts of equity cannot, after the question of the invalidity of a conveyance for fraud has been raised and settled in a court of law, entertain any proceeding founded on such alleged invalidity. *Miles v. Caldwell*, 2 Wall., 89; *Blanchard v. Brown*, 3 Wall., 245.

§ 609. Nor will they take jurisdiction of an action by an assignee in bankruptcy to recover a fraudulent preference under the bankruptcy act, on the sole ground of fraud, where there

is no doubt that the remedy at law is plain, adequate and complete, and the defendant takes the objection by demurrer. *Garrison v. Markley*,* 7 N. B. R., 246.

§ 610. But a court of equity will not dismiss a bill by the assignee of a bankrupt to recover money fraudulently paid by the bankrupt to certain creditors in order to induce them to join a composition deed, they pretending only to have received as much as the other creditors, and the other creditors not knowing of the fraudulent payment. *Bean v. Brookmire*, 1 Dill., 155.

§ 611. And an assignee in bankruptcy may maintain a bill in equity to avoid the title of the bankrupt's wife to property, purchased by funds belonging in equity to the creditors, and conveyed to her by the bankrupt. It is no objection to the jurisdiction that there is a remedy at law. An equitable jurisdiction exists in such a case independent of the bankruptcy act. *Cady v. Whaling*, 7 Biss., 430.

§ 612. — of United States circuit courts.—The circuit court of the United States possesses full jurisdiction in equity in all cases of fraud, including fraud in obtaining judgments and decrees in other courts; and it is not limited in its exercise to cases where, by the state laws, no relief can be granted in the state courts. The jurisdiction is concurrent with the state courts in all such cases, except the case of fraud in obtaining a will. It therefore has jurisdiction in a case of fraud in the settlement of a probate account. *Gould v. Gould*,* 8 Story, 516.

§ 613. While the regularity of a judgment at law in a state court may not be questioned in a federal court, yet any fraudulent conduct of the parties in obtaining the judgment, or in attempting to avail themselves of it, can be inquired into in the circuit or supreme court of the United States, as fraud in obtaining a judgment constitutes an extensive ground of equitable jurisdiction. *Byers v. Surget*, 19 How., 303.

§ 614. Jurisdiction at law.—Courts of law have concurrent jurisdiction with courts of equity in cases of fraud. But at law, when the facts are put before a jury, it is for them to find whether there is fraud or not. *Gregg v. Sayre's Lessee*, 8 Pet., 244.

§ 615. Extraterritorial jurisdiction.—In case of an asserted fraud or of a constructive fraud created by operation of law, a court of equity has jurisdiction though the lands sought to be affected by the decree lie without the territorial jurisdiction of the court. *Briggs v. French*,* 1 Sumn., 504.

§ 616. Pleading and proof.—When a bill sets up a case of actual fraud, and makes that the ground of prayer for relief, the plaintiff is not entitled to a decree by proving some one or more facts, quite independent of the fraud, which create a case under a distinct head of equity. *Fisher v. Boody*, 1 Curt., 206 (§§ 765-70).

§ 617. Affirmative relief cannot be granted in equity upon the ground of fraud unless it be made a distinct allegation in the bill, so that it may be put in issue by the pleadings. *Voohees v. Bonesteel*,* 16 Wall., 16.

§ 618. Where the fraud which is alleged as the sole ground of relief in equity is not proven, the complainant can have no other relief. *Britton v. Brewster*, 2 Fed. R., 160.

§ 619. Sufficiency of allegation of.—A bill brought by one state, to settle the boundary between it and another state, charged fraud in general, but alleged no specific acts of fraud upon the part of the defendant, but that the agent acting for the complaining state in a transfer of territory had been misled. *Held*, that the facts alleged were insufficient. *Virginia v. West Virginia*, 11 Wall., 61.

§ 620. Sufficiency of proof.—This was a bill by certain heirs to set aside the settlement and allowance of two claims against the estate of the intestate, on the ground that such settlement and allowance were procured by a fraudulent agreement and conspiracy between the administrator and all the other heirs, with a design to defraud the plaintiffs of their proper share in the estate. The intestate left ample personal estate for the payment of his debts, except the two in controversy. One of these debts was asserted by his brother and was for assisting him in farming during quite a long period of years. The other was by his sister for keeping house for him during the same period. The administrator, in his second administration account, represented to the judge of probate that he had paid these claims, whereas he had only given his notes for the amount with the understanding that they should stand good against him only for the amount which should ultimately be allowed by the judge. And this proceeding did not appear to have been made known to the judge of probate, or the true state of the facts brought to his notice. There was no evidence whatever in this suit that there was between the intestate and either of these claimants any agreement for the payment of wages during any portion of this long period, nor any acknowledgment of the claims. Nor did it appear that there was any exact evidence to establish them before the probate court. At the time of the allowance and settlement the plaintiffs lived in distant states of the Union, and had no personal notice of the claims or the proceedings to establish them before the court of probate. The only person who appeared to contest the claims was a brother of the plaintiff, who afterwards admitted that he withdrew his opposition upon an understanding with the claimants,

made with the knowledge of the administrator, by which he was to receive pecuniary compensation therefor. But the force of this admission was much weakened by objections to the veracity of this person and by other circumstances. And the claims in controversy were admitted by heirs representing three-sixths of the estate, and were contested in this suit by heirs representing only one-sixth. The bill was not filed until twenty years after the death of the intestate and nineteen years after the settlement and allowance of the claims, and after all those asserted to have been engaged in the transaction, except two, were dead. Considering this fact, the gravity of the charge, and the pointed denials in the answer, it was held that the charge ought to be made out by strong and satisfactory proofs, and that it was not sufficient to raise a suspicion of bad faith from the doubtful character of the claims. The court considered that the charge was not made out, and dismissed the bill. *Gould v. Gould*,* 3 Story, 516.

§ 621. Where it is charged in equity that a license granted by the proper court for the sale of real estate belonging to the estate of a deceased person was fraudulently obtained by the administrators, nothing short of proof of the fraud charged can avail the complainant, as the court to whom the petition was addressed was bound to inquire whether debts were due and unpaid by the estate, before granting the license, and, in the absence of fraud, the finding of the court must be assumed to be conclusive. *Badger v. Badger*,* 2 Cliff., 187; 2 Wall., 87.

§ 622. After thirty-one years have elapsed since the settlement of an administration account, and the administrators who made the account and presented the list of debts, and the guardian of the complainant who approved the same, are dead, a charge by the complainant in a suit in equity that the account is fraudulent, will be required to be proved by full and satisfactory evidence. *Ibid.*

§ 623. Bill to avoid a partition decree on the ground of fraud. The court affirmed the decree of the lower court dismissing the bill, on the ground that the evidence did not identify and establish the right claimed by the complainant. *Coy v. Mason*,* 17 How., 580.

§ 624. **Misrepresentations—Concealment of facts.**—In a court of equity, deliberate concealment is equivalent to deliberate falsehood; and when a living man speaks in such a court to enforce a dead man's contract with himself against parties whom he knows are ignorant of the facts, he must be frank in his statements, unless he is willing to take the risk of presumptions against him. *Crosby v. Buchanan*,* 23 Wall., 420.

§ 625. — **statements of vendor.**—Where two parties engaged in a negotiation have an equal opportunity of judging as to the condition of the subject matter, neither is presumed to trust the other, but to rely upon his own judgment. Thus where a person purchases a claim against a debtor, having knowledge of the circumstances of the debtor, an opinion by the vendor of the claim as to its value, will not invalidate the sale in a court of equity. *Blease v. Garlington*, 2 Otto, 1.

§ 626. **Undue influence.**—Where one in possession of and holding the legal title to land belonging to heirs, who had just become of age and were ignorant of their rights, after having so covered up and complicated their title that they could not understand it, or know the value of their claim, persuaded them to release their title to one whose name he was using for his own purposes, for a consideration much below the value of the property, by telling them that their claim was worthless, and that he offered the amount for the sake of peace and quieting his title, it was held that the deeds so obtained could not be held valid in a court of equity. *Hallett v. Collins*, 10 How., 174 (§§ 144-48).

§ 627. Bill to set aside an assignment of a land warrant, on the ground of fraud and undue influence, held not sustained by the evidence. *Connor v. Featherstone*,* 12 Wheat., 199.

§ 628. **In judicial sales.**—The formation of an association for the purpose of bidding at a judicial sale does not render such sale, when made to the association, void or voidable in equity, especially where it does not appear that any one was prevented from bidding thereby, or that the property sold for less than its value. *Johns v. Slack*,* 2 Hughes, 467.

§ 629. Where relief is sought against a judgment and a judicial sale of property in controversy, and fraud is alleged in the bill, equity has jurisdiction. *Shelton v. Tiffin*, 6 How., 163.

§ 630. At a judicial sale in 1855, C. purchased a tract of land for the sum of \$15,400, paying a portion of the purchase money at the time and giving his notes for the balance. Failing to discharge the notes as they became due, such proceedings were had in the case as resulted in the appointment of commissioners to resell the property. After this decree was obtained, C. paid \$4,000 of the unpaid purchase money. A short time after this the country became unsettled on account of the war, and no steps were taken to sell the property until 1864, when, on the motion of G., one of the commissioners, who was a counsel in the cause, and whose wife was interested in the case, one L. was appointed commissioner to sell, and the land was resold in pursuance of the original order. On a bill filed to avoid the sale it was held that the relation of G. to the case did not render such action on his part a fraud upon C., and that neither did the fact that C. was absent and within the Confederate lines, and that confiscation

proceedings had been commenced against him, render such action fraudulent. *Johns v. Slack*,* 2 Hughes, 467.

§ 631. In issue of patent to public land.—Where a settler under the donation act, which gives to the wife of a settler thereunder one-half of the grant in her own right on account of her wifeship, fraudulently procured the certificate and patent for his wife's share to be issued to a woman not his wife, by falsely representing the latter to be his wife, a court of equity granted relief against the fraud and mistake by compelling the assignee of the patentee to convey to the assignee of the wife. *Stevens v. Sharp*, 6 Saw., 113.

§ 632. Where one entitled to land in the Virginia military tract in Ohio died before the warrants were issued, and his executor procured a certificate from the council of the commonwealth of Virginia that the representatives of the testator were entitled to the land, and assigned this to a third person, and warrants and a patent were afterwards procured on the certificate by the assignee, it was held that a court of equity, on complaint of the heirs that the certificate, warrants, and patent had been procured by fraud, had power to go behind the patent and investigate the transaction. *Ware v. Brush*, 1 McL., 538.

§ 633. In corporate management.—Where the holder of stock in a corporation agreed to sell his stock to the company upon an agreement that obligated the company to pay him such price for the stock as, upon a fair examination of the affairs of the company, and a proper and fair estimate of the moneys, property and assets of the same, the stock was found to be worth; and he was induced to accept a less price than his stock was worth, by concealment and misrepresentation in the examination, it was held that equity had jurisdiction to afford him proper relief. *Hager v. Thompson*, 1 Black, 80.

§ 634. The complainant filed a bill alleging that he was the owner of certain shares of stock in the Crescent City Gas Light Company; that the defendant A., who was the president of this company, conspired and confederated with certain others to obtain control of the company and defraud the stockholders out of their stock; that in pursuance of this conspiracy he obtained a large amount of stock, and by collusion with the directors caused fraudulent assessments to be made upon the stock, and for the nonpayment thereof fraudulently caused said stock to be forfeited, the said A. then subscribing for and claiming to be the owner of said stock; that A. and his confederates, having thus obtained control of the company, caused it to be consolidated with the New Orleans Gas Light Company, the stockholders in the former, except A., being given no stock in the consolidated company. The bill prayed that the complainant might be decreed, if the consolidation was deemed valid, to be the owner of his proportionate share of stock in the consolidated company, and if not valid, then in Crescent City Company. *Held*, upon demurrer, that there was equity in the bill, the ground of jurisdiction being fraud, and there being no adequate remedy at law. *Kilgour v. New Orleans Gas Light Co.*,* 3 Woods, 144.

§ 635. Parties must come with clean hands.—The complainant in his bill alleged that he executed a mortgage to the defendant to secure a debt; that, on foreclosure of the mortgage and decree of sale, in order to defeat the attempt (charged to be fraudulent) of other parties to obtain possession of a part of the mortgaged premises, an agreement was made between the complainant and defendant by which the time of sale was procured to be changed to an earlier date, and by which the defendant bought the property ostensibly for himself, but really to hold as security for the debt; that, to perfect the sale and make it conform to the ostensible title of the purchaser, the complainant rented the premises of the defendant; and that, having obtained the apparent title, the defendant had fraudulently claimed to be the real owner, had extorted an agreement from the complainant which recognized the title of the defendant, and had, by legal, though irregular means, dispossessed the complainant. The bill prayed that the defendant be restrained from disposing of the land, and that so much as was necessary be sold to pay the debt to the defendant, and the balance conveyed to complainant. The court refused relief because the agreement was a fraud on third persons. *Randall v. Howard*, 2 Black, 585 (Conv., §§ 1073-76).

§ 636. As a general rule a party who obtains an advantage over another by fraud must be held as trustee for the latter, but where both parties have been engaged in a scheme to "bluff off" other creditors by recovering a judgment against property on which they had a claim for a sum much greater than was actually due, neither party can invoke the aid of a court of equity against the other to recover a share of the profits of such illegal combination. *Wheeler v. Sage*, 1 Wall., 529.

§ 637. Acquiescence after knowledge of fraud.—Where a bill in equity is brought to set aside an alleged fraudulent contract entered into by the complainant in ignorance of the fraud, it is a good defense to show that the complainant, after knowledge of the fraud, acquiesced in the contract, or that he failed, upon being advised of the facts constituting the fraud, to repudiate them. But equity will not presume a ratification by the injured party if he files his bill to set the contract aside within a reasonable time. *Northern Pacific R. Co. v. Kindred*, 3 McC., 627 (AGENCY, §§ 157-65).

3. *Trusts.*

[See USES AND TRUSTS.]

SUMMARY — *Fraud; constructive trust; tenants in possession.* § 638. — *Fraud of agent,* §§ 639, 640. — *Purchase of outstanding title by tenant in common,* § 641. — *Right to redeem from tax sale,* § 642.

§ 638. Where one is decreed by a court of equity to be a constructive trustee of the legal title to land, on account of a fraud practiced by him, tenants in possession, not charged with the fraud, or as holding in contravention of some equity subsisting between them and the complainants, cannot be ousted by the court. The remedy against them is at law. *Ringo v. Binns*, §§ 643-45.

§ 639. Claimants of land by virtue of an entry, and a survey which had never been registered but was lost, employed an agent to attend to it for them, and to procure a division between the claimants. The agent, on finding that the return of the survey had not been made, and that no grant had been issued, advised the claimants to be at no further expense about it, and took out warrants and caused entries and surveys to be made on the land, and the surveys returned in his own name. On being charged with the fraud, he executed a paper transferring his interests to the claimants; and the legislature subsequently passed an act recognizing the survey made by the agent, and the same was carried out in a grant to the claimants. But, in the meantime, the agent, in violation of his transfer, had taken out a patent in his own name. In a suit by the claimants against the agent for a conveyance, it was decreed that he convey, the court laying down the proposition that if an agent discovers a defect in the title of his principal, he cannot misuse it to acquire a title in himself; and, if he does, a court of equity will hold him to be a trustee for his principal. *Ibid.*

§ 640. The owner of property employed an agent to take charge of it, redeem it from tax sales, pay all future taxes, advancing the money himself, and receive his compensation in a certain share of the proceeds of sales of the lands, to make which a power of attorney was given him. In violation of this duty the agent permitted the lands to be sold for taxes, and became the purchaser at the sales. It was held that a court of equity would compel him to hold the lands in trust for his principal. *Rothwell v. Dewees*, §§ 646-50.

§ 641. It is a rule in equity that where two devisees or tenants in common hold under an imperfect title, and one of them buys in an outstanding title, such purchase will inure to their common benefit, upon contribution made to repay the purchase money. And the rule applies as forcibly to the husband of a tenant in common, as to one of the immediate co-tenants. *Ibid.*

§ 642. The right to redeem property sold for taxes is legal and not equitable, and the party holding the right will not be permitted to intervene in a suit involving equitable issues, there being no obstruction to the assertion of his title at law. *Ibid.*

[NOTES. — See §§ 651-687.]

RINGO v. BINNS.

(10 Peters, 269-282. 1836.)

APPEAL from U. S. Circuit Court, District of Kentucky.

Opinion by MR. JUSTICE WAYNE.

STATEMENT OF FACTS. — The object of this appeal is to reverse the decree of the circuit court, by which the appellants were ordered to convey to the appellees, by deeds of release, with covenants of warranty against themselves and their heirs, and those claiming under them, all the right, title, interest and claim which they respectively have to lands embraced by a patent of two thousand acres to Charles Binns, Jr., and the heirs of Timothy Hixon, and their heirs, dated the 16th of October, 1824.

It appears, by the proofs in the cause, that a survey of two thousand acres was made on Indian Creek, *alias* Fox's Run, or Mason Run, Henry county, Kentucky, on the 20th of November, 1797, for John Alexander Binns and Charles Binns, by virtue of an entry made the 5th of August, 1783. The original survey, by accident, or from the negligence of an agent of the Binnses, to whom it had been sent for such purpose, had never been registered and was

lost, but a copy of it was preserved, which determined with exactness the locality of the land. It was known as Binns' land in the neighborhood and by those owning the contiguous lands. John Alexander Binns transferred his interest in the survey to Husly Bagges, by whom it was sold to Timothy Hixon, the ancestor of Hixon, the appellee. Charles Binns, in August, 1819, appointed John Littlejohn his agent and attorney, with a power of substitution, to attend to this land and his other land in Kentucky, and Littlejohn associated with himself in such agency Burtis Ringo. Ringo, during the agency, and particularly whilst acting in concert with Littlejohn and William P. Rogers, to procure a division of the land between the appellees, called upon Rogers to ascertain when a division of the land could be decreed. Rogers told him there was a difficulty in the way, as the survey had not been returned to the register's office, and that no patent had ever been issued for the land. He received the information in May or June, 1822. On the 10th of July following he wrote to Littlejohn, and, after acknowledging that he had been requested to assist in dividing "Binns' land," he states that he had been at Frankfort, had made search for Binns' patent, but found the return of the survey had not been made, and that no grant had been issued.

He further says he supposed it would be unnecessary to be at any further trouble about it until Mr. Binns had been heard from; as he had written to him, if he had a patent to send it on as soon as possible to Littlejohn or himself; and he requests Littlejohn to send it to him if Littlejohn should receive it. On the same day he wrote a letter to Binns, in which he says, having been requested by Littlejohn to assist him in dividing your lands between you and Mr. Hixon's heirs, he had been in the register's office, and finding that the release of the survey had not been made, and that a grant had not been issued, he advises Binns to be at no further expense about it, as it appears no grant can have issued, and that Binns would be wrong if he thought there was no better right on the land. On the 8th of July, two days before he had written to Littlejohn and Binns, Ringo had taken from the register's office warrants for five hundred acres and one hundred acres of land, and caused entries and surveys to be made upon six hundred acres of the original two thousand acre survey, which had been made for John Alexander Binns and Charles Binns. The surveys were made on the 20th of July, and returned to the register's office in his own name on the 24th of August. When charged by Littlejohn with the fraudulent attempt upon the rights of those principals, and told that application had been made to the legislature of Kentucky to authorize a patent to be issued upon the original survey, on behalf of the Binnses, and that his conduct was known to a committee of the legislature, and might be attended with unpleasant consequences to himself, Ringo, to avoid them, and to prevent a most notorious disclosure of his fraud, expressed in writing his willingness that such an act should be passed by the legislature, as the complainant had applied for, and gave to Littlejohn, under his hand and seal, a paper, of which the following is a copy:

"Whereas, it has been represented that I, Burtis Ringo, of Fleming county, state of Kentucky, had made two entries and surveys of six hundred acres of land, said to belong to John Alexander Binns and Charles, of Virginia, and that the said John A. Binns had sold to Timothy Hixon, now deceased, and that I had extended the surveys for my own benefit, though an agent under John Littlejohn for said Binns. I hereby disavow such intention, and do, by these presents, assign over all my right, title and interest in the said extends

and surveys to Charles Binns and the said heirs of Timothy Hixon, to be carried into a grant at their proper expense; hereby renouncing all claim by virtue of said extends and surveys, and assigning them to the said Binns and Hixon's heirs. As witness my hand and seal this 4th day of November, 1822.

"BURTIS RINGO. [L. s.]

"Signed and acknowledged in the presence of us, Daniel Fechlen, John Littlejohn."

Before this instrument was executed by Ringo, Littlejohn agreed to give him \$100 to reimburse the amount he had expended in procuring the warrants and making the surveys of the six hundred acres; paid him \$50 in commonwealth paper and gave him a note of hand for \$50.

The legislature of Kentucky acted upon the petition of the complainants; passed an act on the 10th of December, 1822, recognizing the survey of the 20th of November, 1797, made on the entries of the 5th of August, 1783; and the same was carried into a grant in favor of Charles Binns, Jr., and the heirs of Timothy Hixon and their heirs, on the 16th of October, 1824. In the meantime Ringo, in violation of his transfer of the entries and survey for six hundred acres to Binns and the heirs of Hixon, took out a patent in his own name. The foregoing facts were charged in the bill of the complainants; were denied by Ringo in his answers; but were established by proof at the hearing. In the original bill Ringo was the only defendant; but the complainants charge in it that the land had been occupied for ten or twelve years by tenants of Binns. By an amended bill the tenants, James Elliott, John Collins, John Elliott, James Lawrence, Thomas Watson, Athey Rowe, George Muse, Sen., and George Muse, Jr., were made parties, and stated to be tenants in possession of the land claimed by the defendant; and the complainants make the same prayer against the tenants as they had against Ringo in the original bill.

The circuit court made the following decree: "The court, being now sufficiently advised of and concerning the premises, doth order and decree that the defendants, Burtis Ringo, James Elliott, John Collins, John Elliott, James Lawrence, Thomas Watson, Athey Rowe, George Muse, Sen., and George Muse, Jr., do, on or before the 6th day of the next term, convey to the complainants, by deeds of release, with covenants of warranty against themselves and their heirs, and those claiming under them, all the right, title, interest and claim which they respectively have to the lands embraced by the two thousand acre patent to Charles Binns, Jr., dated 16th of October, 1824; and the writ of *habere facias possessionem* is awarded the complainants against the said defendants. And it is further ordered and decreed that the defendants pay to the complainants their costs herein expended." The defendants appealed to this court.

§ 643. *Entry, survey, registry and a patent are necessary to a complete legal title to public lands.*

It is contended that the decree is erroneous, and should be reversed. In behalf of Ringo it is urged that he has a prior legal title, unaccompanied by any equity of the complainants. The legal title must rest upon entry, survey, registry and patent; and it will be admitted that a legal title cannot be in any one until a patent has been issued; and further, that all of those requirements, to make a complete title, shall have been done without fraud, to give to a patentee a valid title. If, then, in the course of carrying his surveys into grant, and before a patent upon them was issued to him, Ringo, under a notice to *caveat* the application of the complainants to the general assembly of Ken-

tucky for leave to bring in a bill to authorize a copy of these original surveys for two thousand acres to be received and registered, that a patent might be issued to them, acknowledged their equity to be superior to his immature legal rights, and expressed his willingness that it should be affirmed by legislative enactment. It being done by the legislature, its act nullified his surveys, and the latter could not be afterwards any foundation for a patent of the same land to himself. The complainants' entry and survey were raised by the legislature into a right to the exclusion of every right of Ringo; and any patent afterwards issued to him, upon his entries and surveys, is a nullity. The legal title of the complainants does not rest upon the statute for granting lands, but upon an act of the legislature directing an unregistered survey, inoperative by the lapse of time, to be registered, and a patent to be issued upon it. When this act was passed in favor of the complainants, the land covered by the survey under the entry of the 5th of August, 1783, became excepted from the mass of ungranted vacant land; and the complainants acquired rights in it which could not be defeated by a patent upon Ringo's entry and survey.

§ 644. *If an agent discovers a defect in his principal's title, he cannot misuse his knowledge to acquire a title to himself. If he does, he will be held as his principal's trustee.*

This view of the case makes it unnecessary for us to consider the objections to the decree growing out of Ringo's transfer of his entries and surveys to the complainants, namely, that there was no consideration paid, as agreed to be paid, for his claim; if there was, that it was inadequate, and that it was obtained by fraud. In truth, at the time that paper was executed, he had no legal or equitable interest in the land to convey and be transferred, no more than he was conscientiously bound to do; as he confessed and had so declared to others when he was making his surveys, that they were not made with an intention to appropriate them to himself, but to enable him to make a division of the land between the complainants.

But how forcibly does the equity of the complainants prevail over any claim of Ringo, when the latter is viewed as their agent at the time he made his entry and surveys upon the land which he had undertaken to assist in dividing between them. It is said that an unregistered survey gave to them no equitable right in the land, and that Ringo, being only an agent for the special purpose of dividing the land, he could rightfully enter and survey it for himself when he ascertained the defect in the title of the complainants. The proposition of a want of equitable right in the complainants is true as against the state; for the time within which the survey should have been returned and registered before a grant could issue had expired, and the land had fallen into the general mass of ungranted land liable to entry, survey and grant upon treasury land-office warrants. But the mistake in the argument is in applying the rights of the state in the land, to a right in Ringo, obtained when he was admitting to the complainants his agency for them, and making acknowledgments of their title to others, to enable him more successfully to secure by his artifices a title in the land to himself. On the same day Ringo wrote two letters, one to Littlejohn and the other to Charles Binns. In both he acknowledges himself to be the agent of the complainants; but, by the tenor of his letters to Binns, he conceals from and misrepresents to Littlejohn, and under the pretense of a friendly wish to save Binns from unnecessary expense, he tells him that as no survey had been made and no grant had existed, that he need not go to any expense about it, as it appears no grant can now

issue; that he will be wrong to think there was no better right to the land. These letters were written two days after he had commenced measures to secure the land for himself. The equity of the complainants, therefore, over any right of Ringo, does not arise from the former having had, at this time, any legal title to the land, but from Ringo's having practiced an artifice upon the complainants, whilst he was their agent, to prevent them from curing the defect in their title, that he might deprive them of property which at the same time he acknowledged to be theirs. He was guilty of deceitful practices and artful devices, contrary to the plain rules of common honesty and fair dealing between men, and could not acquire a title to the land valid against the equity which he had acknowledged to be in the complainants. It is unnecessary to pursue this point further. The decree of the court directing Ringo to convey must be affirmed, and the proposition laid down by this court is, that if an agent discovers a defect in the title of his principal to land, he cannot misuse it to acquire a title for himself; and if he does, that he will be held as a trustee holding for his principal.

§ 645. *Bona fide tenants, without notice, of one held as constructive trustee by reason of fraud, cannot be ousted by a court of equity.*

In regard to the tenants, the decree of the court must be reversed. They were made parties by an amended bill. In the original bill, the complainants charge that the land had been occupied for ten or twelve years by tenants of Binns, and in the amended bill they are said to be tenants in possession of the land claimed by the defendant. Nor are they charged with fraud in either. It is not necessary, therefore, to consider the grounds urged in the argument of counsel for a reversal of the decree against the tenants, if a point arises upon the pleadings decisive of their case. Not having been charged with fraud on the bill, or placed by it in any such relation to the land or to the complainants, no case exists for the interference of a court of equity. Whether they occupied the lands as the tenants of Binns, or, as declared in the original bill, as tenants in possession under another, the complainants are to be supposed to have their remedy at law for the recovery of the land until they shall charge and show that the tenants obtained, and retain possession, in contravention of some equity subsisting between them and the complainants. The tenants are not so charged, nor is there anything in the record from which such a conclusion can be drawn. They are merely shown to be in possession of parts of the original survey of two thousand acres, which was resurveyed by Ringo; and it is probable they hold under him; but there is no proof that they were parties to the fraud which he practiced upon the complainants. This point does not appear to have been made in the hearing in the court below, nor was it urged in argument in this court, but it is obvious in the pleadings, and must be noticed by us; it is sufficient for the reversal of so much of the decree as relates to the tenants, and it will be directed with permission to the complainants to amend their bill, if they shall please to do so.

It was also urged that the decree should be reversed, on the grounds that there was no proof showing the complainants, the Hixons, to be the heirs of Timothy Hixon, and that the will of Timothy Hixon showed that the complainants should have claimed as devisees, and not as heirs. The decree being reversed as to the tenants, neither point is material to them; and these objections cannot prevail against the affirmation of the decree as to Ringo, because the allegation in the bill of the complainants, that the Hixons were the heirs of

Timothy Hixon, is not denied in the defendants' answers, and was, therefore, not a point put in issue by the pleadings. Besides, the fact not having been denied by the answer, there are ample and frequent proofs in the record of Ringo's admission that they were the heirs of Timothy Hixon, and of his acknowledgments of their equitable right in the land in that character.

ROTHWELL v. DEWEES.

(2 Black, 618-619. 1862.)

APPEAL from the Circuit Court for the District of Columbia.

Opinion by MR. JUSTICE MILLER.

STATEMENT OF FACTS.—The appellees in this case, who were the defendants in the circuit court, hold the real estate, which is the subject of this controversy, by inheritance from their father, William Dewees. The title of Dewees was a deed from the corporation of Washington city, made August 29, 1836, on a sale for taxes. It seems to be admitted on all sides that this deed vested the legal title in Dewees, and that it is valid in his heirs, unless the plaintiffs shall be permitted to redeem from said sale, and have the deed set aside for reasons set forth by them in their bill.

The property in question was conveyed by Robert Morris, in 1796, to Joseph Ball and Standish Forde. Forde was then doing business in Philadelphia, as a merchant, in partnership with one John Reed, and died about the year 1806 or 1807, leaving the mercantile firm insolvent. Shortly after Forde's death, Reed, the surviving partner, conveyed all the partnership property to William Paige, of Philadelphia, by deed of assignment for the benefit of creditors; and in the schedule attached to the instrument of assignment is included the property thus conveyed by Morris to Ball & Forde. This instrument is dated December 12, 1807.

On the 18th of September, 1833, William Paige, as assignee of Reed, surviving partner of Reed & Forde, entered into a written agreement with William Dewees, the defendant's ancestor, in reference to this property, the substance of which is briefly this: Dewees was to take charge of the property, and redeem it from any tax sales which had already been made, and for which the time of redemption had not expired. He was to pay all future taxes, and all the expenses incident to sales of lots to be made by himself, for which he was furnished with a power of attorney by Paige. The money for all these taxes and expenses he was to advance, except a sum of about two or three hundred dollars, which was supposed to be in the hands of the treasurer of Washington city, belonging to Reed & Forde, arising in some way out of sales for taxes already made. His compensation for all this was that, after deducting his advances and interest from the proceeds of sales made by him, he was to have one-third of the remainder of such proceeds.

It appears that Dewees acted fairly under this arrangement for about three years; making advances to redeem the property where it had been sold for taxes, and paying the accruing taxes, until he had advanced about \$900. He then, not having sold any of the property, nor realized anything from it in any other way, permitted it to be sold for taxes and bought it in himself, and took the corporation deed already mentioned of the 29th of August, 1836. He died on the 3d of September following. On the 10th of April, 1837, Paige, the assignee, by regular power of attorney, appointed Andrew Rothwell, one of the complainants, his agent, with authority to sell lots, to procure partition and

to make settlement with the heirs and representatives of Dewees. In 1841 Robert Smith was, by a decree of court, appointed assignee in place of Paige who had died; and in 1846 said Smith quitclaimed and released to Rothwell all the right, title and interest which he had as such assignee in the property now in dispute. The complainant, Rothwell, also procured deeds of conveyance to himself and his co-plaintiffs, Naylor and Smith, from several persons describing themselves as heirs of Standish Forde, of their interest in the same property.

Rothwell, Smith and Naylor then filed their bill in chancery against the defendants, one of whom is Rothwell's wife, praying to be permitted to pay the sum with interest which William Dewees had paid for his tax deed and to have said deed set aside. After the suit had progressed for some time the other appellant, Robert S. Forde, filed a petition to be admitted as a party plaintiff on the ground that he was a grandson and an heir-at-law of Standish Forde and entitled to redeem for his share. The court dismissed or overruled the petition of Robert S. Forde to be made a party, and, on final hearing, it dismissed the bill as to complainants, Naylor and Smith, and decreed that Rothwell, in his purchase from Robert H. Smith, the assignee of John Reed, should be held to be trustee for himself and wife and the other defendants, heirs of Dewees; and that the defendants should make contribution to him, in payment of the sum so paid by him to Smith, and for taxes afterwards paid by him on the property. From this decree Robert S. Forde and the original complainants appeal.

§ 646. *When holder of legal title cannot intervene in equity.*

The first question to be considered arises from the action of the court in dismissing Forde's petition. It is clear that if Forde had any title or interest in the property it was a legal title, and no obstruction is seen to the assertion of that legal title against the defendants in a court of law. That court is the appropriate one to settle the conflict growing out of the legal title derived by Robert S. Forde from his ancestor, and the title claimed by defendants under the tax deed from the city of Washington. If he has any right to redeem from the sale for taxes it must be a legal right which he can exercise without the aid of a court of chancery. In his petition asking to be made a party, he claims that Dewees must be considered as the agent of Forde's heirs, as well as the agent of Reed's assignee under his agreement with Paige. This claim, however, cannot be sustained.

§ 647. *The fiduciary relations of the trustee of an insolvent firm.*

The partnership of Reed & Forde was insolvent. The assignment was made for the benefit of creditors, and the claim of the assignee to the lots in question was adverse to the claim of Forde's heirs. The assignee had thus claimed them for nearly thirty years when Dewees became the agent of Paige. There can be no pretense then that Dewees was agent for Forde's heirs or occupied towards them any relation of trust or confidence. No ground of equitable jurisdiction is perceived on which Robert S. Forde could assert his title in a court of chancery against the defendants, and his petition was properly overruled.

The next objection to the decree, namely, the dismissal of the bill as to complainants, Naylor and Smith, is based upon almost the same ground as that just considered. These parties have conveyances from individuals who describe themselves in the deeds as heirs of Standish Forde, and in addition to this, the bill alleges that they were partners in the purchase made by Roth-

well from the assignee of Reed. If it be admitted that the parties who made the conveyance to Naylor and Smith were the heirs of Standish Forde, it would not place those complainants in any other or better position than that of Robert S. Forde. But Naylor and Smith, being original plaintiffs, had an opportunity to prove their case at the final hearing, and failed to produce any evidence that their grantors were the heirs of Forde. It cannot be pretended that the recital of that fact in their deeds can be evidence against parties not claiming under them, and we have failed to discover any other evidence of it in the record.

Nor is there any evidence that these parties were interested in the purchase made by Rothwell from Smith, the assignee. If that fact, however, were established, we do not see that they could claim any better position than Rothwell, since they permitted him to take the conveyance to himself without any mention of their rights in the purchase.

§ 648. *The purchase of an outstanding interest in property by a person in fiduciary relations to its owners inures to the benefit of such owners.*

We come now to consider that portion of the decree which concerns Rothwell and the defendants. This must be supported, if at all, upon the two-fold operation of the principle that a purchase of an outstanding title or interest in property by a person sustaining certain relations to others interested in the same property should, at the option of the latter, inure to their benefit; the application being in this case made, first, to the purchase of the tax title by Dewees, agent for Paige, the assignee; and, secondly, to the purchase made by Rothwell from the assignee, he being the husband of one of the tenants in common who held the property as heirs of Dewees.

§ 649. *When an agent becomes a trustee for property bought by him.*

So far as the tax title acquired by Dewees is concerned, there can be no doubt that the principle is correctly applied. As the agent of Paige, it was his duty to pay these taxes, and to prevent the sale of the lots. In violation of this duty he permitted the lots to be sold, and himself became the purchaser. Besides his general duty as agent, he had expressly covenanted, in writing, that he would, out of his own funds, advance the money and pay these taxes. There is nothing in law or morality plainer than that this purchase must be held to be in trust for the benefit of his principal, on repayment of the sum advanced by him. 1 Story, Eq., secs. 315, 1211, 1211a; Story on Agency, secs. 210, 211; 8 Ves., 337. The defendants, who are his heirs, can stand in no better condition than he would if he were alive.

In regard to the application of the principle to the purchase of Rothwell from Smith, the successor of Paige in the assignment, it is claimed by defendants that Rothwell is to be treated as having a common interest with them in the title derived from Dewees, and that his purchase of the outstanding equity of Reed's assignee must inure to the common benefit of the co-tenants of that title.

§ 650. *When a husband becomes a trustee for wife and her co-tenants.*

In the case of *Van Horne v. Fonda*, 5 Johns. Ch., 407, the rule is very fully laid down by Chancellor Kent, that where two devisees or tenants in common hold under an imperfect title, and one of them buys in the outstanding title, such purchase will inure to their common benefit upon contribution made to repay the purchase money. The same point is also decided in *Farmer and Arnold v. Samuels*, 4 Litt., 187. The soundness of the principle is not denied by counsel for plaintiff, as applicable to persons strictly tenants in com-

mon, or joint tenants, or others having an equality of interest or estate; but it is said that the complainant in this case is not tenant in common, but that his interest is at most only tenant by the curtesy of his wife's interest, and that even that is doubtful; and that there is no equality of interest as between him and the defendants. In this connection much stress is laid by counsel upon the language of the court in *Van Horne v. Fonda*, to the effect that in that case there was an equality of estate between the co-devisees. It does not appear to us, however, that any particular force was given to that fact by the learned judge, but rather that the rule was based on a community of interest in a common title, which created such a relation of trust and confidence between the parties, that it would be inequitable to permit one of them to do anything to the prejudice of the other, in reference to the property so situated. It seems to us that the true reason of the rule applies as forcibly to the husband of a tenant in common, as to one of the immediate co-tenants. This seems also to have been the opinion of the court of appeals of Kentucky in the case of *Lee and Graham v. Fox*, 6 Dana, 176. It was decided in that case that the husband of a co-heiress, who had purchased an outstanding incumbrance on the lands of the heirs, should be held to have purchased for the benefit of all the tenants, upon condition only that they should contribute their respective proportion of the consideration actually paid for the incumbrance.

We are quite satisfied with this as a rule of equity, sustained as it is by authority and sound principles of morality, and as the decree of the circuit court was in conformity to it, it must be affirmed.

§ 651. *Equitable jurisdiction.*—Equity has jurisdiction in cases of trust and fraud, and to compel an account and afford relief. *Bradley v. Converse*, 4 Cliff., 366.

§ 652. Though the law courts have jurisdiction in a few cases of the simpler trusts, yet in general equity has exclusive jurisdiction over trusts. *Etting v. Marx*, 4 Fed. R., 678.

§ 653. In order to give a court of equity jurisdiction over a matter involving a trust, some part of the trust must remain unexecuted, or some act remain to be done which rests in confidence; the mere relation between the parties of *cestui que trust* is not enough; there must be a trust which is not cognizable by law. *Baker v. Biddle*, Bald., 394 (§§ 884-96).

§ 654. A controversy between *cestuis que trust* and their trustees, touching the accounts of the latter for services and disbursement in the management of the trust, belongs peculiarly to a court of equity. *Parsons v. Lyman*, 5 Blatch., 170 (Courts, §§ 322-28).

§ 655. Equity has jurisdiction of a bill filed by a trustee and others claiming the benefit of the trust, under a will, against one of the heirs at law of the testator and her husband, praying, among other things, an issue to be directed to try the question whether the testator made the will; and, in case the verdict be in favor of the will, that the same may be carried into execution, and the trustee be decreed to be put into possession of the lands devised to him in trust, to enable him to execute the trust. *Harrison v. Rowan*, 4 Wash., 202.

§ 656. Where a trust exists against the owner of certain lands, and in favor of a person claiming an interest therein, and the trust relationship gives the *cestui que trust* a lien, equity has concurrent jurisdiction to enforce the lien and the trust, though an action at law for damages might be sustained against the trustee. *Seymour v. Freer*, 8 Wall., 215.

§ 657. Where one is sued as trustee of a bankrupt, but for acts for which, upon the theory of the bill, he is personally liable, but is not sued as trustee for the complainant, and no element of trust appears in the controversy, the fact that he is trustee does not give equity jurisdiction. *Dumont v. Fry*, 12 Fed. R., 21 (§§ 1158-59).

§ 658. — *of federal courts.*—Wherever a case in equity may arise and be determined, under the judicial power of the United States, the same principles of equity must be applied, and it is for the courts of the United States, and for the supreme court in the last resort, to decide what those principles are. Whether a trust exists in equity, or whether the complainants have an equitable right to the specific performance of an agreement to create a trust, are questions upon which the supreme court of the United States is not bound by the decisions of any state. *Neves v. Scott*, 18 How., 268.

§ 659. Although *fidei commissi* are abolished by the law of Louisiana, this does not prevent

a federal court of equity from holding one who has fraudulently possessed himself of another's property as a trustee. *Gaines v. Chew*, 2 How., 619.

§ 660. A bill calling upon trustees to account, and to compel them to carry into execution the trust which they have assumed as assignees in bankruptcy, is properly cognizable in a court of equity, and may be brought in the circuit court of the United States, where the complainants are foreign subjects. *Lucas v. Morris*, 1 Paine, 396.

§ 661. The federal circuit court has jurisdiction in equity of a bill which sets out facts which would support a bill for the enforcement of a trust, although the bill may actually be drawn with reference to a local rule of the state courts, by which a party out of possession may file a bill in equity to remove, as clouds on his title, the deeds of an adversary claimant in possession. *Partee v. Thomas*, 11 Fed. R., 769.

§ 662. Without deciding whether a bill in equity, framed in view of a rule of equity obtaining in the state, that a party out of possession may file a bill in equity to remove, as clouds upon his title, the deeds of an adversary claimant in possession, could be maintained in a federal court, if technically a bill to remove clouds from plaintiff's title, it is decided that the court has jurisdiction where the bill is, or should be, on the facts stated therein, a bill to declare and execute the trusts of a will, and secure to the plaintiff his equitable estate against breaches of trust alleged to have been committed by the trustee by which the defendant has gained possession. Such a bill, containing a prayer for general relief, may be maintained in its true character, or amended to conform its special prayer to its real purpose. *Ibid.*

§ 663. Equitable supervision of trust funds.—Where a trustee dies during the life of the trust, a court of equity may appoint a new trustee and compel the performance of the trust by him; or it may decree and enforce the execution of the trust through its own officers and agents, without the intervention of the new trustee; or the trust may be enforced through any one who has control of the property. *Batesville Institute v. Kauffman*, 18 Wall., 151.

§ 664. Where lands dedicated to a public use are appropriated to a different use by a municipal corporation, they do not thereby revert to the original owner, but it seems that a court of chancery may compel a specific execution of the trust. *Barclay v. Howell*, 6 Pet., 507.

§ 665. Courts of equity have always claimed and exercised exclusive jurisdiction in cases of trusts, and over the conduct of those appointed to execute them; and they have power to enforce the execution of trusts in such a manner as may be most likely to accomplish the object of the party creating them, in cases where without such interference the trust would be imperfectly executed or not executed at all. A testator devised all of his property to the plaintiffs, and to the defendants, H. and W., in trust, after payment of debts and legacies, to divide the same into five equal parts, and to stand seized of two of the parts for the use of his minor son, and of the other three for the use of his daughters, the wives of the plaintiffs. The will further empowered the trustees, who were also constituted executors, to appoint an agent or agents to transact all business necessary for the execution of the trusts. H. was appointed and acted as agent for awhile and then resigned. The other trustees nominated one P. to act as agent, but H. refused to concur in the appointment or to deliver the papers to him, and also refused to have any communication or correspondence with the other defendant W. The plaintiffs filed a bill in equity for the confirmation of the agent appointed to execute the trusts, or for the appointment of some one else in that capacity, and to compel H. to deliver over the papers to the person appointed, alleging that the estate was exposed to great danger and that the trusts of the will could not be executed. There was no charge against the integrity or solvency of H., nor against his capacity to execute the duties of trustee and executor. It was decided that the relief should be granted; that P., being the choice of four-fifths of the trustees, should be confirmed as agent; that all the trustees ought to be entitled to free access to the papers; and that the agent should be put into possession of such of them as concerned the business which he would have to transact. *Barings v. Willing*, * 4 Wash., 248.

§ 666. Where a will created an unexecuted trust for the education and support of A., during his minority, and in the event of his death before reaching majority, for the use and absolute enjoyment of the heirs of B., it was held that a court of equity would not permit A. to be deprived of a proper allowance for his maintenance and education in order to enhance the contingent estate for the possible benefit of the heirs of B.; and would not on the other hand permit the property to be improperly lavished on the primary *cestui que trust*, without regard to the contingent rights of the heirs of B. It was further held that the administrator of the deceased trustee could be called to account for the trust fund to the deceased trustee's successor, in a court of equity only, and could not be sued at law to recover the trust fund. *Curtis v. Smith*, 6 Blatch., 537.

§ 667. Where persons have been put into possession, by a court, of property which they hold in a trust capacity, another court has authority to compel them to recognize the trust thus imposed, though the proceedings under which they were put into possession still continue. *Watson v. Jones*, 18 Wall., 721 (CHURCHES, §§ 16-26).

§ 668. Where a debtor made an assignment of his property in trust for the payment of any judgment which the United States might recover against him, it was held, on a bill filed by the United States for an accounting by the trustees, that a trust was created and that the plaintiffs were entitled to an account. It was further held that the court would execute the trust, either by subjecting the property directly to seizure on execution, or by compelling the trustees to dispose of it under the supervision of the court. *United States v. Hoyt*, 1 Blatch., 332.

§ 669. Where the purposes of a trust have been satisfied, equity in a proper case will compel a conveyance from the trustee to the *cestui que trust*, as he has the sole beneficial interest. *James v. Atlantic Delaine Co.*, * 8 Cliff., 614.

§ 670. Misconduct of trustee.—It is a principle of equity jurisprudence, that whenever the trustee has been guilty of a breach of trust, and has transferred the property to any third person, the *cestui que trust* may follow the property into the hands of any but a *bona fide* purchaser for a valuable consideration without notice. If the proceeds of the trust property can be distinctly traced, he has his option to follow the same, or hold the trustee personally responsible. It is not in the power of the trustee to defeat this option by any subsequent repurchase of the property. *Oliver v. Piatt*, 8 How., 333.

§ 671. Courts of equity were established for the purpose, among other things, of enforcing the execution of such matters of trust and confidence, as are binding in conscience, though not cognizable in a court of law. Such courts will not permit trustees, in exercising the powers of their trust, or in dealing with the trust estate, to obtain any advantage or benefit for themselves, to the prejudice of the *cestuis que trust*. It is held, that the managing officers and directors of an insolvent corporation hold such a relation of trust to the funds of the corporation, for the benefit of creditors and all persons interested, that, according to the principles applied by courts of equity to cases of like trusts, they are to be held guilty of a breach of trust, by securing an advantage to themselves not common to the other creditors, and providing for the payment of a debt due a director from the assets of the corporation, to the entire exclusion of all other debts. Equity has jurisdiction to set aside such a transaction. *Bradley v. Farwell*, 1 Holmes, 438.

§ 672. Where a trustee has abused his trust, by converting the trust property, and changing its form, the *cestui que trust* has the option to take the original or substituted property; and if either has passed into the hands of a *bona fide* purchaser without notice, then its value in money. The principle is that the wrong-doer shall derive no benefit from his wrong. The entire profits belong to the *cestui que trust*, and equity will so mould and apply the remedy, as to give them to him. *May v. Le Claire*, * 11 Wall., 217.

§ 673. A trustee cannot purchase the trust property and thereby gain any benefit to himself as against the *cestui que trust*. And the case is much stronger against him when he comes into equity and sets up a title which by its own showing is fraudulent on its face, and that too to defeat the rights of infants acquired for a valuable consideration. *Lenox v. Notrebe*, Hemp., 251 (§§ 772-76).

§ 674. Upon a bill in equity for the removal of a trustee, which does not ask for the distribution of the property, but only such an account as will be rendered necessary by a removal, the court will not, before answer filed, interfere in a summary way to grant a preliminary injunction and appoint a receiver of the trust property, for alleged fraud and bad management of the property, where the danger to the property is not impending, and the fraud is not clearly proved. *Latham v. Chafee*, 7 Fed. R., 525.

§ 675. Where a trustee had invested trust funds in bonds of the Confederate government, and the *cestui que trust*, after twelve years of acquiescence, sued the trustee in equity to recover the scaled value of the Confederate money invested in the bonds, the long acquiescence in the investment was held to prevent a recovery, in view of the rights of the subsequent creditors of the trustee. *Etting v. Marx*, 4 Fed. R., 673.

§ 676. Constructive trusts.—It is a doctrine of equity that, where a purchase is made by parties jointly interested by mutual agreement, neither party can rightfully exclude the other from what is intended to be for the common benefit; and if one of the parties, by private intrigue, seeks to obtain, without contract, but in violation of his good faith to his co-tenants or partners, a private benefit to himself in things touching the common right, it is a fraud, which shall turn him into a trustee for the benefit of all. *Flagg v. Mann*, * 2 Sumn., 486.

§ 677. A court of equity deems the purchase of an outstanding incumbrance or adverse title by one co-tenant or joint owner to be a trust for the benefit of both, if not *ex contractu*, at all events *in foro conscientia*. *Ibid*.

§ 678. If the holder of an imperfect title, which is capable of being ripened into a perfect title, by improvement of the land, enters into a contract with another that the latter shall go upon the land, and, by making the improvements, perfect the title for the joint benefit, the latter cannot purchase and set up, as against the former, an outstanding title. Equity will treat him as a trustee. *Hallett v. Collins*, 10 How., 174 (§§ 144-48).

§ 679. Where a mortgage is given to secure the mortgagee against liability on a bond which he has signed as surety, a court of equity will treat the mortgage as a trust created for the better protection of the debt, and will see that it is applied to the purpose intended. *Burroughs v. United States*, * 2 Paine, 569.

§ 680. The grantee in a deed of trust is bound by actual notice of a prior unrecorded deed; and where such grantee sells the property, he becomes a trustee for the amount of the claim of the grantee in the first deed of trust. *Kurtz v. Bank of Columbia*, * 2 Cr. C. C., 701.

§ 681. The title of a purchaser from the record grantee, who takes with notice of the prior deed, but with an assurance from the grantee in such deed that all will be right, cannot be disturbed. *Ibid.*

§ 682. Trusts created by parol.—Because a trust is created by parol it does not follow that it may not be enforced in equity. On the contrary, if it be afterwards admitted, and the party does not insist upon the defense of the statute of frauds, a court of equity will decree a specific performance. *Flagg v. Mann*, * 2 Sumn., 486.

§ 683. Trusts for aliens.—Where a testator devised land to trustees, upon trust to sell the same and pay the proceeds to an alien, it was held, on a bill in equity by the *cestui que trust*, to compel the trustees to execute the trust by selling the land and paying the proceeds to the complainant, that the devise was to be considered in equity as a bequest of personalty, on the principle that equity considers that as done which is directed to be done, and that therefore the alien could take the proceeds. *Craig v. Leslie*, 3 Wheat., 563 (CITIZENS, §§ 176-87).

§ 684. Trusts for creditors.—Whenever there exists a right or remedy exclusively legal, and perfect in its character and operation, a court of equity cannot take cognizance. But where a debtor has by deed expressly created a trust for the payment of his debts, and the creditor, both by the terms of the conveyance and by statute, is made a *cestui que trust*, such creditor has a right to enforce his legal remedy, or proceed under the trust, *ad libitum*; and in the latter event, he has the consequent right to call for an account of the trust subject in the hands of whomsoever it may be. Nor is it material that the creditor proceeds to enforce the trust at the instance of the surety of the debtor. *United States v. Myers*, 2 Marsh., 516 (§§ 933-41).

§ 685. The schedule attached to a deed conveying property in trust for creditors, mentioned a debt due the debtor in Europe for the collection of which an agent had been appointed. In a suit in equity by a creditor to recover his debt out of the trust fund, it appearing that this agent had a material agency in the management of so much of the specific subject, the court regarded him as taking upon himself the management of this subject, with full notice of its connection with the rights of the *cestui que trust*, and therefore liable to account whenever a settlement should be called for. *Ibid.*

§ 686. "Clean hands" required of beneficiary.—Where the president of a railroad company purchased the land of a farmer with bonds of the company which he knew to be worthless, but which he falsely represented as perfectly good, and would enable the farmer to enter lands of the company which were as good as those which were the subject of the agreement, when he knew the company had no such lands subject to entry; and, as a part of the same transaction, placed other bonds of the company in the hands of the farmer as a trustee to use them in the purchase of lands for the president of the company, it was held that the president had no standing in a court of equity to enforce this trust, the farmer, being unable to buy any lands with the bonds, having sold them and retained the money. *Kitchen v. Rayburn*, 19 Wall., 254.

§ 687. Laches of beneficiary.—As between the trustee and the *cestui que trust*, neither the statute of limitations, nor its analogy, nor lapse of time will, in general, affect the right of the beneficiary to redress; yet equity will in such cases, when the circumstances require it, enforce against the *cestui que trust*, especially where rights of third persons are concerned, its own peculiar maxim, *vigilantibus et non dormientibus jura subserviunt*. *Etting v. Marx*, 4 Fed. R., 678.

4. Nuisance.

[See TORTS.]

SUMMARY — Construction of railroad on a street, §§ 688, 689, 691. — Right to use water, § 690. — Livery stable in residence part of city, § 692.

§ 688. Where the legislature of the state has authorized the construction of an elevated railroad along a street of a city in the manner in which it is being constructed, the courts cannot interfere to enjoin it as a nuisance. *Carrier v. West Side Elevated R'y Co.*, §§ 693-95.

§ 689. An individual owning property abutting a public street in a city, but owning no property in the street, cannot enjoin the erection of an elevated railway along the street as a

nuisance, whether such construction is authorized by law or not, without showing that he has sustained, or is likely to sustain, some special damage, different in kind from that sustained by other property owners along the street. *Ibid.*

§ 690. The complainant, owning a parcel of land on the Winnipiseogee river, and in connection therewith the right to use one-half of the water of said river, for a certain purpose, brought a bill against certain manufacturing corporations, whose works were situated below, alleging that they had so controlled the supply of water from Lake Winnipiseogee, in which said river had its source, and so regulated the flow of the water in the river as to injure the complainant's right, by creating an irregularity in the flow. The defendants denied the injury and claimed that they had improved the complainant's water-power. The bill did not show how the injury was produced, nor in what it consisted, nor did it explain the particular nature of the injury. The court, in looking into the evidence, were left in doubt upon which side the truth was. The bill did not allege either danger of irreparable injury, or of protracted litigation, or of multiplicity of suits, as a ground of relief in equity. The court held it fatal to the standing of the complainant in court, that he had not laid a foundation for relief in equity by previously establishing his right by an action at law. *Parker v. Winnipiseogee Lake Cotton & Woolen Manufacturing Co.*, §§ 696-98.

§ 691. Where a person whose land extends only to the edge of the street, and who does not own the fee in any land in the street, seeks to enjoin the laying of a street car track in the street on the ground that it will be a nuisance, he must show some special damage sustained, or likely to be sustained, by him, differing in kind from that sustained by the neighborhood. *Osborne v. Brooklyn City Railroad Co.*, §§ 699-701.

§ 692. A livery stable in the residence part of a city being considered a nuisance, or not a nuisance, according to circumstances, and not as one under all circumstances, a court of equity will refuse to grant a preliminary injunction against the erection of such a structure, where the allegation that it will be a nuisance is denied. Equity will not interpose by injunction in case of an eventual or contingent nuisance. *Flint v. Russell*, §§ 702, 703.

[NOTES.—See §§ 704-722.]

CURRIER v. THE WEST SIDE ELEVATED PATENT RAILWAY COMPANY OF NEW YORK CITY.

(Circuit Court for New York: 6 Blatchford, 487-495. 1869.)

STATEMENT OF FACTS.—Plaintiff being the owner of lots on Greenwich street, in the city of New York, applied for an injunction to prevent the defendant corporation from constructing an elevated railway on that street under a charter from the state of New York. Further facts appear in the opinion of the court.

§ 693. *A party who owns land only to the margin of a street cannot complain of a structure on the street on the ground that any property of his had been taken.*

Opinion by BLATCHFORD, J.

The plaintiff has not furnished any description of either one of the lots referred to in the bill, claimed to be owned by him, but the defendants show that the plaintiff has a deed conveying to him the premises known as No. 201, Greenwich street, being at the northeast corner of Fulton and Greenwich streets, and being bounded, in the deed, on the west by the easterly side of Greenwich street, and on the south by the northerly line of Fulton street. The plaintiff shows no other deed to himself of any premises, and no deed of any portion of the soil of Greenwich street, and the defendants show acts of ownership heretofore exercised by the corporation of the city of New York over the soil of Greenwich street, in front of the premises covered by the said deed. On this state of facts it must be held that the plaintiff has failed to make out that any property of his has been taken by the defendants. They have not entered or trespassed in any way upon the premises covered by the deed to the plaintiff. All that they have done in Greenwich street, in front of said premises, has been done outside of the lines of said premises. What-

ever the presumption might be as to the ownership of the fee of the street, if the plaintiff's premises were bounded on the west on or by Greenwich street, instead of being bounded, as they are, by the deed, on the west, by the easterly side of Greenwich street, such presumption is rebutted by the language of the deed; and even if such presumption, in case of a boundary on or by the street, would be that the fee of the soil of the street was owned by the plaintiff to the center of the street, that presumption would be rebutted by the acts of ownership shown to have been exercised by the corporation of the city over such soil.

§ 694. *Where a legislature has authorized a structure, a circuit court cannot pronounce it a nuisance.*

The only other question is, the one of a nuisance. If the legislature has authorized the construction of this railway in the manner in which it is being constructed, this court cannot interfere, by injunction, with such construction, on the ground that it is a nuisance. It is not contended that the actual mode of construction differs from the authorized mode of construction, if any construction is authorized by any valid law. The question raised by the bill as to taking private property for public use being out of the case, the only other constitutional question raised is, whether the acts in question are void as containing a delegation of legislative authority to the commissioners mentioned therein. It is claimed that, inasmuch as, by the acts, the defendants have no authority conferred upon them to continue in existence the experimental half mile, or to extend the road, unless the commissioners shall approve, the acts confer upon the commissioners legislative power. On this point the authority of the case of *Barto v. Himrod*, 4 Seld., 483, decided in 1853, is invoked. In that case it was decided that an act of the legislature in regard to free schools, which declared that the electors of the state should determine by ballot, at an annual election, whether such act should or should not become a law, was unconstitutional and void, as being a delegation of legislative power. In the opinion of Chief Justice Ruggles, it is stated that the act did not, on its face, purport to be a law, as it came from the hands of the legislature, for any other purpose than to submit to the people the question whether its provisions in relation to free schools should or should not become a law, and that, by one section of the act, it was provided that the act should become a law only in case it should have a majority of the votes of the people in its favor. The difference between the statute in that case and the acts now under consideration are manifest. In each of the latter there is an express provision that it shall take effect immediately. Its existence and validity as a legislative enactment are not made dependent, in any manner, upon any future event or upon any action or nonaction, or approval or disapproval, by the commissioners. The continuance of the experimental half mile of railway, after it shall be constructed, and the extension of the road further, are, indeed, made dependent upon the approval of the commissioners. But the enactment of such a provision is no delegation of legislative power. Hundreds of statutes are passed by the legislature, conferring contingent rights on individuals and corporations, dependent upon the doing of certain acts, or the making of certain certificates. In all general laws for the creation of corporations, the individuals who associate to form the corporation are required to file, in a certain place, a certificate, in a certain form, and, unless that is done, there can be no corporation; and yet it was never contended that the making of the creation of the corporation to depend upon the happening of such a future event,

although lying wholly in the will of individuals, was a delegation of legislative power.

§ 695. — *authorities reviewed.*

In *Corning v. Greene*, 23 Barb., 33, decided in 1856, a statute provided that the corporation of the city of Albany should file their consent thereto, within a certain time after the passing of the same, or the bill should be void, and it was urged that, as the statute was passed on condition that it should not be a law unless the corporation consented, it was not a constitutional exercise of legislative power. But it was held that, as the statute emanated from the legislative will alone, and had an existence from that single source, it became a mere question of expediency when and how it should cease to exist; that upon that question the legislature might properly exercise its judgment; and that, as it had exercised and given expression to it in the statute, the statute was not for that reason invalid, and the case was not within the principle of *Barto v. Himrod*.

In *Grant v. Couster*, 24 Barb., 232, it was held that a statute authorizing a town to borrow money, provided the consent of a certain proportion of the tax-payers was first obtained, was a statute in which the legislature imposed a condition or restraint on the exercise of the power conferred, and that the imposing of such condition was as much the unaided emanation of the will of the legislature as the conferring of the power itself. The court say: "An act granting power, to be exercised upon such conditions as the legislature impose, is no delegation of legislative authority, nor is it invalid."

In *Bank of Rome v. Village of Rome*, 18 N. Y., 38, decided in 1858, it was held by the court of appeals of New York, that a law which, by its terms, was to take effect immediately, but which conferred upon the authorities of a village certain powers which were not to be exercised until the act had been approved by a vote of the inhabitants, was constitutional, and was not a delegation of legislative power, within the case of *Barto v. Himrod*.

Under the settled law of the state of New York, the acts in question are, therefore, not repugnant to the constitution of the state, as containing a delegation of legislative power. The acts, being valid, what is being done in accordance with their provisions cannot be regarded as a nuisance, to be interfered with by injunction.

It does not appear that any damage which the plaintiff is likely to sustain from the construction of this road will be different, in kind or degree, from that which will be sustained by every other lot-owner on the streets through which the railway will pass. Under such circumstances, the case of *Osborne v. The Brooklyn City R. R. Co.*, decided by Mr. Justice Nelson, and Judge Benedict, in the circuit court of United States for the eastern district of New York, in December, 1866 (5 Blatch., 366), is an authority, binding on this court, for the principle, that, as the plaintiff is not shown to be the owner in fee of any land in Greenwich street over which the railway will pass, he could not maintain this suit, in the absence of proof of special damage, even if it appeared that the defendants had no right to construct the railway in Greenwich street, and were erecting, or about to erect, a public nuisance. The court say, in that case: "They do not propose to enter upon any land of the plaintiff's, and the damage occasioned by the road to the plaintiff will not be different, in kind or degree, from that sustained by every other lot-owner upon the avenue. It is damage resulting from the depreciation of the value of lots abutting on the street, by reason of a railroad running through it, in front of,

but not over, the plaintiff's land. Now, it is well settled, that damage sustained alike by all the individuals of a large class furnishes no foundation for an action on the part of a single individual of the class. *Lansing v. Smith*, 8 Cow., 146; *Davis v. The Mayor*, 14 N. Y., 506. It was incumbent, therefore, on the plaintiff, to show some special damage sustained, or likely to be sustained, by him, differing in kind from that sustained by the neighborhood, to entitle him to ask the interference of the court in his behalf. No such damage is pretended to exist, and its absence is fatal to the plaintiff, on this motion." The application for an injunction is denied.

PARKER v. WINNIPISEOGEE LAKE COTTON & WOOLLEN MANUFACTURING COMPANY.

(2 Black, 545-553. 1862.)

APPEAL from U. S. Circuit Court, District of New Hampshire.

Opinion by MR. JUSTICE SWAYNE.

STATEMENT OF FACTS.— This is a suit in equity. The appellant filed his bill to procure a remedy against an alleged nuisance. The circuit court dismissed the bill. He thereupon appealed to this court.

It appears in the case that the appellant is the owner in fee simple of a certain parcel of land situated on the Winnipiseogee river, in the village of Meredith Bridge. He owns, also, in connection with this real estate, the right to use "one-half of the water, sufficient to carry wheels for operating a trip-hammer, grindstone, and bellows." He claims under Stephen Perley, whose title is undisputed. Perley conveyed the land and the whole of the water-power mentioned to Daniel Tucker, by deed bearing date February 27, 1808. Tucker conveyed the same premises, on the 14th of April, 1832, to F. W. Boynton. The deed of Perley is referred to in Tucker's deed for a description of the land and water-right thereby conveyed. While the premises belonged to Tucker, the dam at Meredith Bridge was rebuilt. The amount to be paid by each of the parties interested in the water-power was fixed by arbitration. The arbitrators awarded that Tucker should pay two-twelfths of the cost of the dam "upon the Meredith side of the river," and he paid accordingly.

On the 29th of October, 1824, Boynton, by deed of that date, conveyed to Asa F. Parker. In this deed the water-right is thus described: "Which said water privilege is the right to draw one-half of the water from the flume connected with the premises." On the same day Asa F. Parker, by deed containing the same description of the premises, conveyed to the appellant.

The Winnipiseogee river has its source in Winnipiseogee lake. The lake has its outlet at a place called *the Weirs*, six miles above the village of Meredith Bridge. The outlet was formerly, by a natural channel, from five to seven hundred feet in length. The water discharges itself from this channel into Long Bay — a sheet of water about four and a half miles long, and from half a mile to a mile wide. At the foot of Long Bay the water is again discharged by a channel about a thousand feet long into "Little Bay." At the outlet from Long Bay is Lake Village. From Little Bay the water is discharged into Sanborton Bay, by a channel about fifteen hundred feet in length. At the outlet of Little Bay is Meredith village, where the premises of the complainant are situated. Little Bay forms the headwater of the dam from which appellant's water-power is supplied. The water is discharged out of Sanborton Bay, at or near a place called Union Bridge, and thence pursues its course, about ten or

twelve miles, to its confluence with the Pemigewasset, below which the united streams take the name of the Merrimac river. This river — receiving several affluents on its way — passes by and supplies with their water-power the manufacturing towns of Lowell and Lawrence.

The dam at Meredith Bridge was built prior to 1808. There is a dam at Lake Village, which was built in 1829. After Perley conveyed to Tucker, he cut a canal through his own land, tapping Little Bay, above the dam at Meredith Bridge, and discharging into the river, below the dam, at its entrance into Sanborton Bay.

The defendant is a corporation created and clothed with its powers by acts of the legislature of New Hampshire. Its stock is owned by the great manufacturing companies of Lowell and Lawrence, except a few shares, held for purposes of convenience, by individuals. The main object of its creation was to secure a more abundant and regular supply of water for the mills at those places. This was to be accomplished by making Lake Winnipiseogee a vast reservoir of water, to be accumulated and retained in wet weather, and to be drawn off and passed down the stream, as it might be needed, in dry weather.

The flow of water below the lake was thus to be equalized, as far as practicable, throughout the year. With a view to this object the defendant has bought up all the water-rights relating to the lake, and all those upon the river above, and for some distance below, Meredith Bridge. Those holding such rights at that village have been compromised with, except the appellant. The answer avers that he was offered the same that was paid to others, and that he refused — seeking to extort an unreasonable and unconscionable sum.

The defendants made excavations at the Weirs in 1845-6, whereby the lake can be drawn down from four to six feet lower than was before possible. They erected a new stone dam at Lake Village in 1851. By means of this dam they can arrest the flow of the water so as to raise it above the intermediate descents back to the lake, and raise the water in the lake and retain it there. They have enlarged the Perley canal and increased the flow of water through it. This was done in 1846. In making their purchases and improvements, the defendants have expended about \$300,000. All was done without any objection from the appellant.

It is admitted by the answer that the defendants intend to make still deeper excavations at the Weirs, and that they have controlled and intend hereafter to control the waters of the lake, both by retention and discharge, so as to equalize at all times throughout the year, as far as practicable, the flow of water below the outlet of the lake.

The gravamen of the appellant's grievances is thus alleged in this bill: "And the said defendants have thus caused a proportionate inequality in the quantity of water flowing in the River Winnipiseogee, by the premises of your orator, greater than any inequality which naturally arose from the ordinary changes of the season, or from the ordinary fluctuations in the head of water in the said lake before the attempted regulation of the same by the said defendants — to the molestation, damage and injury of your orator in the use and improvement of the said mill privilege and water-power aforesaid."

"And your orator further represents that his said water-power is damaged to the same extent as the equality of supply of water at all seasons is disturbed.

"And that the defendants, with the intent and design to deprive your orator of his just rights, have seized upon and taken possession of the waters of the said Winnipiseogee lake and river, to regulate and control them as aforesaid, and

to use the said lake as a reservoir, out of which to supply the Merrimac river with water in time of drouth, and to use the said Winnipiseogee river as a channel through which to regulate and control such supply, whenever and as often as the supply of water in the Merrimac from other sources may fail, or become insufficient for a motive power for the use of the manufacturing establishments situated thereon, and for the benefit, profit and advantage of such manufacturing establishments, their owners or occupants, or parties interested therein, or some of them, and to the hurt and damage of your orator in the use, value and capacity for improvement of his said water-power at Meredith Bridge aforesaid."

In reply to these allegations, the defendants say, "that they have, ever since said dam and excavation were made, used and occupied the same for the purpose of giving greater regularity and steadiness to the flow of water in said river, and to reserve and hold back the surplus water, which would, at wet seasons and during spring freshets, have otherwise run to waste, retarding and interfering with the operation and use of the mills upon said Winnipiseogee and Merrimac rivers, and discharging the same at such times as the same was required in consequence of low state of the waters in said rivers for the use thereof, and that the water of said lake and bay has been so managed and used as to be a material benefit and advantage to the mills upon said rivers."

"And the defendants deny that they have in any manner caused a proportional inequality in the quantity of water flowing in the river Winnipiseogee, by the premises of said complainant, greater either than any inequality which naturally arose from the ordinary changes of the seasons, or from the ordinary fluctuations in the head of water in the said lake before the regulation of the same by the said defendants, to the molestation, damage or injury of said orator in the improvement of his said mill privilege and water-power. And said defendants further say, that said complainant's water-power is not damaged by anything which has been done by them, the equality of the supply of water being not otherwise disturbed by them than is in this answer hereinbefore set forth, and its supply being rendered more equal at times when it was formerly scanty, and the excess of water being prevented at periods of high water, which would not aid, but would retard by backwater the operation of said complainant's mill."

The issue between the parties is thus presented. Several other matters of defense are set forth in the answer. The view which we have taken of the case renders it unnecessary particularly to advert to them. The appellant alleges an injury to his water-right commensurate, in extent, with the additional inequality in the flow of water in the river, which he alleges to have been caused by the works of the defendants.

They deny the injury, and claim that his water-power is improved. The appellant does not state in his bill how the injury is produced, nor in what it consists. The particular nature of the injury is unexplained. He complains neither of a diminished supply of water nor of backwater. We have looked carefully into the evidence upon the subject; the result is, that we are left in doubt upon which side lies the truth. We have failed to find those clear facts of rights upon one side, and wrong upon the other, which are necessary to quicken into activity the powers of a court of equity. We forbear to pursue this inquiry, because the case presents another ground, free from doubt, upon which we prefer to rest our decision.

§ 696. *Relief in equity will be denied where there is a plain and adequate remedy at law.*

It was urged at hearing, as an insuperable objection to the relief prayed for, that the appellant has not established his right by an action at law. The objection was not taken by demurrer, or in the answer. In the courts of the United States, it is regarded as jurisdictional, and may be enforced by the court *sua sponte*, though not raised by the pleadings nor suggested by counsel. 2 Cr., 419; 5 Pet., 496; 2 How., 383. The sixteenth section of the judicial act of 1789 provides, "that suits in equity shall not be sustained in either of the courts of the United States in any case where plain, adequate and complete remedy can be had at law." This is merely declaratory of the pre-existing rule, and does not apply where the remedy at law is not "plain, adequate and complete," or in other words, where it is not "as practical and as efficient to the ends of justice and to its prompt administration as the remedy in equity." 3 Pet., 215. But where the remedy at law is of this character, the party seeking redress must pursue it. In such case the adverse party has a constitutional right to a trial by jury. 19 How., 278.

§ 697. *Without allegations of irreparable injury, protracted litigation, or multiplicity of suits, a court of equity will not assume jurisdiction in a case of private nuisance.*

The concurrent jurisdiction of courts of equity in cases of private nuisance dates back to an early period in the growth of the English equity system. 1 Spence, 672. It has been greatly enlarged since the time of Lord Thurlow. 7 Ves., 307, 308; 33 Cond. Eng. Ch. Rep., 236. It is now too firmly established to be shaken, but it is not without limitation. It is governed by the same principles which animate and control its action in other cases where its aid may be invoked against a wrong-doer.

Many cases of private nuisance will sustain an action at law which will not justify relief in equity. 16 Ves., 338; Story's Eq. Jur., sec. 925. A court of equity will interfere when the injury by the wrongful act of the adverse party will be irreparable, as where the loss of health, the loss of trade, the destruction of the means of subsistence, or the ruin of the property must ensue. 2 Swanst., 335; 16 Ves., 342; 2 Ver., 646; 2 Bro. C. R., 64; 10 Ves., 163; 6 Paige, 83; Wat. Eden, 659, note. It will also give its aid to prevent oppressive and interminable litigation, or a multiplicity of suits, or where the injury is of such a nature that it cannot be adequately compensated by damages at law, or is such as, from its continuance or permanent mischief, must occasion a constantly-recurring grievance, which cannot be prevented otherwise than by an injunction. Mitf. Eq. Pl., by Jeremy, 144, 145; Jer. Eq., 300; 1 Dick., 163; 16 Ves., 342; 6 J. C. R., 46; 6 Paige, 83.

A diminution of the value of the premises without irreparable injury is no ground for interference. 2 Bro. C. C., 65; 16 Ves., 342; 3 M. & K., 169. Where an injunction is granted without a trial at law, it is usually upon the principle of preserving the property, until a trial at law can be had. A strong *prima facie* case of right must be shown, and there must have been no improper delay. The court will consider all the circumstances and exercise a careful discretion. Cr. & Ph., 283.

Where an injunction in such a case has been granted, and the complainant fails to proceed with diligence in his action at law, the injunction will be dissolved. 4 M. & C., 498. A delay of three years or more has been frequently

held to be such laches as will preclude a party from relief in equity until he has vindicated his right at law. 1 Cox, 102; 2 J. C. R., 379; 3 J. C. R., 282; 6 J. C. R., 19; 5 Met., 8.

The better opinion now is that it is only a fact to be considered by the chancellor, in connection with the other facts of the case, by which his discretion is to be guided. *Wood v. Sutcliff*, 8 Eng. L. & E., 217; *Sprague v. Rhodes*, 4 R. I., 304. "Until the rights of the parties are settled at law, only a temporary injunction is issued to prevent irreparable injury." *Irwin v. Dixon*, 9 How., 10 (DEDICATION, §§ 70-72). This jurisdiction is applied only where the right is clearly established—where no adequate compensation can be made in damages, and where delay itself would be a wrong. 2 *Swanst.*, 316; *Angell on Wat. Courses*, 475.

The case must be one "of strong and imperious necessity, or the right must have been previously established at law." 6 Barb. S. C. R., 160; 7 Barb., 400; 2 J. C. R., 164; 4 B. & C., 8; 37 N. H., 254; 17 Me., 202. The right must be clear and its violation palpable. 6 Barb., 160. If the evidence be conflicting and the injury doubtful, this extraordinary remedy will be withheld. 3 Paige, 210; 1 Cooper's Sel. Cas., 333; 3 M. & K., 169; 5 Met., 8; 9 Gill & J., 668; 3 J. C. R., 282; 2 Barb., Ch., 282; 1 Dev. Eq. R., 12. After the right has been established at law, a court of chancery will not, *as of course*, interpose by injunction. It will consider all the circumstances, the consequences of such action, and the real equity of the case. 4 R. I., 301; 8 E. L. & E., 217; 9 E. L. & E., 104; 18 Eng. Cond. Ch. R., 436.

§ 698. *A court of equity will not generally take jurisdiction in a case of private nuisance until there has been an adjudication at law.*

The estate of the appellant in the water is an easement or servitude annexed to his land. As before stated, the excavation was made at the Weirs, and the Perley canal was deepened in 1846. The stone dam was erected in 1851. The appellant brought his bill on the 18th of September, 1855. During these intervening periods, according to his own showing, he slept upon his rights. 8 E. L. & E., 223. He does not allege either danger of irreparable injury, or of protracted litigation, or of a multiplicity of suits, as the ground upon which he seeks relief in equity. There is no warrant for such an averment. If he has been injured, his injury can be ascertained and fully repaired by damages in an action of law. A jury is the tribunal provided by law to determine the facts and to fix the amount, and they can best perform this duty. The fact that other proprietors have been paid bears upon this point. 8 E. L. & E., 222, 223. The appellant can have no standing in a court of equity until he has laid this foundation for relief. This objection is fatal to the case. We decide nothing else.

There are cases in which a court of equity will take jurisdiction and give a complete remedy without the previous intervention of a court of law. 6 Ves., 689; 1 McLean, 355; 39 N. H., 186; 8 E. L. & E., 217; 4 R. I., 301; 4 M. & Cr., 433; 3 Hare, 593; 2 Coll., 431; 7 Hare, 221. But this case does not belong to that class.

The circuit court committed no error in dismissing the appellant's bill. The decree below is affirmed with costs. (a)

(a) Affirming *Parker v. Winnipisogee Lake Cotton & Woollen Manuf. Co.*, 1 Cliff., 247.

OSBORNE v. BROOKLYN CITY RAILROAD COMPANY.

(Circuit Court for New York: 5 Blatchford, 366-369. 1866.)

STATEMENT OF FACTS.—Proceeding in equity for an injunction restraining the Brooklyn City Railroad Company from laying its track upon Greene avenue, a public street. Plaintiff did not own the fee in any portion of the avenue contiguous to his lots. It is averred in the bill that the track is being laid against the wish of a majority of the property owners on Greene avenue, and without authority of law; that the value of the property will depreciate if defendants are allowed to build the road. At the hearing, a temporary injunction was granted, with liberty to the defendants to move, on the same or additional papers, to dissolve it. Additional papers were filed, and now defendants move to have the injunction dissolved.

Opinion by BENEDICT, J.

This case, in its present posture, raises questions different from those discussed upon the motion for the injunction. The additional papers now read show that the plaintiff derives title to the lots described in the bill from one of the parties to an action lately pending in the supreme court of the state to obtain the same relief here sought, and that the deeds to the plaintiff were executed on the day after a similar injunction was dissolved by the supreme court in that action, and but three or four days previous to the filing of the bill in this court. These deeds, with the others produced, also show that the land conveyed to the plaintiff does not extend to the center of Greene avenue, but terminates at the side of the street, and, consequently, that the plaintiff is not the owner in fee, or otherwise, of any portion of the land composing Greene avenue, but is simply an abutting proprietor.

§ 699. *Federal courts will not decline jurisdiction, although a plaintiff has taken title for the mere purpose of enabling him to resort to those courts.*

Upon these facts, it is insisted on behalf of the defendants, that the motive for the conveyance of the lots to the plaintiff was, manifestly, to transfer to the national courts a controversy commenced in the state court, and that, under such circumstances, this court, notwithstanding the discontinuance of the suit in the state court, should decline to exercise jurisdiction. This objection to the proceedings of the plaintiff is not well taken. The deeds show a legal title conveyed to the plaintiff for a valuable consideration, and it is conceded that he is a citizen of New Jersey. This gives the court jurisdiction. "The jurisdiction flows from the citizenship of the parties. The right to recover flows from the sufficiency of the title, and that is matter purposely to be discussed upon the trial of the merits." Story, J., in *Briggs v. French*, 2 Sumn., 258. So long as an actual conveyance has been made, it matters not what may have been the motive which led to it; and the national courts do not decline jurisdiction, although it be conceded that the plaintiff has taken title for the purpose of enabling resort to be had to those courts. This precise point was so decided by the supreme court in *Smith v. Kernochen*, 7 How., 198.

§ 700. *Action by private individual to enjoin a public nuisance. Special damage.*

But it is further insisted that, inasmuch as the plaintiff is not shown to be the owner in fee of any land in the avenue, and over which the railroad is to run, he cannot maintain the action in the absence of proof of special damage. Such is unquestionably the law. Assuming that the defendants have no legal authority whatever to lay down their track in Greene avenue, their position

is that of parties about to erect a public nuisance, which affects the right of every person entitled to use Greene avenue as a street, that is to say, of the whole community. They do not propose to enter upon any land of the plaintiff's, and the damage occasioned by the road to the plaintiff will not be different, in kind or degree, from that sustained by every other lot-owner upon the avenue. It is damage resulting from the depreciation of the value of lots abutting on the street by reason of a railroad running through it, in front of, but not over, the plaintiff's land.

§ 701. *Where damage is sustained alike by a number of individuals by the commission of a nuisance, to support an individual action by a plaintiff he must show some special damage.*

Now, it is well settled, that damage sustained alike by all the individuals of a large class furnishes no foundation for an action on the part of a single individual of the class. *Lansing v. Smith*, 8 Cow., 146; *Davis v. The Mayor*, 14 N. Y., 506. It was incumbent, therefore, on the plaintiff to show some special damage sustained, or likely to be sustained, by him, differing in kind from that sustained by the neighborhood, to entitle him to ask the interference of the court in his behalf. No such damage is pretended to exist and its absence is fatal to the plaintiff on this motion. The question so much discussed, upon the motion for the injunction, whether the grant of the right to lay down and use a railroad track in a public street, for the purpose of transporting passengers about a city in horse cars, is a new burden upon the land on which the rails are laid, for which compensation must be made, appears now to be out of the case, and its discussion is unnecessary here.

For the reasons stated we are clearly of the opinion that the motion should be granted, and the injunction be dissolved.

FLINT v. RUSSELL.

(Circuit Court for Missouri: 5 Dillon, 151-158. 1879.)

STATEMENT OF FACTS.—Bill in equity to enjoin the erection of a livery and sale stable on Locust street, in the city of St. Louis, on a lot adjoining residence property owned by complainant. The substantial allegations of the bill were to the effect that the property in the locality in which it was proposed to erect the stable was used for residence purposes, and had been expensively improved for such purposes, and that its value would be depreciated, and the property itself would be rendered undesirable for residence purposes, etc., by the erection and maintenance of the stable. It was alleged, also, that the erection of the stable was begun as a black-mailing scheme,—with the expectation on the part of the defendants that the owners of property in the neighborhood would be compelled to buy the lot at a price greatly in excess of its value.

Opinion by DILLON, J.

The prayer of the bill is, "that the defendants be perpetually enjoined by the decree of the court from further proceeding with the erection of said livery stable upon the said lot, and from the use and occupation of said premises for the purposes of a public livery stable, and for general relief." The present application is for a special preliminary injunction restraining the defendants from making such erection, and from so using the said premises.

The questions which may finally be involved in the merits of the case are of very great importance, as they arise out of the point where two plain prin-

ciples of law meet. The one is that every owner of private property may make any lawful use of it which he sees proper. The other is that private property must be so used as not to injure the property of his neighbor, or invade the just rights of the public. *Tipping v. St. Helen's Smelting Co.*, Law Rep., 11 H. L., 642.

The essential groundwork of the bill in this case is, that the proposed erection of a livery stable on the lot in question, and its use for this purpose when erected, will constitute a nuisance to the plaintiff's adjoining property. The bill can have no other foundation. On a street, and in a locality such as this portion of Locust street is, many erections can readily be imagined that would be extremely objectionable to the owners of residences, such as a meat market, a green-grocer's establishment, or, indeed, a store building or a business house of any kind. But the general law of the land does not limit the rights of ownership by the tastes and wishes of one's neighbors. Possibly, under the charter provisions, the municipal authorities might be invested with more power, in the nature of police regulations, over the uses to which private property may be put, than can be exercised by the courts under the general law; but it is conceded that the city authorities have not undertaken to regulate the erection or use of livery stables. It is, therefore, clear that this application must rest upon the proposition that the livery stable proposed to be erected and used by the defendants is, and will be, in the legal sense of the term, a nuisance. To be a nuisance it must be something which unreasonably and sensibly interferes with the comfort and enjoyment of life or property — which may be by noises, noxious and offensive smells, injurious gases, the collection of flies and insects, and the like. The books abound in cases where nuisances of this kind are held actionable at law, and where, when the fact is ascertained, either by a verdict or by admission in the pleadings, or from the essential and unavoidable character of the trade or occupation, that the thing or matter complained of is a nuisance, courts of equity have interfered by injunction.

§ 702. *The doctrine when a thing is not per se a nuisance.*

Counsel have referred to a number of adjudications in which the legal rights of the proprietors of livery stables and those of the adjoining or near proprietors have been considered by the courts. The principal cases are the following: *Aldrich v. Howard*, 7 R. I., 87; S. C., 8 id., 246; *Burditt v. Swenson*, 17 Tex., 489; *Dargan v. Waddell*, 9 Ired., Law, 244; *Kirkman v. Handy*, 11 Humph., 406; *Coker v. Birge*, 10 Ga., 336; *Harrison v. Brooks*, 20 id., 537; *Morris v. Brower*, 1 Anth., 368. The judgments in these cases concur in establishing this doctrine, viz., that a livery stable in a town or city is not *per se* — that is, necessarily and unavoidably — a nuisance, but it may be or become a nuisance, and this depends upon its location, as respects the property near by, and the manner in which it is built, kept and used. The foregoing observations are well illustrated by *Aldrich v. Howard*, 8 R. I., 246, where it was decided that a livery stable may be a nuisance, notwithstanding it was properly built, properly kept, and was in a location as fit as any in that part of the city. The court say: "It has been held, in other cases, that a stable in a town is not necessarily and *per se* a nuisance; yet if it is so built or so used as that it destroys the comfort of persons owning and occupying adjoining premises, creating such an annoyance as to render life uncomfortable, then it is none the less a nuisance that it is well kept, carefully built, and as favorably located as the town will admit."

§ 703. *Apprehended nuisance. Principles on which equity proceeds.*

This principle, that a livery stable is or is not a nuisance according to circumstances, is decisive of the present application for a preliminary injunction. The stable is not yet erected. Its erection has just been commenced. The complainant seeks relief by injunction against an apprehended mischief and nuisance. The principles upon which the courts of equity proceed in such cases are well settled, and are thus clearly stated by Lord Chancellor Brougham in the case of the Earl of Ripon *v.* Hobart, 3 Myl. & K., 169, 179: "If the thing sought to be prohibited is in itself a nuisance, the court will interfere to stay irreparable mischief, without waiting for the result of a trial; and will, according to the circumstances, direct an issue, or allow an action, and, if need be, expedite the proceedings, the injunction being in the meantime continued. But where the thing sought to be restrained is not unavoidably and in itself noxious, but only something which may, according to circumstances, prove so, the court will refuse to interfere until the matter has been tried at law, generally by an action, though in particular cases an issue may be directed for the satisfaction of the court where an action could not be framed so as to meet the question." I consider the principles thus laid down as to the time or stage at which equity will interfere as founded on the soundest of reasons; and they have been approved by the supreme court of Tennessee in *Kirkman v. Handy*, *supra*, which refused to prevent the erection of a livery stable upon a lot adjoining the plaintiff's, "on Cherry street, in one of the best neighborhoods in the city of Nashville." In *Coker v. Birge*, 9 Ga., 425, an injunction against the erection was granted, but it was for the reason that, no answer having been filed, the allegations of the bill that the stable would be a nuisance were admitted; but when this was denied, the same court, in the subsequent case of *Harrison v. Brooks*, refused such an injunction. In *Burditt v. Swenson*, *supra*, the livery stable having been found to be a nuisance by the verdict of a jury, the court awarded a perpetual injunction.

No case has been referred to in which the erection of a livery stable has been enjoined where the fact that it would be a nuisance was denied, and where it had not been ascertained to be such by an appropriate judicial inquiry, before the injunction was awarded. And, so far as my researches have gone, Lord Brougham is entirely correct in his statement in the Earl of Ripon's Case, *supra*, "that no instance can be produced of the interposition by injunction in the case of an eventual or contingent nuisance." *Cleveland v. Gas Co.*, 20 N. J. Eq., 201; *Duncan v. Hayes*, 22 id., 25; *Rhodes v. Dunbar*, 57 Pa. St., 274; Wood on Nuisances, sec. 789. The difficulty in thus interfering is greatly increased, if not insurmountable, when it is the use to which the structure is to be put, and not the intrinsic nature of the structure itself, which forms the basis of anticipated grievance. *Duncan v. Hayes*, 22 N. J. Eq., 25.

That the parties may not be misled, it may be well to add that we deny the injunction on the ground that the answer having denied the fact that the building, when erected and used as proposed, will be a nuisance to the property in the neighborhood, and the case being one in which the question of nuisance or no nuisance depends upon circumstances hereafter to be ascertained, it is, therefore, not one in which it is proper to issue the writ asked at this stage of the controversy. The filing of the bill may not, however, prove to be eventually useless, since "it is generally good policy," says Mr. Wood, Law of Nuisances, sec. 790, where there are strong reasons to believe that the thing will be a nuisance, to institute proceedings to stay its progress, particu-

larly if its erection involves large expenditures, as in such cases the party cannot be charged with *laches*, nor can acquiescence in any measure be imputed to him, and the diligence used by instituting the proceedings, operating as a notice and protest against the use of the property in the manner contemplated, strengthens the plaintiff's equities when he asks for an injunction after the use of the property actually proves injurious. The defendants now proceed at their peril, and if it shall hereafter be found by a jury, or otherwise judicially ascertained, that the stable in this place, as used by them, does interfere with the comfortable enjoyment of the neighboring property, they cannot complain if they are then perpetually enjoined from the further use of it for the purpose for which it was designed.

Injunction denied.

§ 704. **Abatement of public nuisance.**—A bill in equity lies to abate a public nuisance by a private individual who has sustained, and is still sustaining, special damages. *Mississippi & Missouri R. Co. v. Ward*, 2 Black, 485. Or is in danger of sustaining special damage. *City of Georgetown v. Alexandria Canal Co.*, 12 Pet., 98; *City of St. Louis v. Knapp, Stout & Co. Company*, 2 McC., 516. He need not join others, who are also injured with him. *Mississippi & Missouri R. Co. v. Ward*, 2 Black, 485.

§ 705. But a private individual cannot prosecute a bill in equity to abate a public nuisance in his own name, unless such nuisance be irreparably injurious to himself. The special and private injury of the individual is the only ground upon which he can ask relief. *Spooner v. McConnell*, 1 McL., 387.

§ 706. And it must appear that he is in danger of suffering individual and special injuries, beyond those suffered by the public at large, and of a nature for which the remedy of a private action in damages would not be adequate. *Illinois, etc., Canal Co. v. St. Louis*, 2 Dill., 70 (Corp., §§ 1996-2000).

§ 707. Injunctions in cases of public nuisance are only to be granted in order to prevent irreparable mischief, or to prevent or suppress continual, oppressive or vexatious litigation. *Silliman v. Hudson River Bridge Co.*, 4 Blatch., 395.

§ 708. An individual may have an injunction to prevent a public nuisance, where such nuisance will be, when created, an extraordinary injury to his property, irreparable in damage, irremediable at law without a multitude of suits. Where the plaintiff shows himself entitled to the use of a public levee in front of and in the vicinity of his block, the exclusive occupation of such levee by the defendant, by the erection of buildings thereon, would be such an injury as to entitle the plaintiff to an injunction, within this rule. *Parrish v. Stephens*,* 1 Or., 78.

§ 709. When a public nuisance will work irreparable injury to an individual, equity may, upon his complaint, enjoin its erection or continuance. *Gilman v. Philadelphia*, 3 Wall., 722 (Const., §§ 1164-70).

§ 710. On a bill in equity filed by a private individual to abate a public nuisance, the court must be governed by the same rule on which a court of law would proceed in case of an indictment for the commission of the nuisance. *Mississippi & Missouri R. Co. v. Ward*, 2 Black, 485.

§ 711. **Injunction against threatened nuisance.**—Courts of equity rarely interfere by injunction against threatened nuisances. To justify the restraining of the erection of a structure as a nuisance, the case must be clear. It must appear that the threatened structure will, if erected, be a nuisance *per se*. The rule applies with special force where it appears that the structure complained of is about to be erected in a navigable river by a riparian proprietor who has an undoubted legal right to place it and maintain it there, provided it does not interfere with navigation or produce damage to others. *City of St. Louis v. Knapp, Stout & Co. Company*, 2 McC., 516.

§ 712. **Obstruction of navigation.**—In applications for an injunction, in cases of alleged nuisance, as the erection of a bridge which will obstruct the navigation of a river, it is not sufficient to deny the law or the facts relied on in the bill, in order to have the injunction refused, and the inquiry will be, whether it is not best for all the parties that the erection of the bridge should be arrested until the final hearing. And if no irreparable or very material injury will probably arise to the defendant, the court will issue the injunction without attempts to adjudicate the merits by anticipation. *Devoe v. Penrose Ferry Bridge Co.*,* 8 Am. L. Reg., 79.

§ 713. **Obstruction of highway.**—Where a bill was brought to restrain the defendant from erecting a fence in the public highway in front of the plaintiff's warehouse, whereby the light

through his windows was obstructed and his warehouse rendered less useful, and a perpetual injunction was granted in the lower court, it was held to be erroneous, because the character of the injury done to the plaintiff by the alleged public nuisance beyond the damage done to the public at large, was not urgent and otherwise irremediable at law, and also because the right of the defendant to thus obstruct the alleged highway was doubtful and expressly claimed in the answer, and there had been a trial at law settling this point. *Irwin v. Dixon*, 9 How., 10 (Ded., §§ 70-72).

§ 714. *Jurisdiction of nuisance.*—Where noxious odors are generated at a manufactory without the jurisdiction of the court, and are blown to the plaintiff's residence within the jurisdiction, whether a bill in equity will lie to abate the nuisance, *quære*. *Keyser v. Coe*, 9 Blatch., 32.

§ 715. Where a corporation can be indicted for the creation of a nuisance, there is no reason why it may not be individually prosecuted in chancery for its abatement. *Missouri & Mississippi R. Co. v. Ward*, 2 Black, 485.

§ 716. On a bill filed by a private individual in the United States district court for Iowa, to abate as a public nuisance, a bridge across the Mississippi river, one half of which was in Iowa and the other half in Illinois, it was held that it must satisfactorily appear that that part of the bridge which was within the jurisdiction of the court, that is, that part west of the middle of the river, was a nuisance. The obstruction which constituted the nuisance being on the Illinois side, the bill was not sustained. *Ibid*.

§ 717. *Obstruction of state navigable waters.*—The legislature of a state may authorize, for the interests of the lumber trade, on rivers wholly within the state and over whose commerce congress has not assumed control, structures that may impede steamboat navigation; and it is not the province of a court of equity to declare such structures a nuisance. If there be an abuse of the power so given, there is an adequate remedy at law, and the law, and not equity, must be resorted to for the remedy. *Heerman v. Beef Slough, etc., Co.*, 8 Biss., 384.

§ 718. Where a corporation exceeds its powers under a charter authorizing it to maintain piers, dams and booms, and thereby obstruct the navigation of a river, lying wholly within a state, and whose commerce is not regulated by congress, a court of equity cannot, at the suit of an individual, declare its works a nuisance or interfere with them by injunction, or other decree in chancery. *Ibid*.

§ 719. *Federal jurisdiction.*—The courts of the United States, as courts of chancery, may interfere at the instance of an individual or corporation, who is likely to suffer some special injury, and prohibit by injunction the erection of nuisances to the navigation of the great navigable rivers leading to the ports of entry within a state. It is immaterial that the river lies wholly within the territory of a state, and the structure sought to be enjoined is authorized by the laws of the state. *Devoe v. Penrose Ferry Bridge Co.*,* 8 Am. L. Reg., 79. But this dictum was overruled in *Milnor v. Railroad Co.*,* 6 Am. L. Reg., 6.

§ 720. It is not within the power of the circuit court of the United States to enjoin as a nuisance that which the legislature of a state has willed to exist, on the ground that it is a nuisance at common law. It must be what may be called a national nuisance. Thus the court refused to enjoin as a nuisance the construction of a wharf in pursuance of a system of improvement laid down by a state in establishing a water front to her port of entry, where the construction of such wharf did not conflict with the power of congress to regulate commerce, or impede, or threaten to impede, the harbor or bay as a common highway. *Griffing v. Gibb*,* 1 McAL., 212. Reversed, *Griffing v. Gibb*, 2 Black, 519.

§ 721. The government may proceed by bill in equity in the United States circuit court to restrain the placing of obstructions in its navigable waters, and to compel their removal. *United States v. Milwaukee & St. Paul R. Co.*, 5 Biss., 420.

§ 722. *Injunction to abate private nuisance.*—The corporate authorities of a city cannot maintain a suit in equity in behalf of the citizens for the abatement of a private nuisance, and they gain nothing by bringing the bill in behalf of such inhabitants, if it contains no allegation of special damage. *City of Georgetown v. The Alexandria Canal Co.*, 12 Pet., 90.

5. Reformation of Instruments.

[See MISTAKE]

SUMMARY — Mistake in settlement, § 723.

§ 723. The complainant and respondent, on the dissolution of a partnership between them, agreed that the respondent should pay to the complainant all the money the latter had put into the firm, less the amount that he had drawn out, and that their clerk should examine the books and ascertain and report the amount, and that if any error was made it should be corrected

when discovered. Under this agreement the clerk reported a certain sum as due the complainant, and both parties, supposing it to be correct, made, executed and delivered to each other all the papers necessary to complete and perfect the agreement of dissolution. Afterwards, on the same day, the clerk found that he had made an error against the complainant in making the computation; and the respondent refused to correct it. It was decided that equity had jurisdiction of a suit by the complainant against the respondent to have the mistake corrected and the papers executed in consummation of the agreement reformed. *Ivinson v. Hutton*, §§ 724-26.

[NOTES.— See §§ 727-745.]

IVINSON v. HUTTON.

(8 Otto, 79-85. 1878.)

APPEAL from the Supreme Court of the Territory of Wyoming.

Opinion by MR. JUSTICE CLIFFORD.

STATEMENT OF FACTS.— Except in an action of account, which is almost obsolete, it is a general rule that between partners, whether they are so in general or for a particular transaction only, no account can be taken at law. *Worrall v. Grayson*, 1 Mee. & W., 168; 1 Collyer, Partnership, 6th ed., 339. Owing to the ability of courts of equity not only to investigate complicated accounts, but also to compel the specific performance of agreements, and to reform or rescind the same, in case of fraud or mistake, and to restrain breaches of duty for the future, it is to them rather than courts of law, that partners usually have recourse for the settlement of controversies among themselves. 2 Lindley, Partnership, 3d ed., 933.

Sufficient appears to show that the parties to the present controversy on the 6th of September, 1872, entered into a copartnership for the purpose of raising cattle in the county where they resided; that their business transactions and accounts were large; that the complainant put into the copartnership the sum of \$51,075.66, and that he had drawn out from the same the sum of \$7,257; that on the 11th of April, 1874, the partnership was dissolved by mutual consent, upon the terms following: 1. That the respondent should pay the complainant \$5,000 and all the money the complainant had put into the partnership, less the amount he had drawn out, and that the respondent should pay or secure all debts and liabilities due and owing by the firm. 2. That the complainant should release, assign and convey to the respondent all the interest of every description which he, the retiring partner, had in the partnership property when the partnership was dissolved.

Neither party knew what amount the complainant had put into the firm, nor what amount he had drawn out, but they mutually agreed that their clerk should examine the partnership books, ascertain the amount, and report the same as the basis of their agreed settlement, and that if any error was made, that it should be corrected when discovered. Pursuant to that arrangement, the clerk examined the books, and reported to the parties that the sum shown to be due from the respondent to the complainant was \$47,039.54. By the record it also appears that both parties supposed that the sum reported was correct, and that they made, executed and delivered each to the other all the papers necessary to perfect and complete the terms and conditions of the dissolution of the copartnership; that in the course of the same day the clerk discovered that he had made an error of \$4,036.12 against the complainant in making the computation.

Prompt notice of the error was given to the parties; and the complainant alleged in the original bill of complaint that the respondent then and there

promised and agreed to re-examine the accounts, and that he would rectify the error or errors if any were found to have been made, which he subsequently refused to do. Service was made and the respondent appeared and demurred to the bill of complaint.

Leave of the court having been first obtained the complainant amended the bill of complaint by striking out the words containing the promise to rectify the error or errors, and the respondent demurred to the amended bill of complaint. Responsive to the same demurrer the complainant filed a motion to strike it from the files as irregular, but the court denied the motion, overruled the demurrer and directed the respondent to file an answer to the amended bill of complaint.

These preliminary matters being settled, the respondent filed an answer denying the jurisdiction of the court and setting up several defenses. Hearing was had upon the bill of complaint and answer, and the court sent the cause to a special master to take the proofs and report the same to the court. Due report was accordingly made by the master, with his findings of fact, which substantially support all the material allegations of the amended bill of complaint. Exceptions to the report of the master were filed by the respondent, all of which were overruled by the court.

Before making that order the parties were again heard; and the court confirmed the report of the master and entered a decree that all the papers, instruments, agreements, notes of hand and mortgages made and executed by the parties in effecting the dissolution of their copartnership be reformed and corrected in accordance with the findings of the master. From which decree the respondent appealed to the territorial supreme court, where the parties having been again heard, the appellate court reversed the decree of the court of original jurisdiction and dismissed the bill of complaint, holding that the complainant had a plain, adequate and complete remedy at law; and from that decree the complainant appealed to this court.

Since the appeal was entered here the complainant assigns for error that the court erred in holding that the case was not one of equitable jurisdiction; that the complainant's remedy was at law and not in equity, and in dismissing the bill of complaint on that ground.

§ 724. *Jurisdiction of courts of equity.*

Courts of equity have jurisdiction of controversies arising out of transactions evidenced by written instruments which are lost; or if through mistake or accident the instrument has been incorrectly framed, or if the transaction is vitiated by illegality or fraud, or if the instrument was executed in ignorance or mistake of facts material to its operation, the error may be corrected or the erroneous transaction may be rescinded. Equities of the kind, whether it be for the re-execution, reform or rescission of the instrument, like the equity for specific performance of a contract, are incapable of enforcement at common law, and therefore necessarily fall within the peculiar province of the courts invested with equitable jurisdiction.

§ 725. *Parol proof admissible to establish mistake in a written contract.*

Power to reform written contracts for fraud or mistake is everywhere conceded to courts of equity, and it is equally clear that it is a power which cannot be exercised by common law courts. *Hearne v. Marine Ins. Co.*, 20 Wall., 490. Relief in such a case can only be granted in a court of equity; and Judge Story says, if the mistake is made out of proofs entirely satisfactory, equity will reform the contract so as to make it conform to the precise intent of the

parties; but if the proofs are doubtful and unsatisfactory, and the mistake is not made entirely plain, equity will withhold relief upon the ground that the written paper ought to be treated as a full and correct expression of the intent until the contrary is established beyond reasonable controversy. 1 Story, Eq. Jur. (9th ed.), sec. 152; Gillespie v. Moon, 2 Johns. Ch., 585; Rhode Island v. Massachusetts, 15 Pet., 271; Daniel v. Mitchell, 1 Story, 172.

Authorities which support that proposition are quite too numerous for citation, and the rule is equally well established that parol proof is admissible to prove the alleged accident or mistake which is set up as the ground of relief. Hunt v. Rousmanier, 8 Wheat., 174; 1 Story, Eq. Jur. (9th ed.), sec. 156; 3 Greenl. Ev. (8th ed.), sec. 360; Adams, Eq. (6th ed.), 171. Support to the latter proposition is also found in all the standard writers upon the law of evidence. Courts of equity, says Taylor, will also admit parol evidence to contradict or vary a writing where, by some mistake in fact, it speaks a different language from what the parties intended, and where, consequently, it would be unconscionable or unjust to enforce it against either party according to its terms. 2 Taylor, Ev. (6th ed.), 1041.

§ 726. *In matters of account and cases of mistake, courts of equity have jurisdiction. Those of common law can give no adequate relief, if any.*

Viewed in the light of these suggestions, it is evident that the ruling of the court below that the complainant had a plain, adequate and complete remedy at law, was erroneous and utterly subversive of the complainant's rights, as it is clear that the common law courts could not give him adequate relief. Hipp v. Babin, 19 How., 274 (§§ 1134-36, *infra*); Insurance Co. v. Bailey, 13 Wall., 621 (§§ 1130-33, *infra*). Reported cases of the highest authority decide that courts of equity possess the power to correct mistakes in written instruments, even to the extent of changing the most material stipulations they contain and which are the subjects of special agreement; but the settled rule of practice is that the power should always be exercised with great caution, and only in cases where the proof is entirely satisfactory. Finley v. Lynn, 6 Cranch, 249; Oliver v. Insurance Co., 2 Curt., 295.

Where an instrument is drawn and executed which professes or is intended to carry a prior agreement into execution, whether in writing or by parol, which, by mistake, violates or fails to fulfil the manifest intention of the parties, equity, if the proof is clear, will correct the mistakes, so as to produce a conformity of the written instrument to the antecedent agreement of the parties. Hunt v. Rousmanier, 8 Wheat., 211; S. C., 1 Pet., 13.

Proof of the most unquestionable character is exhibited in the record that the understanding of the parties was that the respondent was to pay to the complainant the whole amount the latter paid into the firm, less the sums he had drawn out, and that the clerk designated by the parties to examine the books and compute the amount made the mistake alleged in the bill of complaint. Clear proof is also exhibited that corresponding mistakes were made in the writings executed between the parties to effect the agreed dissolution of the copartnership. Under such circumstances equity, if the proof is clear, will reform the agreements and correct the mistakes, as appears by many standard authorities, in addition to those to which reference has already been made. Henkle v. Insurance Co., 1 Ves., 314; Moteux v. Insurance Co., 1 Atk., 545; Collett v. Morrison, 12 Eng. L. & Eq., 171; Andrews v. Essex Co., 3 Mason, 10.

Controversies of the kind often arise in respect to policies of insurance; and

the rule is, when once the contract is agreed to, the underwriters are bound to insert it in the policy, and if they omit to do it, the insured have a right to insist upon a perfect conformity to the original agreement. *Canedy v. Morey*, 13 Gray (Mass.), 377; *Wake v. Harrow*, 1 Hurlst. & Colt., 202. Concede that, and still it is suggested by the respondent that errors in matters of practice were committed by the court of original jurisdiction. Suppose that is so, still it cannot afford any justification for the appellate court in dismissing the bill of complaint, as the errors, if any, were amendable, and might have been corrected, if the appellate court had reversed the decree of the court of original jurisdiction and remanded the cause for further proceedings. Instead of that, the appellate court dismissed the bill of complaint without qualification, the effect of which, if not corrected, will be that the complainant will be barred of relief.

Irregularity in the proceedings may frequently justify a reversal of the decree and a remanding of the case, but it will seldom or never present just cause for dismissing the bill of complaint. By a reversal in such a case the right of the complainant is not barred, and when the cause goes down he may, if he can, correct the errors and preserve his rights. Even if the alleged errors of practice were material, the decree could not be justified, as, if not reversed, it would forever bar the right of the complainant; but upon a careful examination of the supposed errors, it is clear that they presented no just obstacle to the rightful determination of the controversy. Nor is it correct to suppose that the alleged errors of practice constituted the cause of dismissal in this case. On the contrary, the opinion of the court shows that the bill was dismissed solely upon the ground that the complainant had a plain, adequate and complete remedy at law, which is a manifest error, as fully shown by the authorities previously cited.

The decree will be reversed and the cause remanded with directions to enter a decree affirming the decree of the court of original jurisdiction; and it is so ordered.

§ 727. **Reformation of instrument for mistake.**—Where a purchaser of land directed a justice of the peace to draw a deed conveying a part of the land to him upon trust for certain others, and the rest to him in fee simple, and, by mistake of the justice, it was all conveyed upon trust, equity reformed the deed, at the instance of the purchaser, to give effect to the intention of the parties. *Kirk v. Zell*,* 1 MacArth., 116.

§ 728. A misdescription in a deed of trust, consisting in the use of the word *west* instead of *east*, made by the scrivener, contrary to the intention of the parties, will be corrected in equity, not only as against the grantors in the deed, but also against the grantees in a prior deed of trust, of which the plaintiffs had no knowledge at the time of the deed to them, and which was kept off the record by collusion between the parties to it, to enable the grantor to borrow money upon the security of the property. The court will also declare the corrected deed to be the prior incumbrance, and restrain a sale of the property under the unrecorded deed. *Fenwick v. Bruff*,* 1 MacArth., 107.

§ 729. Where a ratification of a deed of settlement of conflicting claims to land, made by an attorney, is insufficient in form, because of the manner in which the attorney has expressed his agency in appending his signature to the instrument, a court of equity will look beyond the form of the execution, and, having ascertained the intention of the attorney in signing the instrument, will, if possible, give it the effect intended. *Stark v. Starr*, 4 Otto, 477.

§ 730. Where one partner who had made fraudulent errors and misentries in keeping the books of the firm which were injurious to the interests of the other partner, made an assignment of all the partnership effects for the indemnity of the injured partner, and the latter came into equity demanding a retransfer of his part of the partnership effects, included in the assignment, it was held the court was not governed by the technical and legal construction of the words of the assignment, but the real intention of the parties in relation to the transaction, and if a mistake existed, it would reform the instrument to carry out that intention. *Askew v. Odenheimer*, 1 Bald., 890.

§ 781. **Mistake must be mutual.**—Where an agreement as reduced to writing omits or contains terms or stipulations contrary to the common intention of the parties, the instrument will be reformed in equity so as to make it conform to the real intention of the parties. The party alleging the mistake must show exactly in what it consists and the correction that should be made. The evidence must be such as to leave no reasonable doubt upon the mind of the court as to either of these points. The mistake must be mutual and common to both parties to the instrument. A mistake on one side may be ground for rescinding but not for reforming a contract. *Harvey v. United States*,* 13 Ct. Cl., 322.

§ 782. **Mistake of law.**—Complainants seeking to have a written agreement reformed solely on the ground that, knowing what it contained and all its provisions, they signed it under a mistaken belief that its legal effect was the same as that of a prior agreement between the parties, are not entitled to relief. *Hoover v. Reilly*, 2 Abb., 471.

§ 783. Where parties, acting under the advice of counsel, desiring to secure a debt between them with the most available security that can be given on a vessel of the debtor, reject security by mortgage, and execute and accept a power of attorney enabling the creditor to sell the vessel to pay the debt, and the power is revoked by the death of the constituent, and the security thereby lost, it is held that equity will not compel the execution of a new security, or create a lien or security in place of the one which has been lost, although the parties have given and accepted the security in ignorance of the rule of law as to the revocation of a power of attorney by the death of the constituent. *Hunt v. Rousmaniere*, 1 Pet., 1; *Hunt v. Rousmaniere*,* 2 Mason, 342.

§ 784. **Evidence required to establish mistake.**—Courts of equity are very slow to reform written instruments on the ground of mistake, and require the strongest and clearest evidence to establish the mistake. It is not sufficient that there be reason to presume a mistake. The evidence must be clear, unequivocal and decisive. It seems that an assignment for the benefit of creditors will not be reformed as against creditors who had no notice of the mistake, and have released their debts on the faith of the validity of the assignment. *United States v. Munroe*, 5 Mason, 572.

§ 785. A court of equity has authority to reform a policy of insurance where there has been an omission of a material stipulation by mistake. But it should withhold its aid where the mistake is not made out by the clearest evidence according to the understanding of both parties, and upon testimony entirely exact and satisfactory. *Andrews v. Essex Fire & Marine Ins. Co.*, 3 Mason, 6.

§ 786. A partner who had effected insurance on a cargo belonging to himself and his copartner, the policy covering his interest only, sought, after the loss, to have the policy reformed in equity so as to cover the interest of both, alleging that previous to the date of the policy it was usual to insert in marine policies a clause to the effect that the insurance was for the benefit of all concerned, and that the respondent had made a change in this usage without making it known to the agents employed to effect the insurance, and that the complainant did not know of this omission until after the loss. The evidence showed that the complainant intended to insure the interest of both. But the relief was refused because it was not clear that the complainant had laid before the company information sufficient to apprise them of the intention to insure the interest of both partners, and to require that they should suggest to the agent the departure of their policy from the ancient form. *Graves v. Boston Marine Ins. Co.*, 2 Cr., 419.

§ 787. **Rights of third parties protected.**—The maker of certain promissory notes, to secure them, executed a deed of trust of certain lands therein described. Upon proceedings to foreclose the deed, the defendants set up a prior deed of trust made by the maker or the notes to secure other liabilities, which deed was alleged to have been intended to describe the same lands, but which by mistake described other lands. There was no allegation that either the party to whom the notes were executed, or the complainants, to whom the notes had been transferred, had any notice of the alleged mistake when they took the paper. When the notes and deed of trust were delivered, a thorough examination was made in the proper office to ascertain if there was any prior incumbrance, but none was found. The misdescription in the prior deed was not asserted in any judicial proceeding to which the trustee or any *cestui que trust* under the later deed was a party, until it was put forth in this suit, which was instituted more than twenty years after the mistake occurred. The court refused to reform the prior deed so as to include the lands described in the subsequent one, and declare the prior one to be a first lien on the lands. *New Orleans Canal & Banking Co. v. Montgomery*, 5 Otto, 16.

§ 788. **Mistake in exercise of power.**—There is a difference between the reformation of a written contract and the correction of mistakes in the execution of powers. In the latter class of cases courts of equity interfere more readily, and upon the footing of presumed intention. *Oliver v. Mutual Commercial Marine Ins. Co.*, 2 Curt., 277.

§ 739. **Abrogated oral agreement.**—Where an oral agreement has been abrogated by a subsequent written one, deliberately made, and appearing from its terms and by the subsequent conduct of the parties to be the only one intended to be carried into effect, equity will not reform the latter by setting up the former in its stead. That the written contract has become inoperative by the act of God will make no difference. *Tilghman v. Tilghman*, 1 Bald., 464 (§§ 180-187).

§ 740. **Reformation of patent to public lands.**—Courts of equity have full power to inquire into and adjust the rights of parties claiming title to real estate under patents from the government. So where it appears, that by a wrong construction of an act of congress, a patent was issued to a wrong person, a court of equity has jurisdiction to correct the mistake. *Johnson v. Towseley*, 13 Wall., 84; *Sampson v. Smiley*, 13 Wall., 92.

§ 741. **Right to reformation set up as a defense.**—It is a rule in equity that a matter entitling a party to an amendment of his contract may be set up by way of equitable defense to a proceeding to enforce the specific performance of the contract, where the clause omitted through mistake or accident would, if found in the instrument, constitute a ground of defense. *Woodworth v. Cook*, 2 Blatch., 151.

§ 742. **Reformation of insurance policy.**—Where a party, having an existing valid contract for insurance, fails through mistake to obtain such a policy as his contract entitles him to, he is entitled to the aid of equity to reform the policy, although the mistake be one of law. *Oliver v. Mutual Commercial Marine Ins. Co.*, 2 Curt., 277; *Hearn v. Equitable Safety Ins. Co.*, 4 Cliff., 192.

§ 743. The power of courts of equity to correct mistakes in policies of insurance goes even to the extent of changing the most material clauses therein which are the subjects of special agreement; but this power is to be exercised with great caution, and only in cases where the proof is entirely satisfactory. *Hearn v. Equitable Safety Ins. Co.*, 4 Cliff., 192; *Hearn v. New England Mut. Mar. Ins. Co.*, 4 Cliff., 200.

§ 744. When a complete contract for an insurance policy is made by a known agent, and nothing is said respecting any declaration of interest, the contract is to insure the property of his principal, and the agent has the implied power to declare the interest and have it inserted in the policy, or to have the policy so drawn as to insure him as agent, leaving the declaration of interest to be made afterwards in case of loss. And if the agent makes a mistake in declaring the interest, equity and good conscience require that the mistake be corrected and the policy reformed. But equity will not relieve where the agent declares the interest in the wrong person, not by mistake, but for a fraudulent purpose. *Oliver v. Mutual Commercial Marine Ins. Co.*, 2 Curt., 277.

§ 745. A court of equity may amend and reform an insurance policy and enjoin the prosecution of a suit at law upon it, where, by a mistake of the parties, it has been issued for a longer time than was intended. *North American Ins. Co. v. Whipple*, 2 Biss., 418.

6. Cancellation and Rescission.

[See CONTRACTS, VI. Contracts between Vendor and Vendee, see LAND.]

SUMMARY—*Concealment of incumbrance*, § 746.—*Fraudulent representations made without authority*, § 747.—*Lapse of time and acquiescence* §§ 748; and *change in value of property*, § 749.—*Of deed or bill of sale for fraud*, § 750.—*Fraud and mistake; purchase of outstanding title by trustee*, § 751.—*Suit by heir to cancel conveyance by ancestor; weakness of mind; lapse of time; improvements*, §§ 752, 755.—*Rule in case of weakness of mind and imposition*, §§ 753-755.—*Conveyances between parent and child*, §§ 756, 757.—*Deed procured by threats*, § 758.—*When damages will be awarded*, § 759.—*Vendor and vendee; defect of title, etc.*, § 760.—*Deed alleged to constitute a cloud*, § 761.—*Ignorance of vendor; fraudulent representations of vendee*, § 762.—*Parties placed in original position; depreciation in value; limitations*, § 763.—*Possession under unrecorded deed; deed of trust; bona fide purchaser*, § 764.

§ 746. It is a *dictum* in this case, that a fraudulent concealment of incumbrances on land sold may lay the foundation for relief in equity, by a rescission of the sale, even after the execution of a deed containing covenants upon which a remedy may be had at law. *Fisher v. Boody*, §§ 765-71.

§ 747. Fraudulent representations coming from third persons, who, in making them, are acting without authority from the other contracting party, will not afford ground for rescinding a contract in equity, except under the head of mistake. *Ibid.*

§ 748. In a suit in equity to rescind a contract on the ground of fraud, lapse of time and acquiescence may be considered by the court, as affecting the proofs, or as barring relief unless explained and accounted for, though not set up by plea or answer. *Ibid.*

§ 749. A court of equity will not rescind a contract, where on account of acquiescence and change in the value of the property, the court is unable, through the fault of the complainant, to restore the parties to their original condition. *Ibid.*

§ 750. A deed or a bill of sale cannot be set aside in equity except for fraud or mistake, and where fraud is alleged for this purpose, it must be clearly alleged in the bill and satisfactorily proved, either by positive or circumstantial testimony. *Lenox v. Notrebe*, §§ 251-58.

§ 751. Hamilton became indebted to Notrebe in the sum of \$500, for which he executed a mortgage on two slaves. All the property of Hamilton was afterwards exposed to sheriff's sale and Notrebe became the purchaser for \$230, agreeing that the former might redeem by paying the purchase money and interest, and also whatever else might be due from Hamilton to Notrebe. A third person furnished the widow of Hamilton with means to pay off this debt for the benefit of the heirs of Hamilton, and the conveyance back was made to Hamilton's representatives, the object being to vest the children with all right and title to the property. The second husband of Mrs. Hamilton filed a bill to set aside and cancel the mortgage made by Hamilton to Notrebe, and also the sale by Notrebe to Hamilton's representatives, claiming that a judgment had been rendered against him for the money advanced by the third person, and also claiming as the purchaser of an outstanding title. It was held that relief could not be granted to the complainant on the first ground, there being no pretension of fraud or mistake, and that as to the second he was in the position of trustee purchasing an outstanding title. *Ibid.*

§ 752. An heir brought a suit to cancel a conveyance by his ancestor, on the ground that she was enfeebled in mind and unfit to make the conveyance, and that it was obtained by imposition and for an inadequate consideration. It was held that the lapse of time, which was six years from the date of the transaction and the death of the ancestor (these two dates being only a few weeks apart), was not a bar to the suit, a full presentation of the facts not having been rendered impossible or inconvenient by the death of witnesses or otherwise, there being no statutory bar in the case, and the improvements placed upon the land by the defendant, the purchaser, not being more than a reasonable rent of the property, and the complainant being willing to allow a credit for them. (*STRONG, WAITE and BRADLEY, JJ.*, dissented on this point.) *Allore v. Jewell*, §§ 777, 778.

§ 753. Whenever there is great weakness of mind in a person executing a conveyance of land, arising from age, sickness, or any other cause, though not amounting to absolute disqualification, and the consideration given for the property is grossly inadequate, a court of equity will, upon proper and reasonable application of the injured party, or his representatives or heirs, interfere and set the conveyance aside. An old woman lived alone in a state of misery and degradation. She had for a long time been eccentric and enfeebled in mind. While these infirmities were aggravated by her last sickness, she made a conveyance of all her property, worth from \$6,000 to \$8,000, for the consideration of \$250 in cash, and an annuity of \$500 for the rest of her life. No one was present at the time except the purchaser, his agent and attorney, and she died a few weeks after the transaction. The court was of opinion that she was, if not disqualified, unfitted to attend to business of such importance as the disposition of her entire estate, and considering the case within the above principle, ordered the conveyance to be set aside. *Ibid.*

§ 754. The degree of weakness or imposition which ought to induce a court of equity to set aside a conveyance is proper for the consideration of the court itself; and there seems to be no necessity for the intervention of a jury, unless the case be one in which the court would be satisfied with the verdict, however it might be found. *Harding v. Handy*, §§ 778-89.

§ 755. A court of equity has jurisdiction of a suit brought by heirs at law to set aside a conveyance of lands obtained from their ancestor by undue influence, he being so infirm in body and mind from old age and other circumstances as to be liable to imposition, although his weakness did not amount to insanity. The same jurisdiction may be exercised when one of the heirs at law has, with the consent of the others, taken such a deed, upon an agreement to consider it as a trust for the maintenance of the grantor, and after his death, for the benefit of his heirs, and the grantee refuses to perform the trust. But in such a case, the grantee ought not to be burdened with the maintenance of the ancestor or lose the improvements and repairs which he has placed upon the estate. *Ibid.*

§ 756. A wife, just before her death, conveyed two tracts of land in trust for her husband in fee, and the residue of her estate in trust for her daughter and only child. The deed was invalid for want of a privy examination. The husband, not aware of this defect, subsequently devised both the tracts to the daughter. Afterwards, while the daughter was young and still living with him, he prevailed upon her to convey to him these two tracts, and thus make good

the conveyance of them to him by her mother, assuring her that his design was to promote her interests as well as his own. The evidence repelled any meditated fraud or imposition upon the daughter. It was highly probable that he was not aware that the estate would not pass to the daughter by the devise, and thought that the daughter could not be injured by the conveyance. But the will having proved ineffectual for securing to the daughter the consideration which induced her to make the deed, the court set aside the deed as having been made under a mistake and for a consideration which had failed. *Slocum v. Marshall*, § 790.

§ 757. Although a conveyance from a child to a parent is not *prima facie* absolutely void, yet a court of equity will carefully examine the circumstances attending such transactions, when brought under review before it, to discover if any undue influence has been exercised in obtaining the conveyance. A daughter just come of age, living in the home of her parents, was induced by her father to convey in trust for her mother during the life of the father and mother, and after their death, for the equal benefit of herself and her brothers and sisters, all of a large estate which had been left to her absolutely by the will of her uncle. There was no consideration whatever for the conveyance, and it appeared that immediately after the death of the uncle various means were actively used to withdraw from the daughter the fruits of the bounty of her uncle. Her family reproached her for having intercepted the bounty which, but for her, would have flowed to them, and thereby ruined their prospects and broken the heart of her father. They dictated a letter from her to her father declaring her belief that the property was meant by the uncle for the benefit of the whole family, and containing very suspicious declarations of her own independence and free will in making the conveyance. The father himself was one of the executors in the will of the uncle, and a depository of the trust of protecting the daughter. The conveyance contained false recitals that part of the property had once been conveyed by the father to the uncle upon a trust to carry into execution a marriage settlement between the father and mother, and that the conveyance by the daughter was made with the sole view of effectuating this marriage settlement. It was held under the circumstances that the conveyance was not obtained by proper influences, and should be set aside. *Taylor v. Taylor*, §§ 791, 792.

§ 758. A court of equity will order the cancellation of a deed procured from the complainant through threats of personal violence and by means of duress. *Brown v. Pierce*, §§ 798-800.

§ 759. On a bill to rescind a contract, chancery will not decree damages except under peculiar circumstances. *McKay v. Carrington*, §§ 801-11.

§ 760. In 1817 McKay purchased from Mrs. Carrington a piece of land paying part in cash and giving notes on time for the balance. There was no time fixed for the conveyance, but the vendor was not bound to make it until the payments were made. Mrs. Carrington had purchased this land under a decree of court against Martin. The latter had purchased of Mrs. Carrington's husband in his life-time, the seller retaining the title until purchase money was paid, and having a right to annul the contract upon failure to make any one of the payments. Both Carrington, during his life-time, and his administratrix, after his death, had a chance to annul this contract, but did not do it, and treated it as in full force and effect. The equity of Martin was therefore not extinguished at or before the decease of Carrington, and the purchase money went to the administratrix as assets in her hands. The heirs of Carrington brought suit in chancery to enforce this contract, a decree was entered against Martin for the balance of the purchase money, and, on his failure to pay it, the land was ordered to be sold. It was at this sale that Mrs. Carrington purchased, and the equitable interest of Martin was all that she got by the purchase. In 1823, Mrs. Carrington instituted a suit against the Carrington heirs to perfect her title, and McKay advanced money for the prosecution of this suit. These heirs were non-residents, and one of them a minor, and a decree was rendered *pro confesso* on notice given according to the statute. The circumstances did not justify the presumption that McKay purchased with notice of the full legal import of Mrs. Carrington's title, though he must have been aware of the defects in the title when he aided Mrs. Carrington in her efforts to remove the objections to it. McKay paid neither of the instalments when they became due in 1819 and 1820, but in 1821 brought a bill to rescind the contract on the ground of the deterioration in the value of the land, and the inability of Mrs. Carrington to make a good title, and her failure to put him in possession for a number of years after the sale, purchasers under Martin having held possession during this time. The infant defendant against whom the decree was rendered in the suit by Mrs. Carrington to perfect her title might of course have it opened and reversed on his coming of age, and this constituted a fatal objection to the perfection of the title. The court considered these facts as sufficient to justify a refusal of a specific performance of the contract if it had been asked by Mrs. Carrington. It was held that under all the circumstances the complainant's failure to pay the instalments and his apparent acquiescence by aiding the defendant to perfect her title did not prevent his coming into equity for a rescission; that the fact of the defect of the title and that the notes were outstanding and might be assigned and enforced against the complainant, authorized the

jurisdiction of a court of equity; and that, having taken jurisdiction on this ground, the court would settle the whole controversy by decreeing a rescission of the contract, a cancellation of the notes, and a repayment with interest of the money paid on the purchase, but not a repayment of the amount expended in aiding the defendant in the perfection of her title, as there was no evidence as to the amount and the law afforded a remedy. *Ibid.*

§ 761. A court of equity will not decree that a deed which is alleged to be a cloud upon complainant's title be delivered up and canceled, when the complainants have prevailed in an action of ejectment against the defendants who claimed under the deed in question, when it appears that such deed was void on its face. The decree dismissing the bill should state the reasons, and costs should not be awarded against the complainants who also asked an account of the rents and profits and the appointment of a receiver. *Piersoll v. Elliott*, § 812.

§ 762. Where the owners of land, who had theretofore been ignorant of their title, were induced to convey the same to a person familiar therewith upon the knowingly false representations of the purchaser as to the state of the title, the quantity and quality of the land, and upon his false representation that he had a lien thereon for unpaid taxes, the conveyance was set aside, and the defendant directed to account for the profits of the land while held by him on repayment of the amount paid as purchase money. *Tyler v. Black*, § 813.

§ 763. A plantation had by fraud been obtained from the grantor, who received therefor only a bond executed by himself, which was canceled by the grantee. The court below set aside the deed and restored the bond in full force and effect to its original owner, the grantee, who appealed because the court refused to make the payment of the bond a condition precedent to the reconveyance of the plantation. *Held*, that the decree put the parties as nearly as possible where they were before the transaction and was correct; and that it was no objection that the property had fallen in value since the transaction, or that the statute of limitations may possibly have barred the bond. *Neblett v. MacFarland*, §§ 814, 815.

§ 764. The complainant purchased certain land of B., but neglected at the time to have his deed recorded. B. subsequently made a deed of trust to the respondents to secure a loan, which deed by mistake included some of the land sold by B. to the complainant. This deed of trust was recorded before the deed to complainant, but complainant was in possession at the time the deed of trust was made, and had been openly and notoriously for eleven or twelve years. The complainant was one of the appraisers when the loan was made and the deed of trust given, and signed the appraisal, which by number included his land, but according to the plat did not. Complainant was an ignorant and unlettered man, and was laboring under a mistake when he signed the appraisal. Complainant brought a bill to cancel the deed of trust so far as it included his land. It was held that the respondents could not claim to be *bona fide* purchasers without notice; that complainant was not estopped by the appraisal; and that he was entitled to the relief asked. *Gum v. Equitable Trust Co.*, §§ 816-19.

[NOTES.—See §§ 820-858.]

FISHER v. BOODY.

(Circuit Court for Maine: 1 Curtis, 206-223. 1852.)

Opinion by CURTIS, J.

STATEMENT OF FACTS.—This is a bill in equity, filed by David A. Fisher, a citizen of Massachusetts, against Henry H. Boody, Freeman Bradford and Joseph Russell, citizens of Maine, to set aside a sale and conveyance of land on the ground of fraud. The material allegations of the bill upon which the claim to relief is rested are, that the defendants, claiming to be the owners of a tract of land in the state of Maine, containing six thousand six hundred and ninety-four acres, known as the Bog Brook tract, authorized one Nathaniel Miller to make sale of it; that on the 7th day of August, 1835, the complainant contracted with Miller to purchase one undivided eighth part thereof at the rate of \$4.50 per acre; that, at or near the same time, other persons purchased five undivided eighth parts of the same land; that the complainant received from two of the defendants, Bradford and Russell, a written contract to convey to him what he thus purchased, and paid to them in cash the sum of \$1,255.12, and executed three promissory notes for the sum of \$836.67 each, one payable in one year, one in two years, and one in three years from the 7th day of August, 1835, and on the 9th day of November, 1835, received

the deed of the defendants, purporting to convey to him, in fee simple, one undivided eighth part of the land; that the defendant paid, at its maturity, the first of his notes, but the others are outstanding.

The bill further states that Miller applied to him in Boston to purchase, representing that there were some gentlemen there from Maine who had a choice piece of timber land which they offered to sell at a great bargain; that he intended to take part of it and wished the complainant to take a share, and was desirous of making up a company of his friends that they might operate on the land, get off timber from year to year, and make a great profit; that Miller exhibited a plan of the land, and stated that the lumber cut therefrom would come to navigation the first season; that on the complainant's declining to purchase he induced him to see one Borland, who, he said, had explored the land; and Borland informed the complainant that he had explored it and found it one of the best tracts of timber land in Maine; that it would yield from four to six thousand feet of choice pine timber per acre, and other timber, such as spruce, juniper and cedar, to make it average ten thousand feet per acre, and possessed all the advantages of locality and streams to enable those who purchased it to float the timber to market the first season after being cut; that it was a great bargain at \$5.50 per acre, and if it could be had at that price he, Borland, was determined to go into it to the extent of his ability. That the complainant, still declining to purchase, Miller afterward brought to him a person named Fogg; represented that Fogg had been sent down to explore the land and he wished the complainant to hear his statement concerning it; whereupon Fogg stated that the land would average from three and a half to four and a half thousand feet of choice pine timber per acre, and other timber in proportion; that the advantages for getting out lumber were good, and that timber cut therefrom could be floated down to a market the first season.

The bill charges that the land was of no value whatever as timber land or for the purpose of lumbering, because about all the pine trees of sufficient size to be sawed into boards were wholly unsound and rotten, so much so that the same could not be got out and manufactured into boards and sold at a sufficient price to pay the expense of the operation, and that this was known to the defendants; that when the defendants contracted to sell, they did not own the land, but only had a right to purchase it at not more than \$1.50 the acre, and they knew it was not worth even that price, and obtained this right to buy merely with a view of defrauding some unsuspecting person.

It further charges, that one Lewis L. Miller, having been authorized by the defendants to sell the land, applied to one Cheeseborough to purchase, and they having agreed to have it explored, Miller selected Fogg and Cheeseborough selected Borland, and sent them down to the land on that business; that Borland and Fogg, in July, 1835, went on to the land, in company with the defendants, Bradford and Russell, and found it wholly worthless for purposes of lumbering; that the defendants, knowing that Borland and Fogg would so report, while coming from Portland to Boston with them in a steamboat, offered to each of them a deed of one undivided eighth part of the land, or a part of the profits, if they would report that the land was well covered with valuable timber, and was a great bargain at \$4.50 per acre, and if they would aid and assist in working off a part, or the whole, of the land at that price; that Borland and Fogg agreed to the proposal, Borland, however, reserving the right to acquaint Cheeseborough secretly, of the worthlessness of

the land, which he did, on seeing Cheeseborough; that the defendants gave Fogg a written promise to perform their nefarious contract, and that Borland and Fogg did report, falsely, to Miller, that they had found the land valuable, that it contained a large quantity of choice pine timber, and other valuable timber, and was a great bargain at \$4.50 per acre.

The bill further states, that when Borland and Fogg made the above-mentioned representations to the complainant, they were under the corrupt contract aforesaid with the defendants; and that the complainant, being deluded and influenced by the false and delusive declarations and representations made by Nathaniel Miller, Borland and Fogg, did, on the same day, conclude a bargain, as above mentioned. There is another charge in the bill, concerning an incumbrance on the land, which will be noticed hereafter.

This is a succinct statement of the substance of the case made by the bill; and as there can be no doubt a sufficient case is stated, the first inquiry must be, whether it is made out in proof.

§ 765. *False representations by a third party, not sufficient to rescind a deed of conveyance.*

It should be observed, at the outset, that the bill does not aver that either of the defendants, in person, made any misrepresentation; the charge is, that the false representations, which misled the complainant, were made through Nathaniel Miller, Borland and Fogg. We have, therefore, to ascertain from the evidence, not only what each of these persons represented to the complainant prior to his purchase, but also, whether at the times of such representations, each was so connected with the defendants as to render the defendants responsible for his acts in respect to this land. It has been urged, that if a third person, wholly unconnected with the defendants, made fraudulent representations, which induced the complainant to purchase, he is entitled to relief. I will not say a case for relief might not be made, resting on such a basis; but it must be on the ground of mistake, and must be brought within the principles applicable to that head of equity. There can be no responsibility for the fraud of a mere third person, acting without any authority from the defendants. And this bill states no case of mistake. It is true, that in summing up the grounds for rescinding the sale, this language occurs: "and although such gross and palpable fraud has been committed and practiced upon your orator, or such gross and palpable mistakes mutually made and committed in regard to the value of said land and timber." But there is nothing in the bill to which these words concerning mistakes can be referred. No mutual mistake is anywhere described, and the averments throughout are of positive and intentional fraud and deception.

§ 766. *The plaintiff must establish actual fraud when such is alleged as ground of relief.*

I assent to the rule laid down by the Lord Chancellor, in *Price v. Berrington*, 7 Eng. L. & E., 254, that when a bill sets up a case of actual fraud, and makes that the ground of prayer for relief, the plaintiff is not entitled to a decree by establishing some one or more of the facts, quite independent of the fraud, which might of themselves create a case under a distinct head of equity. I return, therefore, to the inquiry, whether Nathaniel Miller, Borland or Fogg, made to the plaintiff, before the purchase, the representations charged in the bill; and if so, whether he was so connected with the defendants, or either of them, as to give a title to relief on the ground of fraud.

And first, as to Nathaniel Miller. The only evidence of representations

made by him comes from himself, as a witness for the plaintiff; and he fails to prove that he made the representations alleged in the bill. He admits that he urged the plaintiff to buy, told him he intended to purchase, and that he and some of his friends, who were to purchase the other parts of these lands, would join the defendant in operating, that is, getting off the timber. But he does not remember telling him it was a choice piece of timber land, or that it was a great bargain, or that great profits could be made. In short, he proves no material representation charged in the bill, even of the most general character, which was not true. It was urged by the plaintiff's counsel, that as he declares he said as much to the plaintiff as he did to others, and it is proved he made some more specific representations to others, and as it is apparent that, from the age of the witness and the lapse of time since the occurrences, his memory was not clear, the court should presume that he did make to the plaintiff the declarations charged in the bill. But having been carefully interrogated, by a set of very pointed, not to say very leading, questions, upon each representation alleged in the bill, and having declared that he did not remember making them, it would be exceedingly dangerous to assume that his subsequent loose statement, that he said as much to the plaintiff as to others, is evidence that he made to the plaintiff the representations charged in the bill. If his memory was not sufficient to enable him to say whether he did or did not make those representations, it was not sufficient to enable him to prove the fact that he made them; and how much he said to others is quite immaterial.

There is some ground laid by the bill for the inquiry, whether the plaintiff was not influenced by the belief that Miller was to pay for his eighth of the land, as much as the plaintiff; but I am spared the necessity of investigating this, by the disclaimer of the plaintiff's counsel of all intention to impute to Doctor Miller, any intentional concealment of the fact, that a discount was to be made to him, and by the frank admission, which, indeed, Miller's testimony seems to render necessary, that his client has nothing to complain of in this particular.

I proceed, therefore, to examine what relation Borland bore to these plaintiffs, at the time when the interview took place between him and the plaintiff and Miller, on the 7th day of August. This was the only interview with Borland, before the plaintiff's purchase, which was concluded on that day.

The bill charges that Borland and Fogg, having been sent to explore these lands by Miller and Cheeseborough, who proposed to purchase them, were bribed by the defendants to make a false report to their employers, and to aid in selling the lands, by making misrepresentations. The answer of each defendant explicitly denies this charge and all connection with Borland, at any time prior to the 13th day of August; and they deny that Borland then had any agency for them, or either of them; but they admit that Russell and Bradford then agreed, that if he and his friends should take up the residue of the land, which Miller and his friends should not buy, at the rate of \$4.50 the acre, they would give him one-eighth of the land.

So far as respects the denial of the bribery of Borland and Fogg, by the defendants, to make a false report to their employers, the answers are supported by the testimony of Fogg, taken by the plaintiff, who swears he knew nothing of it, and, so far as he was concerned, it was not true; and this very grave charge is not supported by any proof; nor is there evidence of any relation whatever between Borland and the defendants, prior to the time when the

plaintiff made his purchase. That before the interview between himself and the plaintiff, Borland intended to have some connection with the sale of these lands, and hoped, as he declared, to make something out of it, is highly probable. That these plaintiffs had in any way employed him in reference thereto, before the plaintiff made his purchase, or knew that he had busied himself about the sale, or were at any time informed that he had made any representations to the plaintiff, does not appear.

In respect to Fogg, the principal evidence in the cause comes from himself, he having been examined as a witness on the part of the plaintiff. His testimony, while it negatives, decidedly, any fraudulent purpose on the part either of himself or of any of the defendants, does clearly prove an employment by Bradford, to give information to the plaintiff and others concerning these lands. And it shows, at the same time, a direct interest to promote the sale to the extent of \$1,000, which he was to receive in case the sale should be effected for the price of \$4.50 the acre. He says there was a written contract between himself and Bradford and Russell to this effect, the manner of obtaining which he thus describes: "I invited Bradford, on the day of the date of the obligation, to walk with me; he talked on various subjects. I told him I expected he was making a great deal of money by this bargain, and I would stay till it was decided whether they sold, if he would give me \$1,000. I told him I could say nothing more in praise of the land than I had already said; but I could blow up the bargain, and would, unless they gave me an obligation for \$1,000." A copy of an obligation to Fogg, signed by the defendants, Bradford and Russell, is put into the case by the plaintiff; but it purports to relate to a tract of land materially different in quantity from the one in question, not identified with it by any certain description, and the answers of Bradford and Russell, which in this respect are responsive to the bill, aver that it does not relate to this land.

I do not pause upon this; my present purpose being to declare how far there was an employment of Fogg, in behalf of the defendants, or any of them, in reference to these lands, so as to make them responsible for his representations.

Nathaniel Miller testifies that Fogg told the plaintiff the land had from three and a half to four and a half thousands of good pine, per acre. Fogg himself declares he made no representation he did not believe to be true; that he gave a correct account of the land, as near as he had been able to learn; that he considered the land a bargain at the price asked; and that he had made his report, and told all he knew about the land, before he was employed by the vendor.

It is necessary, to a correct understanding of the case, to state that the gravamen of the plaintiff's complaint does not respect either the soil, or local position, or even the quantity of timber on the land; but its quality. As to the quantity of timber, though there is some conflict of opinion among the practical lumbermen who have worked on the tract, yet the general result of the evidence is, that the quantity was large; and the plaintiff's counsel explicitly declared, at the bar, that he did not make a question on that point; and the bill states, in terms, that it was the unsound and rotten condition of the pine timber which rendered the land of no value, and that it was in that particular the plaintiff was and continued to be deceived, even for the space of two years after he made his purchase. Indeed, it is only upon this ground the bill can stand, because during the years 1835-36, and 1836-37, the plaintiff and his associates had sufficient means of knowledge of the quantity of timber, and

the bill alleges no concealment by the defendants in this particular; and as the plaintiff and his associates continued to operate on the land during both those seasons, and this bill was not filed until August, 1844, it would be impossible to maintain the suit upon the ground of a deficiency in the quantity of timber. The real cause of complaint is, that the quantity of sound merchantable pine timber was not equal to what was represented.

Upon this point, the testimony of Miller and Fogg, taken together, is, that Fogg represented there was from three and a half to four and a half thousand of good pine per acre, and that he believed what he said to be true. In point of fact, I think the evidence shows this representation was not substantially correct; a considerable part of the pine timber then standing on the land being more or less decayed.

§ 767. *Case of constructive fraud made by honest but mistaken statements of facts.*

But it is a very material inquiry here, whether this assertion by Fogg was of a matter of fact, or a matter of opinion merely. An honest but mistaken assertion of a fact, to another's loss, and his own gain, by a vendor or his agent, may be a constructive fraud; but this principle does not extend to assertions of what are known to both parties to be matters of opinion only. And an assertion may appear to be a matter of opinion, either from its being made in that form, or from the very nature of the thing asserted. It is shown, by the evidence in this case, and I think is so obvious that it must be taken to have been known to the plaintiff, that a representation of the quantity of sound pine timber standing on the land, was of a matter of opinion. Many persons, of practical experience in such matters, and better acquainted with these lands than one merely sent to make an exploration could be supposed to be, have testified in this cause on this subject. They differ very widely. The result may be summed up in the words of one of the witnesses, who says some lumbermen thought the best and most valuable timber had been cut, and others thought differently. The very representation relied on, showed it to be somewhat loose and conjectural; three and a half to four and a half thousand feet per acre does not convey the idea of a precise statement of a matter of fact. According to the bill, the plaintiff had just before been told by the other explorer, Borland, that the land would yield from four to six thousand feet of choice pine per acre. Such a wide discrepancy between the two persons employed to explore, and to whom the plaintiff resorted for information, must at least have apprised him that they were speaking from loose estimates. It must be observed that the assertion relates to the quantity of sound timber. This involves not merely the question how much pine timber was on the land, but what part was sound and what unsound. The latter is very difficult to be determined, with any approach towards precision, by a mere exploration of the land. No doubt some estimate may be formed, but the nature of the thing, as well as the very considerable discrepancies among the witnesses, show it to be purely a matter of opinion upon which honest and skilful men will greatly differ.

I have examined the substantial allegations in the bill respecting the misrepresentations relied on, in order to see what their character was; whether they are supported by the proofs, and how far the defendants are responsible therefor. There are many allegations concerning the representations made to others which are material only as tending to show, if proved, a general fraudulent purpose on the part of one or more of the defendants and of Bor-

land. But inasmuch as no representations by the defendants themselves are alleged, and as Borland is not shown to have been their agent, or to have been in any way connected with them before the plaintiff purchased, I have not thought it necessary to detail them. There are also circumstances in the case tending to show that some of these transactions, with others than the plaintiff, were not conducted fairly by all who were concerned in them. It is very extraordinary that one-eighth of the whole tract should have been given to Borland. It is not quite clear to my mind that the promise to Fogg referred to the sale of another tract of land; it is proved, I think, that Borland deluded some of the other parties; but the great difficulty in the plaintiff's case is that he does not connect himself with these circumstances, and show himself to have been deluded into making this purchase by such evidence as will enable me to set aside this conveyance after the lapse of so much time, and after the acquiescence by him which appears; all fraud being explicitly denied by the answers.

§ 768. *Effect of lapse of time upon decree when bill seeks to rescind a sale.*

This sale was made in August, 1835, and nine years elapsed before the bill was filed. It is true, no statute of limitations is pleaded, and the lapse of time is not specifically relied on in the answer. But I apprehend the true doctrine on this subject is given by Lord Brougham, in *Irvin v. Kirkpatrick*, 3 Eng. L. & E., 24, decided in the house of lords in 1851. "A party, say they, meaning to avail himself of the topic of time, must do it by a plea, and must succeed altogether, or, I suppose, they mean to add, fail altogether. I cannot go so far as that. I, too, say that a court of equity will overleap the barrier of time to get at the fraudulent practice. I, too, say the length of time which has elapsed is not a bar to this suit; but that it should not enter into our consideration; that it is to be wholly dismissed; that, as a suggestion, it is to have no effect in moulding, as it were, in influencing the frame of mind, in which we shall be when we are to consider the rest of the case, either as a jury upon the facts or as judges upon the law,—to that proposition I cannot assent. Am I to dismiss that fact from my mind, and deal dryly with all the facts and all the law of this case exactly as if it had occurred three or four years, or as many months, before the action was brought? I cannot go that length. On the contrary, I hold it is most material," etc.

This distinction between a positive bar from lapse of time, and that lying by and acquiescence which will cause a court of equity to look upon the proofs with some distrust, and to refuse relief unless the delay and acquiescence are satisfactorily accounted for, I consider a most important principle, necessary to be constantly kept in view in wielding the transcendent powers of a court of equity; and it rests upon ample authority, though, in my judgment, it has sometimes not been sufficiently regarded. *Prevost v. Gratz*, 6 Wheat., 481; *Elmendorf v. Taylor*, 10 Wheat., 153; *Piatt v. Vattier*, 9 Pet., 416; *Stearns v. Paige*, 1 Story, 217; *Wagner v. Baird*, 7 How., 234; 1 Mad. Ch., 99; *Lawrence v. Blake*, 8 Cl. & Fin., 504; *Hough v. Richardson*, 3 Story, 659.

The plaintiff seems to have been quite aware of this difficulty, and has introduced into his bill some allegations designed to avoid it. Their substance is, that by the fraudulent practices of some of the defendants, and of other persons having a common interest with them, the plaintiff and his associates were prevented from discovering the decayed state of the timber until the summer of 1837; and the bill avers, "that he made no discovery of the frauds

practiced upon him until the 5th day of January, 1839; at which time your orator first discovered and was satisfied, and felt himself able to prove, the many charges set forth in this, his bill of complaint, and has to this time delayed prosecuting the same on account of the poverty the said frauds of the defendants brought upon him, and the hope that his appeals to their justice and equity would save him from the vexation, trouble and expense of an appeal to this court for redress."

This, taken in connection with the facts in the cause, is far from being satisfactory to my mind. It appears that, in the summer of 1837, a large quantity of this timber, taken from the land during the two preceding years by the plaintiff and his associates, was actually sawed into boards; and it is the result of that operation which is now relied on, as showing the worthlessness of the timber. If the plaintiff did not then know that its quality fell so far short of the representations as to amount to a fraud, he was either guilty of gross neglect, or there was not such a fraud as he relies on.

§ 769. *Unreasonable delay on the part of the plaintiff must be satisfactorily accounted for.*

In respect to his first feeling himself able to prove all his charges of fraud in January, 1839, no particular sources of evidence, then first discovered, being in any way indicated by the bill, or appearing in the proof, I can allow no weight to it. Such vague allegations are too easily made to be entitled to any effect. If, at that time, the plaintiff made any particular discovery, the bill should have stated what it was, and why it was not before known, and how it was discovered. *Stearns v. Paige*, 7 How., §29. That the delay has arisen from the poverty of the plaintiff, brought upon him by the frauds of the defendants, is not shown. He has paid the plaintiffs less than \$2,200; it does not appear that he lost any considerable sum in the lumbering operations; the evidence tends to show that, in 1835, he was worth about \$10,000, and that he was engaged in other eastern land speculations. His letter to the plaintiff, Boody, written in January, 1838, though it shows he was in want of money, does not indicate poverty; and there is no evidence that this pretense in the bill is well founded.

§ 770. *Acquiescence on the part of the plaintiff, though not pleaded in bar by the defendant, is often sufficient to prevent a rescission by the court.*

It is not by a statement of imaginary difficulties, or unreal obstacles, that delay is to be accounted for. In this case, I am not satisfied that anything more substantial is shown.

But this case contains facts still more formidable to the plaintiff's claim than mere delay. From 1837 down to the filing of the bill, lumbering operations have been carried on upon these lands by practical lumbermen, and so large quantities of timber removed, as to affect very materially the value of the land. During this time it has also been injured by fire. In January, 1838, after the timber taken off by the plaintiff and his associates had been actually sawed into boards, the plaintiff wrote a long letter to Boody, in which he recognizes his notes as due, and gives assurances of their being paid. And though he does not appear to have been concerned in the profits of the subsequent operation on the land, yet, as late as 1840, he offered to Purrington, one of the witnesses, a permit to cut timber thereon.

Here is an amount and kind of acquiescence, and a consequent change in the value of the property, which render the court, through the fault of the plaintiff, unable to restore the parties to their original condition.

There is one other part of the bill which must be adverted to. It is the claim for relief, by reason of an incumbrance on that part of the land purchased of Russell. There can be no doubt that a fraudulent concealment of incumbrances on the land sold may lay the foundation for relief, by a rescission of the sale, even after the execution of a deed of conveyance containing covenants, upon which a remedy might be had at law. But I apprehend that a very different case from the present must be made. The answer of Russell admits that the land was represented, at the time of the sale, to be unincumbered, and that it was his intention to have had an unincumbered title made by the holder of that title; but that the plaintiff, with a full knowledge of the state of the title, proposed to accept a deed from him, and to rely on his removing the incumbrance, which he afterwards did, by paying it off, and taking a discharge of the mortgage. There is nothing in the proofs sufficient to control this; and it is in part supported by the record evidence. The plaintiff has not suffered any loss by reason of the existence of the mortgage; nor does he show that he is now exposed to any. I cannot, for this cause, set aside a conveyance made seventeen years ago.

I have not adverted particularly to some more general grounds of complaint contained in the bill. It is certainly true that the defendants were not the owners of the land when the sale was made, having only a right to purchase it on certain terms. It is true, also, that the price at which they sold was at a very large advance upon that which they were to pay. I am satisfied that a prudent man, who knew the amount and condition of the timber standing on the land, would not have agreed to purchase at the rate of \$4.50 per acre. But I am not satisfied that the defendants knew the condition of the timber, nor that the land was worthless for lumbering operations. The fact that practical lumbermen have operated upon it so many years since 1835 is quite decisive on this point. These, and some other circumstances, would have been entitled to a more rigid scrutiny, if the transaction were recent, and the plaintiff had approached nearer to making satisfactory proof of the more specific charges of fraud in his bill. But, independent of the fraudulent concealment, by the defendants, of the state of the timber, alleged, but not to my satisfaction proved, they do not of themselves afford ground for relief, by reason of fraud; and I have, therefore, not thought it necessary more particularly to allude to them.

For similar reasons, I have not spoken of some of the points made in behalf of the defendants, and particularly of the defendant Boody. But it may be proper to state, what was conceded by the plaintiff's counsel, that his connection with these transactions was, if any, a mere legal relation, he not having, at any time, actually participated in them.

§ 771. *Fraud not proved; bill dismissed; plaintiff must pay costs.*

The bill is to be dismissed; and as to costs I shall follow what I understand to be a settled rule, that if a bill charges fraud, which is not proved, and the bill is dismissed, the plaintiff must pay costs.

LENOX v. NOTREBE.

(Superior Court, Territory of Arkansas: Hempstead, 251-258. 1834.)

Opinion by LACY, J.

STATEMENT OF FACTS.—The complainants filed their original bill to set aside and cancel a mortgage which they allege was executed by James Hamilton in

his life-time to Frederick Notrebe, and also to set aside and cancel a deed of sale made by said Notrebe to the legal representatives of said Hamilton; they pray all the title and interest of the property contained in said deed be vested in themselves. The bill states that Hamilton became indebted to Notrebe in the sum of about \$500, for which he executed a mortgage on two slaves, Phillis and Caroline, which they have fully satisfied. It charges that all the property belonging to Hamilton was exposed to sheriff's sale in 1825, and that Notrebe became the purchaser for the sum of \$220, and that he agreed that Hamilton might redeem the property one year thereafter, by his paying to Notrebe the purchase money and interest, and also whatever else was owing by Hamilton to Notrebe. It alleges that Drusilla Hamilton during her widowhood, and Lenox since his intermarriage with her, have fully paid off and discharged Notrebe's debt.

Notrebe and the heirs of Hamilton are made defendants to the original bill. Notrebe answered, and admitted generally the allegations set forth. The fund, by which the payment was made, is alleged to have been a gift from Sarah Blanton to Drusilla Hamilton, for her sole benefit and use, and the remainder out of individual means of Lenox. The heirs answered by their guardian, and denied the allegations generally and specifically. It is stated by them, after the purchase by Notrebe of Hamilton's personal estate at sheriff's sale, it was agreed between Hamilton and Notrebe that the latter was to reconvey the property to them by Hamilton's paying whatever might be owing to Notrebe; that Hamilton in his life-time never did pay off the debt and take a conveyance to himself, nor did he redeem the property for their benefit; that in 1826 their relative, Sarah Blanton, furnished to their mother, Drusilla Hamilton, now Drusilla Lenox, \$1,100 for their sole use and benefit, and upon express conditions that Notrebe's bill of sale was to be paid off with it, and all the property therein contained conveyed to them. Accordingly the said Drusilla did pay the \$1,100 to Notrebe for their use, and took a deed of conveyance, which was regularly acknowledged and recorded in 1826, conveying all the right, title, and interest to the legal representatives of James Hamilton, deceased. They afterwards filed a cross-bill against Lenox and Notrebe (his wife Drusilla having previously departed this life), setting forth the same material facts as contained in their answer, and prayed that the slaves be surrendered to their guardian for them, and that a decree be rendered in their favor, for the rents and profits accruing upon the estate.

Lenox answered, and set forth in addition to his original bill that the money advanced for the redemption of the mortgage and bill of sale was furnished by his wife and himself individually, and that a judgment had been rendered in the state of Mississippi against him, in favor of Sarah Blanton's administratrix, for the \$1,100 furnished his wife, Drusilla, to pay off Notrebe's debt, and on that judgment suit had been instituted against him in the Arkansas circuit court and judgment obtained, for which he was then liable. He also claimed title to the same property by a bill of sale executed by James Hamilton to Pugh in 1825, and prior to the sale by the sheriff to Notrebe. Pugh conveyed to William Rainey in 1825, and Rainey to the complainant in 1831. It was admitted that Mrs. Lenox and her two infant children, Sarah E. and Isaac Francis, departed this life in December, 1828.

Notrebe answered, and admitted the conveyance to Hamilton's heirs and representatives, and the full satisfaction of his debt. He stated the \$1,100 was paid by Mrs. Blanton, for the benefit of the heirs of Hamilton, and that

he made the conveyance to Hamilton's legal representatives. The proof in the cause clearly demonstrated that the \$1,100 was the consideration of the deed from Notrebe to Hamilton's representatives, and was furnished by Sarah Blanton, for the sole use and benefit of the children and representatives of James Hamilton, deceased, and also that Mrs. Hamilton herself manifested some displeasure at the conveyance not having been made to the children. The object of the advancement, as shown by the testimony, was to vest in the children all right and title to the property.

The pleadings in this cause present considerable confusion and some contradiction. The parties seem to have changed their ground in their complaint and defense, and herein the court have found no little embarrassment in examining the record. The questions presented are numerous and highly important, and we have given to them a careful consideration. In their investigation, the court has derived much assistance from the highly satisfactory arguments of all the counsel concerned.

The complainants' bill is mainly a claim to set aside a deed or bill of sale, regularly executed and recorded, and to vest title in themselves, without charging expressly that the conveyance was made through mistake or fraud. It is difficult for the court to conceive by what means they propose to effect their object. It is not pretended that Notrebe, in conveying the property to Hamilton's representatives, acted fraudulently. The proof shows that he was governed by the most scrupulous honor; that his object was to protect the rights of the children, without prejudicing the interest of creditors. And hence, though he knew that it was the wish and intention of Mrs. Blanton and Mrs. Hamilton to convey the property to the children by name, he chose to employ descriptive terms in the conveyance, for fear they might by possibility be injured. Was it by mistake that the term "legal representatives" was used in the conveyance? Certainly not; for he had a full knowledge of all the facts, and even incurred the expense and trouble of consulting counsel upon the subject. It is contended that the conveyance was improperly made. In what way? The court is not aware that a deed or bill of sale can be impeached except for mistake or fraud.

The defendants claim the property as the legal representatives of Hamilton, and they show a deed or bill of sale, regularly executed and recorded, to protect their title. Even where fraud is alleged to set aside a deed, it must be satisfactorily proven, either by positive or circumstantial testimony. This doctrine is so fully and ably examined in the leading case of *Hildreth v. Sands*, 2 Johns. Ch., 36 to 56, by Chancellor Kent, and the authorities there cited are so numerous and conclusive, that it is deemed unnecessary to refer to others.

§ 772. *A deed will be set aside for fraud. The fraud must be alleged and clearly proved.*

A deed, or even a judgment, or a decree of a court of chancery of twenty years standing, can all be set aside on the ground of fraud; but then it must be clearly alleged in the bill and supported by proof. In this case there is no charge of fraud, nor is there any attempt to prove it. The defendants are clothed with the legal title, and until that title is destroyed by a superior equity they are the rightful owners of the estate. It is not denied but what they are the legal representatives of Hamilton, and if so, all the right, title and interest of the estate attached immediately to them on the execution of Notrebe's bill of sale.

§ 773. *An equity is not subject to execution unless by statute.*

It is contended that the purchase by Notrebe, at the sheriff's sale, conveyed no more than an equitable interest, and that the mortgagee held the property subject to redemption. An equity is not subject to execution, unless by some particular statute. This principle is too familiar and salutary to require argument or authority to sustain it. Hamilton's legal estate was sold by the sheriff, and Notrebe became the purchaser; and that estate, whatever it may be, the defendants are in law and equity entitled to.

It is difficult to conceive how it can be considered a mortgage when the complainant does not charge in his bill that it was one, though the defendants treat it in the character of a mortgage in their answer. It was, to all intents and purposes, a legal sale, and a legal title was conveyed. And if there was a latent equity, constituting it a mortgage, even a court of chancery would never consider it so, unless for beneficial purposes. This sale was good against Hamilton and his heirs, and the agreement of Notrebe afterwards to reconvey did not change its character, though it might have incumbered it with conditions. Both the complainant and the defendants claim through the purchase of Notrebe, and it is good against them both and all the world. It can be impeached only on the ground of fraud or mistake by creditors or purchasers. Is the present complainant a creditor or purchaser? Can a court of equity view him in that light? When did Hamilton's estate become indebted to him, or at what time did he constitute himself creditor or purchaser? The property remaining in Hamilton's possession, or coming to him, could not make him the one or the other. It might and did constitute him a trustee. 1 Atk., 489.

§ 774. *A trustee cannot become the purchaser of the trust estate, nor buy an outstanding title to it for his own benefit.*

A trustee cannot acquire any advantage by possession of property, but holds it for the benefit of his *cestui que trust*. 2 Johns. Ch., 30; 1 Dow., 269; 1 Ch. Cas., 191; 1 Ball & Beatty, 46, 47; 2 Johns. Ch., 269. It is a settled principle that a trustee can gain no benefit by any acts done by him as trustee, but that it shall accrue to him for whom he holds. He is not permitted to become a purchaser of part or the whole of the estate for which he is trustee for a valuable consideration. Lord Hardwicke determined that a trustee could not buy at a sale by auction, and Lord Eldon has followed that decision. The reason is apparent. So jealous is the court of a trustee's taking advantage of his situation to benefit himself, that he could not even purchase property which the owner refused to sell to the *cestui que trust*. So a trustee who purchases a mortgage or judgment which was a lien upon the trust estate is not allowed to turn such purchase to his own advantage. 1 Mad., 90-93; 1 Johns. Ch., 27; 2 id., 252. In 2 Caines' Cases in Error, 183, it is decided that a trustee cannot purchase an outstanding claim or title for his own benefit. If this doctrine be true, and of that there can be no doubt, then what sort of title did Lenox acquire, when holding the property for Hamilton's children, by this purchase from Rainey? If the purchase from Rainey was fair and for a valuable consideration, it could not avail the complainant anything, for he was holding as trustee for the defendants, and hence he could take nothing by his purchase, and it would inure to their benefit. How much stronger is the case against him when he comes into equity and sets up a title which, by his own showing, is fraudulent on its face, and that, too, to defeat the rights of infants, acquired for a valuable consideration. Besides, this fraudulent deed or bill of sale was

executed long after the suit was commenced, and even after the filing of the cross-bill, and for the avowed and express purpose of defeating a legal and equitable title.

The defendants claim as purchasers for a valuable consideration, which is proved to have been advanced and paid to Notrebe in discharge of his demand against their ancestor, and this title is attempted to be disturbed and overthrown by a voluntary conveyance, fraudulently entered into, to defeat the rights of innocent purchasers or creditors. The rule of law that a fraudulent conveyance between the grantor and grantee is obligatory upon himself and his heirs, so far from prejudicing the right of the infants before the court, will shield and protect them. They are purchasers, and claim the estate as such, and do not derive title by descent. The conveyance of Rainey to Lenox, as to them, is fraudulent and void. But it is said that Notrebe and the defendants treated the sheriff's sale as a mortgage in their cross-bill and answer, and it being such will enable the complainant, in right of himself and his wife, to take the estate. The bill nowhere charges the sheriff's sale, in express terms, to be a mortgage. It is true it often has reference to a mortgage, but when that is the case, it is confined to the mortgage of the two slaves, Phillis and Caroline. Infants cannot be prejudiced by the misstatements or omissions of their guardian in his answer. Hence a court of chancery will decree according to the facts of the case. 3 Johns. Ch., 367.

§ 775. *The answer of one defendant cannot be evidence for or against a co-defendant.*

The answer of one defendant cannot be evidence for or against a codefendant. 9 Cranch, 153; 2 Wheat., 380. In this instance, the original answer of Notrebe responds in general terms affirmatively to the complainant's bill. The defendants, not deeming it satisfactory and complete, asked in their cross-bill for a full disclosure of all the facts, and hence his answer may be considered an amended answer to the complainant's original bill, and although it is not evidence against his codefendant, is nevertheless evidence against the complainant. *Field v. Holland*, 6 Cranch, 8; 2 P. Wms., 453. Notrebe's answer confirms the other testimony in the cause, which is abundant without it, and therefore there can be no doubt that the fund that redeemed the property sold at the sheriff's sale was advanced upon the express condition that it was to be conveyed to the children of Hamilton, and the deed shows upon its face by whom and for what purposes it was so advanced. If the property was held as collateral security subject to redemption, before Lenox and wife could ask a conveyance, they would have to show that they had actually paid the incumbrance. The solvency or insolvency of the estate can make no difference, for the view here presented considers the infants as purchasers, and the complainant and wife claiming as representatives of the estate. Besides, the deed from Notrebe to the children was procured through the agency of Mrs. Hamilton, and she entirely approved of its contents. Whatever right she had or possessed before that time was, by that conveyance, relinquished and given up to her children, and her husband, who claims through her, can in no possible event derive title.

§ 776. *A widow cannot be endowed of a trust estate.*

A widow cannot be endowed of a trust estate. 1 Har. Ch., 7, 22. The property remaining with Hamilton during his life-time, and with her afterwards, and coming finally into the possession of Lenox, did not at all change the nature of Notrebe's purchase. He was the legal owner, and no one could

possibly have any title to it, except in equity. As the case stands, Notrebe could not have probably been compelled by any one to have reconveyed, for his promise was made after the sale and without consideration; and above all, there can be no pretense that he could be compelled to convey to Lenox and wife. If creditors have lain dormant and lost their rights, or can even yet assert them, that cannot be any reason why those should be preferred who have no shadow or pretext of right in their favor. The estate vested in the defendants is both a legal and an equitable one, so far as the complainants are concerned; and they will not be permitted to disturb it without showing right or title in themselves. It is no answer to say that a judgment is rendered against Lenox by the administratrix of Sarah Blanton, deceased, which remains yet unsatisfied and enjoined by the complainants. That record could not be evidence in any point of view against the defendants, for they were neither privy nor parties to it (1 Stark. Ev., 217); but if it even could be, still it would weigh nothing against the mass of testimony in the cause. Though the judgment and the purchase by Lenox of Rainey, after the filing of the cross-bill, throw a dark and dishonoring shade over the whole of this transaction, and demonstrate its true nature and complexion, yet the court will forbear, and not indulge in expressions of harshness and severity which might be called for, and would be justified on this occasion,—*requiescat mortuum manes in pace*.

Every aspect in which the court is capable of viewing or considering this subject constrains them to believe that both the law and equity of the case are with the defendants. It will, therefore, be decreed that the original bill be dismissed with costs, and the prayer of the cross-bill granted.

Decreed accordingly.

ALLORE v. JEWELL.

(4 Otto, 506-518. 1876.)

APPEAL from U. S. Circuit Court, Eastern District of Michigan.

Opinion by MR. JUSTICE FIELD.

STATEMENT OF FACTS.—This is a suit brought by the heir-at-law of Marie Genevieve Thibault, late of Detroit, Michigan, to cancel a conveyance of land alleged to have been obtained from her a few weeks before her death, when from her condition she was incapable of understanding the nature and effect of the transaction.

The deceased died at Detroit on the 4th of February, 1864, intestate, leaving the complainant her sole surviving heir-at-law. For many years previous to her death, and until the execution of the conveyance to the defendant, she was seized in fee of the land in controversy, situated in that city, which she occupied as a homestead. In November, 1863, the defendant obtained from her a conveyance of this property. A copy of the conveyance is set forth in the bill. It contains covenants of seizin and warranty by the grantor, and immediately following them an agreement by the defendant to pay her \$250 upon the delivery of the instrument; an annuity of \$500; all her physician's bills during her life; the taxes on the property for that year, and all subsequent taxes during her life; also, that she should have the use and occupation of the house until the spring of 1864, or that he would pay the rent of such other house as she might occupy until then. The property was then worth, according to the testimony in the case, between \$6,000 and \$8,000. The de-

ceased was at that time between sixty and seventy years of age, and was confined to her house by sickness, from which she never recovered. She lived alone, in a state of great degradation, and was without regular attendance in her sickness. There were no persons present with her at the execution of the conveyance, except the defendant, his agent and his attorney. The \$250 stipulated were paid, but no other payment was ever made to her; she died a few weeks afterwards.

As grounds for canceling this conveyance, the complainant alleges that the deceased, during the last few years of her life, was afflicted with lunacy or chronic insanity, and was so infirm as to be incapable of transacting any business of importance; that her last sickness aggravated her insanity, greatly weakened her mental faculties, and still more disqualified her for business; that the defendant and his agent knew of her infirmity, and that there was no reasonable prospect of her recovery from her sickness, or of her long surviving, when the conveyance was taken; that she did not understand the nature of the instrument; and that it was obtained for an insignificant consideration, and in a clandestine manner, without her having any independent advice.

These allegations the defendant controverts, and avers that the conveyance was taken upon a proposition of the deceased; that at the date of its execution she was in the full possession of her mental faculties, appreciated the value of the property, and was capable of contracting with reference to it, and of selling or otherwise dealing with it; that since her death he has occupied the premises, and made permanent improvements to the value of \$7,000; and that the complainant never gave him notice of any claim to the property until the commencement of this suit.

The court below dismissed the bill, whereupon the complainant appealed here. The question presented for determination is, whether the deceased, at the time she executed the conveyance in question, possessed sufficient intelligence to understand fully the nature and effect of the transaction; and, if so, whether the conveyance was executed under such circumstances as that it ought to be upheld, or as would justify the interference of equity for its cancellation. Numerous witnesses were examined in the case, and a large amount of testimony was taken. This testimony has been carefully analyzed by the defendant's counsel; and it must be admitted that the facts detailed by any one witness with reference to the condition of the deceased previous to her last illness, considered separately and apart from the statements of the others, do not show incapacity to transact business on her part, nor establish insanity, either continued or temporary. And yet, when all the facts stated by the different witnesses are taken together, one is led irresistibly by their combined effect to the conclusion that, if the deceased was not afflicted with insanity for some years before her death, her mind wandered so near the line which divides sanity from insanity as to render any important business transaction with her of doubtful propriety, and to justify a careful scrutiny into its fairness.

Thus, some of the witnesses speak of the deceased as having low and filthy habits; of her being so imperfectly clad as at times to expose immodestly portions of her person; of her eating with her fingers and having vermin on her body. Some of them testify to her believing in dreams, and her imagining she could see ghosts and spirits around her room, and her claiming to talk with them; to her being incoherent in her conversation, passing suddenly and without cause from one subject to another; to her using vulgar and profane

language; to her making immodest gestures; to her talking strangely, and making singular motions and gestures in her neighbors' houses and in the streets. Other witnesses testify to further peculiarities of life, manner, and conduct; but none of the peculiarities mentioned, considered singly, show a want of capacity to transact business. Instances will readily occur to every one where some of them have been exhibited by persons possessing good judgment in the management and disposition of property. But when all the peculiarities mentioned, of life, conduct and language, are found in the same person, they create a strong impression that his mind is not entirely sound; and all transactions relating to his property will be narrowly scanned by a court of equity, whenever brought under its cognizance.

The condition of the deceased was not improved during her last sickness. The testimony of her attending physician leads to the conclusion that her mental infirmities were aggravated by it. He states that he had studied her disease, and for many years had considered her partially insane, and that in his opinion she was not competent in November, 1863, during her last sickness, to understand a document like the instrument executed. The physician also testifies that during this month he informed one Dolsen, who had inquired of the condition and health of the deceased, and had stated that efforts had been made to purchase her property, that in his opinion she could not survive her sickness, and that she was not in a condition to make any sale of the property "in a right way."

This Dolsen had at one time owned and managed a tannery adjoining the home of the deceased, which he sold to the defendant. After the sale, he carried on the business as the defendant's agent. Through him the transaction for the purchase of the property was conducted. The deceased understood English imperfectly, and Dolsen undertook to explain to her, in French, the contents of the paper she executed. Some attempt is made to show that he acted as her agent; but this is evidently an afterthought. He was in the employment of the defendant, had charge of his business, and had often talked with him about securing the property; and in his interest he acted throughout. If the deceased was not in a condition to dispose of the property, she was not in a condition to appoint an agent for that purpose.

The defendant himself states that he had seen the deceased for years, and knew that she was eccentric, queer and penurious. It is hardly credible that, during those years, carrying on business within a few yards of her house, he had not heard that her mind was unsettled; or, at least, had not inferred that such was the fact, from what he saw of her conduct. Be that as it may, Dolsen's knowledge was his knowledge; and when he covenanted to pay the annuity, some inquiry must have been had as to the probable duration of the payments. Such covenants are not often made without inquiries of that nature; and to Dolsen he must have looked for information, for he states that he conversed with no one else about the purchase. With him and with his attorney he went to the house of the deceased, and there witnessed the miserable condition in which she lived, and he states that he wondered how anybody could live in such a place, and that he told Dolsen to get her a bed and some clothing. Dolsen had previously informed him that she would not sell the property; yet he took a conveyance from her at a consideration which, under the circumstances, with a certainty almost of her speedy decease, was an insignificant one compared with the value of the property.

In view of the circumstances stated, we are not satisfied that the deceased

was, at the time she executed the conveyance, capable of comprehending fully the nature and effect of the transaction. She was in a state of physical prostration; and from that cause, and her previous infirmities, aggravated by her sickness, her intellect was greatly enfeebled; and, if not disqualified, she was unfitted to attend to business of such importance as the disposition of her entire property, and the securing of an annuity for life. Certain it is that, in negotiating for the disposition of the property, she stood, in her sickness and infirmities, on no terms of equality with the defendant, who, with his attorney and agent, met her alone in her hovel to obtain the conveyance.

§ 777. *Where there is weakness of mind short of insanity, arising from age or sickness, and the consideration is grossly inadequate, undue influence in obtaining a conveyance will be inferred.*

It is not necessary, in order to secure the aid of equity, to prove that the deceased was at the time insane, or in such a state of mental imbecility as to render her entirely incapable of executing a valid deed. It is sufficient to show that, from her sickness and infirmities, she was at the time in a condition of great mental weakness, and that there was gross inadequacy of consideration for the conveyance. From these circumstances imposition or undue influence will be inferred. In the case of *Harding v. Wheaton*, reported in the 2d of Mason [378], a conveyance executed by one to his son-in-law, for a nominal consideration and upon a verbal arrangement that it should be considered as a trust for the maintenance of the grantor, and after his death for the benefit of his heirs, was, after his death, set aside, except as security for actual advances and charges, upon application of his heirs, on the ground that it was obtained from him when his mind was enfeebled by age and other causes. "Extreme weakness," said Mr. Justice Story, in deciding the case, "will raise an almost necessary presumption of imposition, even when it stops short of legal incapacity; and though a contract, in the ordinary course of things, reasonably made with such a person, might be admitted to stand, yet if it should appear to be of such a nature as that such a person could not be capable of measuring its extent or importance, its reasonableness or its value, fully and fairly, it cannot be that the law is so much at variance with common sense as to uphold it." The case subsequently came before this court; and, in deciding it, Mr. Chief Justice Marshall, speaking of this, and, it would seem, of other deeds executed by the deceased, said: "If these deeds were obtained by the exercise of undue influence over a man whose mind had ceased to be the safe guide of his actions, it is against conscience for him who has obtained them to derive any advantage from them. It is the peculiar province of a court of conscience to set them aside. That a court of equity will interpose in such a case is among its best settled principles." *Harding v. Handy*, 11 Wheat., 125 (§§ 779-89, *infra*).

The same doctrine is announced in adjudged cases almost without number; and it may be stated as settled law that whenever there is great weakness of mind in a person executing a conveyance of land arising from age, sickness or any other cause, though not amounting to absolute disqualification, and the consideration given for the property is grossly inadequate, a court of equity will, upon proper and seasonable application of the injured party or his representatives or heirs, interfere and set the conveyance aside. And the present case comes directly within this principle.

In the recent case of *Kempson v. Ashbee*, 10 Ch. Cas., 15, decided in the court of appeal in chancery in England, two bonds executed by a young

woman living at the time with her mother and step-father — one at the age of twenty-one, as surety for her step-father's debt, and the other at the age of twenty-nine, to secure the amount of a judgment recovered on the first bond — were set aside as against her, on the ground that she had acted in the transaction without independent advice; one of the justices observing that the court had endeavored to prevent persons subject to influence from being induced to enter into transactions without advice of that kind. The principle upon which the court acts in such cases, of protecting the weak and dependent, may always be invoked on behalf of persons in the situation of the deceased spinster in this case, of doubtful sanity, living entirely by herself, without friends to take care of her, and confined to her house by sickness. As well on this ground as on the ground of weakness of mind and gross inadequacy of consideration, we think the case a proper one for the interference of equity, and that a cancellation of the deed should be decreed.

§ 778. *Lapse of six years in bringing suit cannot help defendant where the de'ay has not injured his property or rights.*

The objection of the lapse of time — six years — before bringing the suit, cannot avail the defendant. If, during this time, from the death of witnesses or other causes, a full presentation of the facts of the case had become impossible, there might be force in the objection. But as there has been no change in this respect to the injury of the defendant, it does not lie in his mouth, after having, in the manner stated, obtained the property of the deceased, to complain that her heir did not sooner bring suit against him to compel its surrender. There is no statutory bar in the case. The improvements made have not cost more than the amount which a reasonable rent of the property would have produced, and the complainant, as we understand, does not object to allow the defendant credit for them. And as to the small amount paid on the execution of the conveyance, it is sufficient to observe that the complainant received from the administrator of the deceased's estate only \$113.42; and there is no evidence that he ever knew that this sum constituted any portion of the money obtained from the defendant. A decree must, therefore, be entered for a cancellation of the deed of the deceased and a surrender of the property to the complainant, but without any accounting for back rents, the improvements being taken as an equivalent for them.

Decree reversed, and cause remanded with directions to enter a decree as thus stated.

MR. JUSTICE STRONG dissented (WAITE, C. J., and BRADLEY, J., concurring), on the ground that the complainant had been guilty of inexcusable laches.

HARDING v. HANDY.

(11 Wheaton, 108-133. 1826.)

APPEALS FROM U. S. Circuit Court for Rhode Island.

STATEMENT OF FACTS.— The bill alleged that Harding and Nancy, his wife, and Sterling Wheaton, with others, not parties to this suit, and the defendant, Caleb Wheaton, were heirs of Comfort Wheaton, who died in 1810. That about 1802, the latter became of weak mind, and soon became incapable of managing his estate. Whereupon Caleb W., on behalf of himself and the plaintiffs, to preserve the estate for the heirs, entered into an agreement with

the defendant Handy, to have the said estate conveyed to Handy by the deceased for a nominal consideration; and that Handy should by deed covenant to hold the same in trust for the following purposes: To provide for the support of said Comfort W., during his life; and after remuneration for his trouble and expense, to hold the residue of the estate for the benefit of the heirs. The property was so conveyed by Comfort W. to Handy by deed of May 9, 1805, but the latter refused to execute the trust deed above described and claimed the property as his own. The bill also alleged that Caleb W. became administrator of the personal estate of the deceased, and further proceedings, as the sale by the administrator of said real estate, and its purchase by Caleb W., for the benefit of the heirs, and that various suits at law were brought by which the property became greatly depreciated in value, and closed with a prayer for an accounting and for a decree exonerating the property from the deeds to Handy after satisfying his just charges, and for an order setting off the interests of the plaintiffs to them, and for general relief.

Handy, in his answer, denied the incapacity of Comfort W., and that he, Handy, purchased as trustee, and alleged that he was a purchaser for valuable and full consideration. Caleb W. admitted the allegations of the petition, and submitted to any decree that the court might render. Further facts are stated in the opinion.

Opinion by MARSHALL, C. J.

The counsel for Asa Handy contend that the bill seeks to set up a parol trust, which is denied in the answer, and that the decree is founded on a supposed incompetency of Comfort Wheaton to convey his property. The decree, therefore, is not supported by the allegations of the bill. They also contend that the decree is not sustained by the proofs in the cause.

§ 779. *The allegations in a bill in equity must be sufficient to found a decree upon, to conform with them.*

That the bill alleges the conveyances of the 9th of May to have been received for the benefit of the family is unquestionable; but this is not incompatible with the incompetency of Comfort Wheaton to execute them. Deeds may be obtained from a weak man for the purpose of preserving his estate for himself and family, and of protecting him from the impositions to which he might be exposed; and there is nothing to restrain one of the heirs who may think himself aggrieved, from bringing the whole case before a court of equity. If, indeed, it were true in fact that the bill does not allege this incompetency so as to put it in issue, the objection would be conclusive; for it is well settled that the decree must conform to the allegations of the parties.

§ 780. *Though a statement of facts, in a bill, from which a conclusion of incompetency may be drawn is not as satisfactory as a direct statement, it is sufficient after answer filed to the merits.*

But we think this bill is not justly exposed to this objection. It states the general correct conduct of C. W. during the life of his wife; that soon after her decease he was visited by a paralytic stroke, which was followed by a total change in his conduct. He was addicted to intoxication and to many vicious habits, in the course of which fears were excited in his family that he would waste all his property or convey it to his profligate companions. They consulted together and with their friends; and the first proposition was to apply to the court for a guardian to manage his affairs, according to the law of Rhode Island in such cases. It was, however, finally agreed that Asa Handy

should obtain deeds for his property, and hold it for the use of C. W. during his life, and of his heirs after his death. The bill then proceeds to state that the said Asa Handy, knowing the premises, did induce the said Comfort, "he being in the state and condition of body and mind aforesaid," for the nominal consideration of \$2,178, to make the conveyances in the bill mentioned.

Although a more direct and positive allegation that C. W. was incapable of transacting business would have been more satisfactory than the detail of circumstances from which the conclusion is drawn, yet we think that the averment of his incompetency is sufficiently explicit to make it a question in the cause. The defendant has met this charge, and we cannot doubt that his answer is sufficiently responsive to the bill, to give him all the benefit which the rules of equity allow to an answer in such circumstances.

§ 781. *The degree of weakness of mind and imposition to induce a court of equity to interfere is for the consideration of the court alone, and a jury is not necessary.*

We proceed, then, to look into the proofs in the cause, and to inquire whether the testimony establishes the incompetency of C. W., when these deeds were executed.

We have examined, with attention, the immense mass of contradictory evidence which the record contains. A number of persons, and among others the witnesses to the deeds, express the opinion that he was capable of managing his affairs and of disposing of his property. This evidence, however, is met by such a mass of opposing testimony as can scarcely be resisted. Among the numerous witnesses who testify to the imbecility of his mind are many who had been long and intimate acquaintances. All his physicians concur in stating, in strong and decided terms, the weakness of his mind as well as his body, which they ascribe chiefly to the character of his disease. One of them, Dr. Barrows, attended him about the time these deeds were executed. He says: "With regard to the state of his mind, at all times when I saw him within the said period (from the 1st of March to the 25th of November, 1809), I can say that he appeared to me wholly incapacitated to transact any money business or to have the care of any concerns whatever. It is my opinion that the decay of his mental faculties was such as to induce that state of fatuity which would unfit him for all the purposes relative to the affairs of life, except obeying the various calls of nature." Some of the witnesses add to their opinion of his imbecility some circumstances on which the opinion is founded, which cannot fail to make a deep impression on the mind. Ziba Olney says that he was acquainted with C. W. for the last five years of his life, who, for the last fifteen months of them, resided in his family. "That during the whole of these times he appeared to be childish and incapable of transacting any business. The reasons of this opinion are: that he would frequently repeat the same questions, and would several times in the same day ask what day of the week it was. At short intervals he would talk rationally, and then would break off from conversation to singing, and from that to crying. That he would frequently go out in the night and day naked, except his shirt. That he would frequently break out in profane language, and at other times preach." Several other witnesses describe the situation and conduct of this afflicted old gentleman, in a manner to add great weight to their opinion that his faculties were prostrated. Many, even of those witnesses who depose to his competency, declare that the public opinion and language of his neighborhood was that his mind was deplorably impaired; and the conduct and declarations of his family,

including the defendant, Asa Handy, himself, showed a settled conviction that C. W. was incapable of managing his affairs.

There is evidence of the consultations in which Handy participated, previous to the deeds of the 9th of May, for putting the old gentleman and his estate under guardianship; and there is, also, evidence of similar consultation respecting the propriety of procuring a conveyance of his property, in order to save it for himself and his family. This may not be admissible as proof of a trust; but it is strong evidence of a conviction that the person from whom the deed was to be obtained was unfit for the management of his own affairs. Among other testimony to this point, Abner Daggett deposes that Asa Handy asked him if he had a notion of buying his father Wheaton's lot. The witness answered that he had had some conversation with Wheaton about it; upon which Handy said, Wheaton was no more capable of selling his estate than a child. The witness was deterred from purchasing, though he wished to acquire the lot, by the fear of subsequent controversy.

The great and sudden revolution in the whole conduct of C. W., immediately after the first paralytic stroke, viewed in connection with his advanced age, is a strong circumstance in corroboration of the opinion that his mind was diseased. A sober, prudent, reflecting and moral man, between seventy and eighty years of age, mingles with profligate people, to whom he devotes himself, and becomes suddenly intemperate, immoral, and childishly whimsical and indiscreet, so that his nearest friends think it necessary to put it out of his power to ruin himself.

The terms on which this old gentleman stood with his family are not entirely unworthy of consideration. But two of his children, Caleb and Mary, the wife of the defendant Asa, lived near him. From causes, some of which may be discerned in the record, he was on ill terms with Caleb. One of the witnesses deposes that he said on one occasion: "You know, Asa, I made you the deeds to spite Caleb." There is other testimony to the same effect. The necessary consequence of this quarrel with Caleb was, to subject him, in an increased degree, to the influence of Mary Handy and her husband, and exposes the deeds, conveying all his property to them, to an increased degree of suspicion.

The inadequacy of the consideration, as stated in the bonds referred to in the answer, furnishes an additional argument against these deeds. It was chiefly the support of C. W. for the residue of his life. This proved to be five years, which was a longer time than his age and state of health, at the time of the transaction, rendered probable; but which was certainly not a full consideration for the property.

These various circumstances add so much weight to the opinions of those who depose to the incompetence of C. W., that the mind cannot withhold its assent from that conclusion. An issue, indeed, might have been directed; but we do not think it a case in which this course ought to have been pursued. The degree of weakness or of imposition, which ought to induce a court of chancery to set aside a conveyance, is proper for the consideration of the court itself; and there seems to be no reason for the intervention of a jury, unless the case be one in which the court would be satisfied with the verdict, however it might be found. A verdict affirming the capacity of C. W. to execute these deeds, on the 9th of May, 1805, could not, we think, have been satisfactory to the court; and it was, consequently, not necessary to refer the question of competency to a jury.

§ 782. *Where a deed is obtained by undue influence from one of weak mind, a court of equity has power to set it aside; but the grantee may be allowed his just claims for repairs and improvements that are beneficial to the property.*

If these deeds were obtained by the exercise of undue influence over a man whose mind had ceased to be the safe guide of his actions, it is against conscience for him who has obtained them to derive any advantage from them. It is the peculiar province of a court of conscience to set them aside. That a court of equity will interpose in such a case is among its best settled principles. The cases cited in the argument, which we will not repeat, place this beyond the possibility of question. It was, therefore, proper to set aside the deeds, and to direct the defendant, Handy, to account for the money he had received under them.

But, although that defendant ought not to be permitted to benefit himself by his own improper act, it is not reasonable that he should be burdened with the debts of C. W., and the expenses of his maintenance. These are proper charges on the estate itself. So are improvements and repairs which enhanced the rents, and the value of the estate. As a defendant in equity, Asa Handy has certainly a right to retain them, and to receive credit for them in the account which was directed by the circuit court.

§ 783. *The court will not investigate items of an account unless by exceptions to the master's report, supported by his special statements or by evidence, which ought to be brought before the court by reference to the particular testimony on which exceptor relies.*

There is, we think, no error in the manner in which the account was directed to be taken. The parties were heard before the master, who, after a very laborious and comprehensive examination of their accounts, has made a voluminous report, to which both parties have excepted.

It may be observed, generally, that it is not the province of a court to investigate items of an account. The report of the master is received as true, when no exception is taken; and the exceptions are to be regarded so far only as they are supported by the special statements of the master or by evidence, which ought to be brought before the court by a reference to the particular testimony on which the exceptor relies. Were it otherwise, were the court to look into the immense mass of testimony laid before the commissioner, the reference to him would be of little avail. Such testimony, indeed, need not be reported further than it is relied on to support, explain or oppose a particular exception.

1. The first exception made by Handy is, that only the sum of \$5,448.26 was allowed him by the commissioner, instead of \$101,167.30, the amount of his claim. This is a general exception, which comprehends, it is supposed, the particular alleged errors enumerated in the subsequent exceptions.

§ 784. *A party cannot prove items of an account by his own oath, which can be fully proved by other competent evidence.*

2. The second exception is, that the master did not admit his whole account on his own oath. The conduct observed by the master on this point is thus specially stated by himself: "I admitted said Asa to make oath to all charges, whether for money, specific articles or services, which, from the circumstances of the parties, or the nature of the charge itself, could not, in my opinion, be proved by vouchers or other legal evidence."

This rule, adopted by the master, is, in our opinion, one to which Handy could make no just objection. There can be no propriety in admitting the

party as a witness to support items in an account, which, from their character, admit of full proof. Of this description are the items which constitute his third exception. It is the demand of testimony to support his charges for repairs and improvements. These repairs and improvements are susceptible of complete proof; and, as there could be no difficulty in procuring it, the commissioner did right in requiring it. The fourth exception is to the rejection of his oath to discharge himself from rents, which, as he alleged, he had not received.

The commissioner has made considerable deductions from the total amount of rent, if calculated for the whole time, but has rejected the oath of Handy, because he admitted that he had kept ledgers in which his receipts of rents were regularly entered, which were still in his possession, but which he refused to produce. The decision of the master on this point was so obviously right that it need only be stated to be approved.

§ 785. *A measurement of repairs, taken in the presence of the master, and proved, is entitled to more weight than an ex parte measurement.*

5. The fifth exception is, that the master has not allowed for repairs and improvements according to the measurement of Nathan Parks, which was on oath, but according to the estimate of John Newman, which was not founded on actual measurement, but made principally by the eye.

The master reports that, "in addition to the evidence produced by the parties, I appointed John Newman, an experienced and skilful measurer of carpenter's work, to go on the premises, together with the said Handy and myself, and to measure and estimate all such repairs, and alterations, and buildings, as said Handy, being under oath, should point out as being made and executed by him." The estimate of the said Newman, with his deposition, are referred to and annexed to the report.

Newman deposes that his estimate is founded on actual measurement, except parts of the roof of one building, which he took from the measurement of Nathan Parks, and of another, in which he was guided by the statement made by Handy himself, of the length of the rafters, which accorded with his own estimate.

That a measurement thus made and proved was entitled to more respect than the *ex parte* measurement of Parks, cannot be doubted.

§ 786. *An exception to a master's report which is wholly unsupported by the evidence will be disregarded.*

6. An exception is also taken to the report because it disallows the charge made by Handy of a note, which he says was proved.

This exception, it is presumed, was not taken before the master, as he does not notice it, and it is too vague to be regarded. Neither the note, nor the ground on which payment is claimed, nor its amount, nor the reasons of its rejection, are stated; nor is there any reference to the evidence in support of it. Nothing is stated to induce a suspicion that the disallowance of it was improper. Yet the court, from its solicitude to discover whatever the record might contain on this subject, has looked through the report. Nothing is said, so far as we can perceive, respecting a note, except in the affidavit of Ziba Olney, who states that Asa Handy became the indorser of some note for Appleby, which was settled in some way in the board of C. W., on which note, he believes, Handy was sued. If this is the note to which the exception alludes, the claim is absorbed in the allowance made him for the board of C. W. But, whether it be the note or not, the exception is totally unsupported and cannot be sustained.

7. A seventh exception is a charge of money alleged to have been received of Doctor Bowen, although he discharged himself therefrom on oath, in payments of different sums under \$20 each. This is the application to a particular item of the principle contained in the second exception, and is disposed of with that exception.

8, 9. The eighth exception is a repetition of the objection to the manner in which Handy is charged with repairs, the master's report respecting which has been already stated to be satisfactory; and the ninth is a repetition of the claim to sustain his accounts on his own oath.

§ 787. *The fact that a ledger contains entries of transactions prior to those in controversy does not justify its non-production.*

10. The tenth exception is to the requisition made on him to produce his ledger, in which entries had been made of the rents he had received; a requisition to which he objects, because it contained transactions anterior to the entries of rent. The validity of this objection cannot be admitted. The ledger might be inspected in the presence of the defendant, Handy, and there could be no propriety in commencing the examination with prior transactions.

§ 788. *Where the account consists of numerous small items it is proper to make rests and calculate interest on totals.*

11. The eleventh exception respects the calculation of interest. The commissioner had made what are denominated rests in the account instead of calculating interest on each minute item. This mode of calculating receipts and expenditures, in accounts consisting of numerous small items, is recommended by convenience, and has been generally adopted. It seems to have been properly adopted in this case.

12. The twelfth and last exception is a repetition of the often repeated, and as often rejected claim, to be admitted to swear to his whole account.

1. The original plaintiffs except to the allowance made to the said Asa Handy for buildings which were erected on the lot after the death of C. W., which are said to be no advantage to it. But there is no proof, and no reason to believe, that these buildings were not a real advantage to the property, and did not increase the rent and the value. This exception, therefore, was properly overruled.

2. The second exception is to the admission of the said Handy's oath, in cases in which he refused to produce his books, and the books of C. W. No example of this admission is given, nor is there any proof in support of the exception. The rule by which the master was governed has been already stated and approved.

3. The third exception is a repetition of the objection to the admission of items in the account of Handy, on his own oath; and is answered by a reference to that part of the report which relates to this subject, and which has been already stated.

The fourth, fifth, sixth and seventh exceptions are totally unsupported by evidence, and, consequently, cannot be sustained.

We think the circuit court did right in confirming the report of the commissioner.

§ 789. *Under a bill to set aside a deed for fraud or undue influence upon a deceased ancestor, a sale cannot be decreed unless all the heirs are made parties to the proceedings.*

Upon the return of this report, the circuit court directed the estates to be sold, and the money due to the said Asa Handy to be paid, in the first instance,

and that one-fifth of the residue should be paid to each of the plaintiffs, that being the distributive share of each under the law of Rhode Island. The decree proceeds to authorize the heirs who were not made parties to come in and receive their distributive shares on paying their proportion of the costs and charges of suit.

The objection to this decree is that the children of Mary Handy and the children of Daniel Wheaton are not parties to the suit. It has been supposed that it is not necessary, in Rhode Island, to make all the heirs parties, because, by the laws of that state, parceners can sue separately for their respective portions of the estate of their ancestor. This law would undoubtedly be regarded, in a suit brought on the common law side of the circuit court. Its influence on a suit in equity is not so certain. But, however this may be, we are satisfied that a sale ought not to have been ordered unless all the heirs had been before the court as plaintiffs or defendants. Although the legal estate may be in Caleb Wheaton, under the deed made by the administrator, yet he acknowledges himself to be a trustee for the heirs, having purchased for their benefit. They have, therefore, a vested equitable interest in the property, of which they ought not to be deprived without being heard. They may choose to come to a partition and to redeem their shares by paying their proportion of the money with which the estate is charged. The bill does not state that the heirs who are not made parties are unwilling to become so or cannot be made defendants by the service of process. We think, then, that there is error in proceeding to decree a sale without bringing all those heirs before the court who can be brought before it; and for this error the decree must be reversed and the cause sent back with liberty to the plaintiffs to amend their bill by making proper parties.* If all the heirs cannot be brought before the court, the undivided interest of those who do appear is to be sold, and the lien of Asa Handy is to remain on the part or parts unsold, to secure the payment of so much of the money due to him as those parts may be justly chargeable with.

SLOCUM AND WIFE v. MARSHALL.

(Circuit Court for Pennsylvania: 2 Washington, 397-402. 1809.)

STATEMENT OF FACTS.—Mrs. Slocum was the only child of Mr. Marshall by his first marriage. Mrs. Marshall, plaintiff's mother, had land in Bucks county, thirteen acres meadow near Philadelphia, and a house in Southwark. In 1781 she conveyed the Bucks county property in trust for her husband in fee, and the rest of her property for her daughter, but the deed was invalid, there being no privy examination. In 1805 Mrs. Slocum conveyed to one Collins for the use of her father the two tracts of land, and later, upon the eve of her marriage with Slocum, she conveyed the Southwark house also. This bill was filed for an account of the Bucks county land which Mr. Marshall had sold in his life-time for \$8,000, and for a conveyance of the meadow land and the Southwark house. Further facts appear in the opinion of the court. It appeared further that in 1799 Mr. Marshall, under the impression that his wife's deed to Collins for his benefit was valid, made his will and devised the property to his daughter.

Opinion by WASHINGTON, J.

The first question in this cause is whether the complainants are entitled to be relieved against the deed executed by the female complainant on the 26th

of June, 1805, either upon the ground of a parol declaration of trust, inconsistent with the absolute nature of the conveyance; or upon the ground of fraud, in reference to the circumstances under which it was given, as they respected the grantor or the subsequent rights of her husband? It is sufficient to say, in answer to the first question, that there is no evidence of a declaration of trust, either written or parol, by which the nature of that trust can at all be understood; and the attempt to create and to enforce a specific trust, from the loose and equivocal expressions of the parties, made at different times and upon different occasions, would be inconsistent, not only with the spirit and policy of the statute of frauds, but with the general rules of evidence. In this case, it is true, the statute of frauds is not pleaded, or relied upon; but it is still necessary that the parol declarations of a trust should be plain and unambiguous, before the court can change the absolute nature of the conveyance, and decree an execution of a trust not expressed in the deed.

It is impossible for this court to say whether any agreement upon this subject took place between the father and daughter; or if any, what it was. From Mr. Collins' testimony, it would seem, that the intention of Mr. Marshall was to dispose of the Bucks county land; and after bestowing a part of the purchase money upon his daughter, who was about to be married, to invest the residue in some productive fund. As to the meadow tract, that his design was to give her that by his will. Hill confirms by his testimony this evidence, in relation to an intended gift to the daughter; but would lead us to suppose, that instead of money, it was the intention of Mr. Marshall to bestow upon his daughter a house, in case she and her husband should determine to live in Philadelphia. The testimony of Weir & Beisley affords very little satisfaction upon this subject, as it is quite uncertain whether the reconveyance which Mr. Marshall declared he meant to make to his daughter referred to the property conveyed by her to him in June, 1805, or to the Southwark lot. From the whole of this evidence, then, it does not appear whether Mr. Marshall had bound himself, or not, by any promises to his daughter, to reconvey, or to devise this property to her, or to dispose of it in any other manner for her use; or, whether his different conversations with the witnesses extended any further than to express his own intentions in relation to the property. If, then, the court were called upon to enforce the execution of any specific agreement between the father and daughter, I should consider the evidence too uncertain and indefinite on which to found a decree.

§ 790. *Circumstances which will establish undue influence, and in equity invalidate a deed.*

Taking this deed, therefore, as an absolute one, the next question is, can it be supported as such? Consider the situation of the parties to it. The grantor, a young lady who from her birth had but on one occasion, and that for a short period, left the paternal roof, bound to him by the strong ties of filial affection, duty and respect—accustomed, at all times, to repose in his advice and opinion the most unbounded confidence, and to consider even the request of such a parent as equivalent to a command,—is informed by him that a certain portion of her property, about two-fifths in value, had been conveyed to him by her mother; but that the same, from some legal objection, had failed to take effect. She is then requested to confirm this title, and is at the same time assured by the father, that his design, in obtaining this confirmation, is to promote her interest as well as his own. She reflects upon the proposal, and, influenced by the double motive of promoting her own interest and

that of her father, and at the same time of fulfilling the intentions of her dead mother, she consents to execute the conveyance. It does not appear that the daughter had any distinct idea of the manner in which this conveyance was to benefit herself, or to fulfil the intentions of her mother; because, it must at once have struck her, that an unqualified confirmation of her mother's grant would be completely destructive of her own interest, and consequently that the two objects she had in view were incompatible with each other. It is obvious, therefore, that her conduct in this affair was altogether influenced by the declaration and by the advice of her father, in which she appears to have placed the most implicit and respectful confidence.

A transaction attended by such circumstances will naturally excite the jealousy of a court of equity. I know not what conversations passed between the father and daughter; nor whether any and what particular inducements were held out to her for parting with so great a portion of her fortune. But this is certain, beyond all doubt, that she had been impressed, generally, with the belief that her interest was to be consulted, and that she acted under that impression. Yet nothing could be more inconsistent with her interest than the deed which she was prevailed upon to execute.

That a fraud or imposition of any kind was at any time meditated against this lady by her father, the fairness and purity of his character forbid me for a moment to suspect. Independent of his general character, the cause furnishes abundant evidence to repel any insinuation to his disadvantage in this respect. And from this evidence it is not difficult to conjecture in what manner the conveyance was intended to promote the interest of the two parties to it, and at the same time to gratify the laudable wish of the daughter to fulfil her mother's intentions. It is to be remarked that more than two-thirds in value of this property was entirely unproductive, and of course could add nothing to the revenue of the father, whose interest was only that of a tenant for life. By converting it into money, and investing that in other property of a more active nature, this inconvenience would be remedied. But the father had no power to sell the fee-simple interest in the estate without being enabled by his daughter to do so. The plan suggested to her was adequate to the purpose, and was therefore adopted. In this way the interest of the father was promoted. On the other hand, he had devised the whole of this property to his daughter; and not knowing, as is highly probable, that the estate would not pass by this devise, but would be considered as a lapsed devise, he at once perceived that his daughter could not be injured by the conveyance. The deed from the mother was intended to give him the absolute control over the property, and that from the daughter gave effect to that intention. The daughter was to be benefited in two respects — by an advance of money as an outfit on her marriage, and by the protection which her father would be enabled to afford her in the event of any misfortunes which might befall her intended husband. That these were the objects contemplated by the father is strongly supported by the evidence; and it is not improbable that they were communicated to the daughter. But the will of the former having proved ineffectual for securing to the latter the consideration which induced her to make the deed, a court of equity can do nothing less than to set aside the deed, as having been made under a mistake, and for a consideration which has failed. But in doing this I am clearly of opinion that the intention of Mr. Marshall would be frustrated, by considering any part of the advances made by him to his daughter as a gift, in addition to her own fortune. I wish

I could feel satisfied in depriving her also of any part of his other estate in which it was decidedly his intention she should not participate. Upon this subject, however, my opinion is not yet conclusively formed; and for the purpose of hearing the counsel upon that point, in case it should not be compromised in the meantime, I shall reserve it for future consideration.

I shall decree a conveyance to the complainant, Elizabeth F. Slocum, of the meadow tract and the Southwark lot; and an account of the money received for the tract in Bucks county; and of all advances made by Christopher Marshall for his daughter since the 26th of June, 1805, or towards the improvement of her property before or since that period.

TAYLOR v. TAYLOR.

(8 Howard, 188-210. 1849.)

APPEAL from U. S. Circuit Court, District of Georgia.

Opinion by MR. JUSTICE DANIEL.

STATEMENT OF FACTS.— The object of the complainant below (the appellant here), as disclosed in her bill, is to vacate the deed, executed on the 22d day of January, 1828, by her before her marriage, conveying to William Taylor, in trust for the use of the mother of the grantor for life (exempt from the debts of her father), and after the death of her father and mother, for the use in equal portions of the said grantor, and of her brothers and sisters, all the property, real and personal, which was given to the said grantor by the will of her uncle, Robert Isaac, whose will is made an exhibit in the cause and referred to in the deed.

The grounds on which this deed is impeached are the following: that it was founded on no real consideration, was executed during the nonage of the complainant, and whilst she was living in the family of her parents; that it was extorted from her by false representations, both as to her filial duties and her rights to the property left her by her uncle; and of extreme urgency and harsh treatment on the part of her parents, to procure its execution; and of the hope, by a compliance with their importunities, of reconciling her parents to her marriage with her husband, which marriage they had theretofore opposed. The objection of nonage must be surrendered in this investigation, it being ascertained that the complainant was some few months over majority when the deed was executed. The other allegations, as resting upon the proofs in the cause, and upon the law as applicable to them, remain for consideration.

§ 791. *A deed from a child just of age, to a parent, is not void, but if any unconscionable advantage was taken, will be set aside.*

The rules of law supposed to control the contracts of parties who do not stand upon a perfect equality, but who deal at a disadvantage on the one side, whether applicable to the relations of parent and child, trustee and *cestui que trust*, attorney and client, or principal and agent, have been laid down in various cases in the courts, both of England and of our own country. To trace these rules to the several cases by which they have been propounded would be an undertaking rather of curiosity, than of necessity or usefulness here, as the extent to which this court has applied them, or is disposed to apply them in cases resembling the present, may be found within a familiar and direct range of inquiry. They are aptly exemplified by the late Justice Story, in his treatise on Equity Jurisprudence, vol. I, § 307, where, speaking of frauds which “arise from some peculiar confidence or fiduciary relation between the

parties," he remarks: "In this class of cases there is often found some intermixture of deceit, imposition, overreaching, unconscionable advantage, or other mark of direct and positive fraud. But the principle on which courts of equity act in regard thereto, stands independent of any such ingredients, upon a motive of public policy; and it is designed in some degree as a protection to the parties against the effects of overweening confidence and self-delusion, and the infirmities of hasty and precipitate judgment. These courts will therefore often interfere in such cases, where, but for such peculiar relations, they would wholly abstain from granting relief, or grant it in a very modified and abstemious manner." He proceeds, § 308: "It is undoubtedly true, that it is not upon the feelings which a delicate and honorable man must experience, nor upon any notion of discretion, to prevent a voluntary gift or other act of a man whereby he strips himself of his property, that courts of equity have deemed themselves at liberty to interpose in cases of this sort. They do not sit, or affect to sit, in judgment upon cases as *custodes morum*, enforcing the strict rules of morality. But they do sit to enforce what has not inaptly been called a technical morality. If confidence is reposed, it must be faithfully acted upon, and preserved from any intermixture of imposition. If influence is acquired, it must be kept free from the taint of selfish interests, and cunning, and overreaching bargains. If the means of personal control are given, they must be always restrained to purposes of good faith and personal good. Courts of equity will not, therefore, arrest or set aside an act or contract, merely because a man of more honor would not have entered into it. There must be some relation between the parties which compels the one to make a full discovery to the other, or to abstain from all selfish projects. But when such a relation does exist, courts of equity, acting upon this superinduced ground, in aid of general morals, will not suffer one party, standing in a situation of which he can avail himself against the other, to derive advantage from that circumstance." Applying the principles thus annunciated and drawn from an extensive collection of the English cases to the relation of parent and child, and to transactions occurring in that relation, the same author remarks, § 309: "The natural and just influence which a parent has over a child renders it peculiarly important for courts of justice to watch over and protect the interests of the latter; and therefore all contracts and conveyances, whereby benefits are secured by children to their parents, are objects of jealousy, and if they are not entered into with scrupulous good faith, and are not reasonable under the circumstances, they will be set aside, unless third persons have acquired an interest under them."

The same principle has been clearly put by Justice Washington, in the case of *Slocum v. Marshall*, 2 Wash., 400 (§ 790, *supra*), where, in stating that case, he remarks: "The grantor, a young lady who from her birth had not but on one occasion left the roof of her father,—bound to him by the strong ties of filial affection,—accustomed to repose in his advice and opinion the most unbounded confidence, and to consider his request ever as equivalent to a command,—is informed by him that a certain portion of her property had been conveyed to him by her mother, but that the same, from some legal objection, had failed to take effect. She is then requested to confirm this title, and at the same time is assured by her father, that his design in obtaining this confirmation is to promote her interest as well as his own. She reflects upon the proposal, and, influenced by the double motive of promoting her own interest and that of her father, and of fulfilling the intentions of her dead mother, she

makes the conveyance." He proceeds: "A transaction attended by such circumstances will naturally excite the suspicions of a court of equity." It has been insisted that, for the principles just stated, the sanction of this court cannot be avouched; but that, on the contrary, they have been weakened, if not rejected, by the doctrines ruled in the case of *Jenkins v. Pye*, 12 Pet., 241. The peculiar features of the last named case, which may in some respects distinguish it from the one now under consideration, and be thought to bring it less obviously within the principles above stated, need not be pointed out; but we inquire what are in truth the doctrines ruled in the case in 12 Pet.; and whether they are not substantially, nay literally, those propounded by Justices Story and Washington. In the case of *Jenkins v. Pye*, this court refused to adopt the rule which they said had in the argument been assumed as the doctrine of the English chancery, namely, that a deed from a child to a parent should, upon considerations of public policy arising from the relation of the parties, be deemed void. They deny, indeed, that this is the just interpretation of the English decisions relied on, but declare that all the leading cases they have examined are accompanied with some ingredient showing undue influence exercised by the parent, operating upon the fears or hopes of the child; and showing reasonable grounds to presume that the act was not perfectly free and voluntary on the part of the child. But the court, whilst they deny that a deed from a child to a parent should *prima facie* be held absolutely void, as unequivocally declare that "it is undoubtedly the duty of courts of equity carefully to watch and examine the circumstances attending transactions of this kind, when brought under review, before them, to discover if any undue influence has been exercised in obtaining the conveyance." Between the doctrine here ruled and the principles stated by Justices Story and Washington, no difference, much less any contradiction, can be perceived. For why this watchfulness, thus enjoined as a duty, this severe and peculiar scrutiny as applicable to contracts between parent and child, but that they are justly "objects of jealousy," rendered so by the relation of the contracting parties,—a relation aptly and naturally productive of powerful influence on the one hand, and of submission on the other,—subjecting such transactions to presumptions never attaching *a priori* to contracts between parties standing upon a perfect equality.

§ 792. *The evidence in this case reviewed and commented upon, and held to amount to fraud and undue influence by the parent upon the child.*

And now let the character of the contract under consideration, and of the circumstances surrounding the execution of that contract, be subjected to the test rationally and justly imposed by the rules above stated. This is a contract between parent and child, operating by its terms exclusively for the benefit of the former, and to the prejudice of the latter; for it transferred from her a valuable interest, by the very terms of the transaction admitted to be legally and absolutely hers, and by the same terms transferred it without the shadow of an equivalent received or proffered; and for which, the testimony conclusively shows, none could possibly be given. Thus far, the provisions of the contract.

With regard to the circumstances attending and surrounding its execution. It is shown that the grantor in this deed, though of age, had little more than attained to majority; that she was living in the house with her parents,—her only home; and may fairly be presumed to have been liable to the influence of feelings and habits which, in the absence of contravening evidence, would

control the dispositions and conduct of a youthful female thus situated. She might be moulded to almost anything, in compliance with the earnest wishes (with her habitually yielded to as commands) of her parents. Those parents, who once had lived in affluence and luxury, had, with all the habits and necessities which such a condition naturally creates, by commercial reverses, been brought to indigence; from the date of the purchase by Robert Isaac of the property in dispute, had been permitted by him to occupy and enjoy it. In fact, it was apparently their only means of shelter or support. In this state of the family, Robert Isaac by his will bestowed the whole of this property upon the complainant; and it has been argued that, with her knowledge of the situation of her parents, the impulses of filial duty and affection might of themselves have formed a sufficient groundwork for the complainant's conveyance. However hazardous it might be to prescribe, as a rule of right or of property, imperfect obligations which the law does not originally enforce, this argument can be deemed satisfactory in instances only in which the motives supposed to enter into such obligations are shown to have been free and unconstrained in their operation. In the present instance, too, independently of the influences which will be shown to have been brought to bear upon the transaction, it is thought that the injunctions of filial duty and affection would have demanded something less than the surrender of all possessed by the grantor; and would have been satisfied with a concession, as to which there probably would never have existed a difficulty,—one, indeed, that seems to have been assented to in practice,—the occupation and enjoyment of the property during their lives, by the parents of the grantor. Nay, it would seem that proper parental tenderness, and solicitude for the welfare of the child, or the true principles of rectitude and fairness, would have permitted nothing beyond this. And in the estimate of motives which may have led to the transaction under review, it should not be without weight, that this same filial duty and affection, however commendable in themselves, and however their spontaneous action may be recognized and binding, strengthen the probability of their being converted into means of wrong and oppression; and this very probability it is which challenges the duty of watchfulness and jealousy in the courts, in scanning the transactions of those whose peculiar situation exposes them to danger from such means.

Immediately after the death of Robert Isaac, it seems that the various appliances designed to withdraw from the complainant the fruits of the bounty of her affectionate uncle, were put into strikingly active operation. Directly following the death of Isaac, it is charged in the bill, came the urgency of the complainant's family, and their reproaches against her for having intercepted, as they said, the bounty which but for her would have flowed to the family; and for having dictated to her uncle the disposition of his property, thereby having ruined their prospects and broken the heart of complainant's father. The natural effects of such appeals upon the feelings of an affectionate and sensitive girl, or even upon a spirit awake to the impulses of pride alone, can easily be comprehended. Then, as is alleged, was the reluctance of the complainant to despoil herself of her property ascribed to the avarice of her intended husband; and then, too, amidst her perplexity and distress, upon consultation between both her parents, was suggested to her the device of a letter from her, declaring her belief of the wish of the testator, Isaac, to bestow the property for the benefit of the family, and asking the consent of the father of the complainant to a settlement of the property in conformity with

such a wish. Although these allegations are not supported by direct statements of witnesses, yet the intrinsic evidence flowing from other conduct of the parties to these transactions, and that presented by the written documents in this cause, impart to the above allegations a force equal, if not surpassing, that which an explicit narrative by witnesses could give them. And here it is worthy of remark that the will of Robert Isaac contains no expression nor hint of a desire or intention that the property should go according to the supposition assumed, or according to the provisions of the deed subsequently executed. This circumstance alone should be one of controlling influence, even if the testator could be regarded as a person of a capacity and character of the most inferior grade. But none can fail to perceive, from the proofs in this cause, that the testator was a man of intelligence and sagacity, extensively practiced in the business of life. He strongly declares his affection for his niece, and as clearly gives to her, and to her only, the property in dispute. What room is there for assuming that others, and not this niece, were the chief objects of his bounty? Such an assumption is forbidden by every rule of law or of common sense; it goes very far of itself to stamp with fraud and contrivance the means resorted to in order to divert that bounty to other ends.

We will next consider the letter (a) (Exhibit A, filed with the answer of Goodwin) addressed by the complainant, then Charlotte Scarborough, to her father; concocted, as is alleged by the complainant, between her parents, as preparatory and introductory to the wrong about to be consummated; in which letter she professes her readiness and her desire to settle the property derived from her uncle to the use of her parents for their lives, and after their deaths to the use of all the children equally. The will of Robert Isaac was admitted to probate on the 9th day of January, 1828, and amongst the persons who qualified as executors of that will were William Scarborough, the father of the complainant, and William Taylor, the trustee in the deed now sought to be vacated. These men, the depositaries of the solemn trust reposed in them by Isaac — fully capable of comprehending his will, and one of them sustaining the further obligation of a parent to protect the interests of this young woman — make themselves the ready instruments to betray this confidence, and this in violation of the clearest language in which their duty

(a) "MY EVER-HONORED FATHER: From a sense of my unworthiness, I am convinced that the love my dear uncle bore me, and which dictated his bequest to me in his last will, would not, could he now see my conduct, condemn me for pursuing the feelings of a heart strongly and sincerely devoted in affection to the members of my family. Having arrived at an age when I may with impunity legally make a transfer of that which has been so generously placed at my discretion, I unhesitatingly follow this course of conduct, unbiased by any control whatsoever; and in the liberty I am now using, I am acting by my own free will, dictated by my feelings alone, and unknown to any person. Thus, then, I most emphatically transfer all my right to the said property (the gift of my ever-lamented uncle) to my beloved mother, to be used and enjoyed as her unquestionable right, during her life-time; and at her death and yours to be equally divided between my sisters, brothers and myself, my right operating in no manner in my favor to the exclusion of the other members of our family.

"In thus making a transfer of the said property, I trust my much loved parent will acknowledge one alight proof of my gratitude for all his numerous kindnesses lavished on me. Most thankful do I feel for being made the simple instrument of accomplishing the will of him who so kindly and generously placed his confidence in me; and, in acting thus, convince the world that my devoted affection for him was pure, disinterested and unbiased by any future expectation.

"I am, dear Sir, your most affectionate and grateful daughter,

"CHARLOTTE D. SCARBOROUGH.

"*Savannah, January 10, 1828.*"

could possibly have been prescribed. How far this conduct can be excused or palliated under the pretext of duty to Mrs. Scarborough, founded on the alleged marriage contract, or on any supposed intention of Isaac flowing from the same source, will hereafter be shown in the conduct of Scarborough and Taylor in reference to this very property, when dealing with it for their own personal advantage. This conduct will furnish a most efficient clew in unraveling the texture of the deed in question.

On the 10th of January, 1828, the day succeeding the probate of the will of Robert Isaac, was written the letter above mentioned from Charlotte Scarborough to her father. It seems impossible to resist the evidence furnished by this singular production, that it was a fabrication, designed to conceal the very facts and circumstances which it palpably betrays. In the first place, it may be inquired why such a letter should be written, and whether it would be usual or probable in a transaction between persons thus situated, if dictated solely by an admitted sense of propriety, and sanctioned by a willingness of both the parties to it. Can we accredit the probability of a formal diplomatic communication from a daughter just grown, to her father, residing under the same roof, to justify an act which they both believed it a sacred duty to perform? Again, let us look at the declaration here so anxiously and pompously paraded, that, in the act about to be performed by this daughter, she "was unbiased by any control whatsoever; and that, in the liberty she was then using, she was acting by her own free will, dictated by her feelings alone, and unknown to any person," and we shall perceive an apprehension, or consciousness of suspicions, which it was believed the simple transaction itself would neither prevent nor allay. Here are the very *clausulæ inconsuetæ* pointed to in Twyne's case, as the sure badges of that which they are intended to hide. Why should this young woman have taken such deliberate pains to declare, and to place as it were on record, a history of her motives,—her entire exemption from persuasion, authority, or even advice, in what she was about to do, in obedience to affection and a sense of duty? If these had constituted the real incentive to her act, would they have left room for one thought or surmise of dishonor, connected with the objects of that affection and duty? Such suspicions and surmises are rather the offspring of colder calculation, and of the "compunctious visitings" that wait on contemplated wrong. And, again, in the concluding paragraph of this letter, may be seen a strong corroboration of this charge in the complainant's bill, of the painful and discreditable imputations which had been made against her, as inducements to come into the proposed arrangement. The language of this paragraph is as follows: "Most thankful do I feel for being made the simple instrument of accomplishing the will of him who has so kindly and generously placed his confidence in me, and, in acting thus, convince the world that my devoted affection for him was pure, disinterested, and unbiased by future expectation." It will naturally occur to every one to inquire, why this young woman should accuse herself, or fancy herself accused by others, of unworthy motives or conduct, because she had been the object of her uncle's affection? The rational solution of the matter would seem to be this,—that the assumption of such motives on the part of those around her, represented by them, too, as entering into the opinions of the world, had been pressed as an efficient means of influence; and that a vindication from their existence, furnished a plausible coloring for the proceeding about to be effected. The tone, the language, the artificial structure of this letter, its familiarity with the terms peculiar to the business

of life, all bespeak it, in our judgment, not the production of an inexperienced girl, but of a far more practiced and deliberate author. Lastly may be mentioned, with respect to this letter, the care with which it has been preserved, and placed beyond the control of this daughter, as a prop to a transaction which could not stand alone, and as a means of stilling the inurmurings of future complaint; the very ends for which it at last emerges from its secret recess.

Next in the chain of evidence, and closely following its harbinger and herald, we will notice the deed itself from the complainant, conveying from her every description of property derived from her uncle; and it is one of the peculiarities of this conveyance, not without significance, that it was executed before there was an inventory made by the executor, to inform the grantor specifically what she had a right to claim or to bestow. Turning, then, to the recitals of this deed, they must be regarded as wholly irreconcilable with truth; and especially with that *uberrima fides*, that fullness of candor and fairness, required in transactions between parent and child; transactions upon their face, too, operating to the disadvantage of the latter. This deed sets out a marriage contract entered into between Scarborough and his wife, anterior to their marriage, purporting to cover a portion of the property in dispute; it then states the failure of this contract, by reason of an omission to record it, and proceeds to declare that, some doubts having been suggested as to the validity of the said marriage settlement, from the omission to record the same, the said William Scarborough did, in consequence of such doubts, transfer and convey all his right, etc., to the said Robert Isaac; and that the said Isaac, having departed this life, had left this property, with certain personal estate, to his niece, Charlotte Scarborough; and that she, to whom the devise and bequest had been made, being desirous of carrying the marriage settlement into effect according to the original intent of the parties, had, on coming of age, determined to convey all her right, title and interest in the property derived from her uncle, for that purpose.

The deductions from these recitals—nay, their necessary meaning, we may add, their literal import—are these. That the conveyance from Scarborough to Isaac was with the sole view of effectuating the marriage settlement and of curing any defects attributable to that contract; that Isaac took the property clothed with this trust, and for no consideration moving from himself, and vesting in him an absolute title or estate; that his devise and bequest to his niece were purely to secure the same objects, and that she, fully aware of all these acts and intentions, had, as soon as she could legally do so, determined upon their accomplishment. Such are the declarations and recitals contained in this deed, not one of which, save the statement of a project of a marriage settlement, that is not by the evidence on the record shown to be palpably false. Thus, if we look to the deed from Scarborough to Isaac of the 13th of May, 1820, to the agreement between Isaac and McHenry as the agent of A. Low & Co., in February, 1826, and to that between Robert Isaac and Andrew Low on the 8th of March, 1827, and also to the return of the marshal of the sale under execution of the personal property in dispute, we find that Isaac was the purchaser and exclusive owner of all this property, for a pecuniary consideration paid by him of nearly \$23,000. Looking next from the recitals of this deed to the will of Robert Isaac, we find no ambiguity, no declaration, hint or implication in the will to sustain these recitals, but everything to falsify and condemn them. We there see clearly the motive of the

testator; his affection for his favorite niece, and the subjects and the mode with and by which he designed that his affection should be manifested. He gives to her, clear of all trusts or incumbrances, "the lot, dwelling-house, and all other improvements thereon, which formerly belonged to her father, together also with the plate, furniture of all kinds, books and prints, all of which were purchased and paid for at marshal's sale by me." If this clause of the will were shown to and clearly understood by the complainant, it is difficult to conceive how it could be made rationally to express or imply a duty on her part to disrobe herself of this bounty, as being clearly designed for others, and not for herself. The conduct of these persons, Scarborough and Low, and of Taylor, who was named as trustee both in the marriage settlement and in the deed from Charlotte Scarborough, furnishes convincing evidence of the light in which they viewed any obligation supposed to be adhering to this property, and forming a binding consideration, either legal or moral, for the deed now impugned; that is, an obligation to bestow it in conformity with the stipulations of the marriage contract. But it may be naturally asked, if this supposed obligation was limited to Charlotte Scarborough. Did it not, if existing at all, extend equally to her father, and to the trustee in the settlement, and to others acquainted or connected with that contract? In a moral view, at least, no difference is perceived in the position of these parties, and it is not pretended that Charlotte Scarborough sustained any legal obligation to convey away this property. Yet it is seen by the record that William Scarborough, to serve his convenience or his interest, had no difficulty in subsequently incumbering it both to Low and to Taylor, the trustee in the marriage settlement, or in subsequently selling it out and out to Isaac; and that this same trustee, Taylor, manifested as little scruple for the sanctity of his trust, in its application for his own benefit. And it seems to us to be a most pregnant state of facts connected with this deed, that, when it was to be executed, Taylor and Low, who had so dealt with this property as to be necessarily cognizant of the falsehood of the recitals it contained, were carried to the house of Scarborough to become, the first the trustee, the second a witness to this instrument. The other witness to this deed, John Guilmartin, seems to have been taken under the stress of necessity, from the refusal of James Taylor to attest the deed, and the manner in which the transaction impressed itself upon Guilmartin is evinced in his deposition, in which he says that he inquired of Miss Scarborough whether this deed was her voluntary act, but was permitted to have no answer from her, and was silenced in his inquiries by the remark from Low that the witness had been sent for to attest the deed, and for no other purpose. This witness further swears that the deed was not read to nor by the grantor in his presence. He states moreover this uncalled for remark on the part of the father (although witness was not permitted to obtain information from the child), that he, Scarborough, had sent for the witness to attest "a deed from Miss Scarborough to her mother, which, as a dutiful child, she had made." Again, when this deed from Charlotte Scarborough was to be proved, the only witness to its execution called on was Andrew Low; he who knew that its recitals were inconsistent with truth, he who deemed all inquiry about the willingness of the grantor to make it to be impertinent. John Guilmartin was passed by; he might have revealed, if called, circumstances coeval with the transaction, which would be calculated to remove or to weaken the influence of seeming acquiescence or of the lapse of time; circumstances which time alone, in the absence of direct impeaching

testimony, would be competent entirely to cover up. The testimony adduced in support of the deed from the complainant falls far short of the object for which it was intended; much of that evidence, too, seems to have been given under influences necessarily detracting from the weight which it otherwise might have had. It wholly fails to countervail the evidence arising from the statements of witnesses on the other side; from the relative positions of the parties; and, more than all, from the intrinsic nature and force of the documents relied on both by plaintiff and defendants in the court below. From a careful analysis of the facts and circumstances of this case, we think the conclusion cannot be resisted, that the deed from Charlotte Scarborough to William Taylor, of the 22d of January, 1822, was not a fair and voluntary transaction; but was drawn from her by means and under influences which rendered that conveyance void. We are, therefore, of the opinion, that the real property conveyed by that deed should be reconveyed to the said Charlotte, now Charlotte Taylor; and that the several articles of personal property bequeathed to her by her uncle, Robert Isaac, so far as the same are now in existence, and in the possession or under the control of Mrs. Julia Scarborough, or of any other person acting under her authority, or claiming from her and not for valuable consideration without notice, or claiming under like circumstances from any person by virtue of the provisions of the deed of trust above mentioned, should be delivered up to the complainant as her own property; but it is the opinion of this court, that rents and profits for the use and occupation of the real estate above mentioned, or compensation for the use and enjoyment of the personal property bequeathed to the complainant, should not be allowed her under all the circumstances attending this case; they are accordingly hereby denied her. It is, therefore, upon consideration, adjudged, ordered, and decreed, that the decree of the circuit court for the sixth circuit and district of Georgia, pronounced in this cause at the April term of that court in the year 1846, be and the same is hereby reversed; and this cause is remanded to that court, with directions to decree therein in conformity with the opinion herein above expressed.

JUSTICES NELSON and WOODBURY dissented.

BROWN v. PIERCE.

(7 Wallace, 205-218. 1868.)

ERROR to the Supreme Court of the Territory of Nebraska.

Opinion by MR. JUSTICE CLIFFORD.

STATEMENT OF FACTS.—Representations of the complainant were, that on the 10th of August, 1857, he acquired a complete title to the premises described in the bill of complaint, under the pre-emption laws of the United States, and that thereafter, on the same day, he was compelled, through threats of personal violence and fear of his life, to convey the same, without any consideration, to the principal respondent. Framed on that theory, the bill of complaint alleged that the first named respondent was at that time a member of an unlawful association in that territory, called the Omaha Claim Club, and that he, accompanied by three or four other persons belonging to that association, came to his house a few days before he perfected his right of pre-emption to the land in question, and told the complainant that if he entered the land under his pre-emption claim he must agree to deed the same to him, and added,

that unless he did so, he, the said respondent, and his associates, would take his life; and the complainant further alleged, that the same respondent, accompanied, as before, by certain other members of that association, came again to his house on the day he perfected his pre-emption claim, and repeated those threats of personal violence, and did other acts to intimidate him, and induce him to believe that they would carry out their threats if he refused to execute the deed as required.

Based upon those allegations, the charge is that the complainant was put in duress by those threats and acts of intimidation, and that he signed and executed the deed, and conveyed the land by means of those threats and certain acts of intimidation, and through fear of his life, and without any consideration; and he prayed the court that the conveyance might be decreed to be inoperative and void, and that the grantee might be required to reconvey the same to the complainant.

Two other persons were made respondents, as claiming some interest in the land in controversy. Pierce, the principal respondent, and Weston, one of the other respondents, were non-residents, and were served by publication pursuant to the rules of the court and the law of the jurisdiction. They never appeared, and failing to plead, answer or demur, and due proof of publication in the manner prescribed by law having been filed in court, a decree was rendered as to them that the bill of complaint be taken as confessed. *Nations v. Johnson*, 24 How., 201 (APPEALS, §§ 1670-74).

Morton, the other respondent, appeared and filed an answer, in which he alleged that the principal respondent, on the 28th of August, 1857, and for a long time before, was the owner in fee of the premises; that he was informed, and believed, that the complainant entered upon the land as the tenant of the principal respondent, and that he was prosecuting this suit in violation of the just rights of all the respondents; that the principal respondent wanting to borrow money, he, the respondent before the court, loaned him a large sum, and accepted bills of exchange for the payment of the same, drawn to the order of the borrower of the money, and which were indorsed by the drawer; that the bills of exchange not having been paid when they became due, he brought suit against the drawer and indorser, and recovered judgment against him for \$3,100; that the judgment so recovered is in full force and unsatisfied, and that the same is a lien on the premises described in the bill of complaint.

No answer, from any knowledge possessed by the respondent, is made to the allegation that the complainant acquired a complete title to the land under the pre-emption laws of the United States, nor to the charge contained in the bill of complaint, that the deed was procured by threats of personal violence amounting to actual duress. On the contrary, the answer alleged that the respondent before the court was an utter stranger to all those matters and things, and that he could not answer concerning the same, because he had no information or belief upon the subject.

§ 793. *If the answer is not excepted to it will be deemed sufficient.*

Authorities are not wanting to the effect that all matters well alleged in the bill of complaint, which the answer neither denies nor avoids, are admitted; but the better opinion is the other way, as the sixty-first rule adopted by this court provides that if no exception thereto shall be filed within the period therein prescribed, the answer shall be deemed and taken to be sufficient. *Young v. Grundy*, 6 Cranch, 51; *Brooks v. Byam*, 1 Story, 297.

Material allegations in the bill of complaint ought to be answered and ad-

mitted, or denied, if the facts are within the knowledge of the respondent; and if not, he ought to state what his belief is upon the subject, if he has any, and if he has none, and cannot form any, he ought to say so, and call on the complainant for proof of the alleged facts, or waive that branch of the controversy; but the clear weight of authority is, that a mere statement by the respondent in his answer, as in this case, that he has no knowledge that the fact is as stated, without any answer as to his belief concerning it, is not such an admission as is to be received as full evidence of the fact. *Warfield v. Gambrill*, 1 Gill & J., 508.

Such an answer does not make it necessary for the complainant to introduce more than one witness to overcome the defense, and the well-known omissions and defects of such an answer may have some tendency to prove the allegations of the bill of complaint, but they are not such an admission of the same as will constitute a sufficient foundation for a decree upon the merits. *Young v. Grundy*, 6 Cranch, 51; *Parkman v. Welch*, 19 Pick., 234.

Proper remedy for a complainant, in such a case, is to except to the answer for insufficiency within the period prescribed by the sixty-first rule; but if he does not avail himself of that right, the answer is deemed sufficient to prevent the bill from being taken *pro confesso*, as it may be if no answer is filed. *Hardeman v. Harris*, 7 How., 726; *Stockton v. Ford*, 11 How., 282; 1 *Daniell's Ch. Prac.*, 786; *Langdon v. Goddard*, 8 Story, 13.

Attention is called to the fact that no replication was filed to the answer; but the suggestion comes too late, as the respondent proceeded to final hearing in the court below without interposing any such objection.

§ 794. *Mere formal defects in the proceedings must be objected to in court of original jurisdiction.*

Mere formal defects in the proceedings, not objected to in the court of original jurisdiction, cannot be assigned in an appellate tribunal as error to reverse either a judgment at law or decree in equity.

§ 795. *Legal effect of a replication.*

Legal effect of a replication is that it puts in issue all the matters well alleged in the answer, and the rule is, that if none be filed, the answer will be taken as true, and no evidence can be given by the complainant to contradict anything which is therein well alleged. 1 *Barb. Ch. Pr.*, 249; *Mills v. Pitman*, 1 *Paige, Ch.*, 490; *Pierce v. West*, 1 *Pet. C. C.*, 351; *Story's Eq. Pl.*, 878; *Cooper's Eq. Pl.*, 329.

Undenied as the answer is by any replication, it must have its fair scope as an admission; but the court is not authorized to supply anything not expressed in it beyond what is reasonably implied from the language employed. Proofs were taken by the complainant, and they show, to the entire satisfaction of the court, that all the matters alleged in the bill of complaint, and not denied in the answer, are true, and the conclusion of the court below was that the complainant acquired a complete title to the land under his pre-emption claim, and that the deed from him to the principal respondent was procured in the manner and by the means alleged in the bill of complaint.

Nothing is exhibited in the record to support any different conclusion, or to warrant any different decree, unless it be found in one or the other of the first two defenses set up in the answer.

§ 796. *When an answer must be construed as referring to the title under the deed in controversy.*

First defense is, that the principal respondent, on the 28th of August, 1857,

and long before that time, was the owner in fee of the premises; but neither that part of the answer, nor any other, denied that the complainant acquired a complete title to the land, as alleged in the bill of complaint, nor set up any defense in avoidance of those allegations, nor made any attempt to present any defense against the direct charge, that the deed under which the respondent claimed title was procured from the complainant through threats of personal violence and by means of duress. Indefinite as the allegation of title is, the answer must be construed as referring to the title under the deed in controversy, as it is not pretended that the respondent ever had any other, and, if viewed in that light, it is in no respect inconsistent with the conclusion adopted by the supreme court of the territory.

Such an indefinite allegation cannot be considered as presenting any sufficient answer, either to the alleged title of the complainant or to the charge made in the bill of complaint.

Briefly stated, the second defense set up in the answer is that the respondent was informed and believed that the complainant entered upon the land as a tenant, but the time when the supposed entry was made is not alleged, nor are the circumstances attending the entry set forth, nor is any reason assigned why the allegations were not made more definite, nor is there any fact or circumstance alleged which shows or tends to show that there was any prior owner to the land except the United States, nor that the respondent ever pretended to have any other title to the same than that derived from the complainant.

§ 797. *When an answer is insufficient or evasive.*

Viewed in any light, those allegations must be regarded as evasive and insufficient; and they are not helped by the omission of the complainant to file the general replication. Those parts of the answer being laid out of the case as insufficient to constitute a defense, the conclusion is inevitable that the title to the land was in the complainant as alleged, and that he parted with it through threats of personal violence and by duress, and without any consideration.

§ 798. *What duress sufficient to render void a deed.*

Argument to show that a deed or other written obligation or contract, procured by means of duress, is inoperative and void, is hardly required, as the proposition is not denied by the respondent. Actual violence is not necessary to constitute duress, even at common law, as understood in the parent country, because consent is the very essence of a contract, and, if there be compulsion, there is no actual consent, and moral compulsion, such as that produced by threats to take life or to inflict great bodily harm, as well as that produced by imprisonment, is everywhere regarded as sufficient, in law, to destroy free agency, without which there can be no contract, because, in that state of the case, there is no consent.

§ 799. *Duress defined.*

Duress, in its more extended sense, means that degree of constraint or danger, either actually inflicted or threatened and impending, which is sufficient, in severity or in apprehension, to overcome the mind and will of a person of ordinary firmness. Chitty on Contracts, 217; 2 Greenl. on Ev., 283.

Text-writers usually divide the subject into two classes, namely, duress *per minas* and duress of imprisonment, and that classification was uniformly adopted in the early history of the common law, and is generally preserved in

the decisions of the English courts to the present time. 2 Institutes, 482; 2 Rolle's Abr., 124.

Where there is an arrest for an improper purpose, without just cause, or where there is an arrest for a just cause, but without lawful authority, or for a just cause, but for an unlawful purpose, even though under proper process, it may be construed as duress of imprisonment; and if the person arrested execute a contract or pay money for his release, he may avoid the contract as one procured by duress, or may recover back the money in an action for money had and received. *Richardson v. Duncan*, 3 N. H., 508; *Watkins v. Baird*, 6 Mass., 511; *Strong v. Grannis*, 26 Barb., 124.

Second class, duress *per minas*, as defined at common law, is where the party enters into a contract (1) For fear of loss of life; (2) For fear of loss of limb; (3) For fear of mayhem; (4) For fear of imprisonment; and many modern decisions of the courts of that country still restrict the operations of the rule within those limits. 3 Bacon's Abr., title "Duress," 252.

They deny that contracts procured by menace of a mere battery to the person, or of trespass to lands, or loss of goods, can be avoided on that account, and the reason assigned for this qualification of the rule is, that such threats are held not to be of a nature to overcome the mind and will of a firm and prudent man, because it is said that if such an injury is inflicted, sufficient and adequate redress may be obtained in a suit at law.

Cases to the same effect may be found also in the reports of decisions in this country, and some of our text-writers have adopted the rule that it is only where the threats uttered excite fear of death, or of great bodily harm, or unlawful imprisonment, that a contract, so procured, can be avoided, because, as such courts and authors say, the person threatened with slight injury to the person, or with loss of property, ought to have sufficient resolution to resist such a threat, and to rely upon the law for his remedy. *Skeate v. Beale*, 11 Ad. & Ell., 983; *Atlee v. Backhouse*, 3 Mees. & W., 642; *Smith v. Monteith*, 13 id., 438; *Shep. Touch.*, 6; 1 Parsons on Contracts, 393.

On the other hand, there are many American decisions, of high authority, which adopt a more liberal rule, and hold that contracts procured by threats of battery to the person, or the destruction of property, may be avoided on the ground of duress, because in such a case there is nothing but the form of a contract, without the substance. *Foshay v. Ferguson*, 5 Hill, 158; *Central Bank v. Copeland*, 18 Md., 317; *Eadie v. Slimmon*, 26 N. Y., 12; 1 Story's Eq. Juris. (9th ed.), 239; *Harmony v. Bingham*, 12 N. Y., 99; S. C., 1 Duer, 229; *Fleetwood v. New York*, 2 Sandf., 475; *Tutt v. Ide*, 3 Blatch., 250; *Astley v. Reynolds*, 2 Str., 915; *Brown v. Peck*, 2 Wis., 277; *Oates v. Hudson*, 5 Eng. L. & Eq., 469.

But the case under consideration presents no question for decision which requires the court to determine which class of those cases is correct, as they all agree in the rule that a contract procured through fear of loss of life, produced by the threats of the other party to the contract, wants the essential element of consent, and that it may be avoided for duress, which is sufficient to dispose of the present controversy. 2 Greenl. on Ev., 283; 1 Black. Comm., 131.

Next question which arises in the case is, whether the judgment set up by the appellant creates a superior equity in his favor over that alleged and proved by the appellee. Before proceeding to examine this question, it will be useful to advert briefly to the material facts exhibited in the record.

Title was acquired by the complainant under the pre-emption laws of the United States, and on the same day the principal respondent, through threats to take his life if he refused, compelled him to convey the same to that respondent, and the record shows that the respondent before the court, within the same month, loaned the money to the grantee in that deed, for which he recovered judgment, although the grantor was then in possession of the land, and has remained in possession of the same to the present time.

The judgment is founded upon the bills of exchange received for that loan. Judgments were not liens at common law, but several of the states had passed laws to that effect before the judicial system of the United States was organized, and the decisions of this court have established the doctrine that congress, in adopting the processes of the states, also adopted the modes of process prevailing at that date in the courts of the several states in respect to the lien of judgments within the limits of their respective jurisdictions. *Williams v. Benedict*, 8 How., 111; *Ward v. Chamberlain*, 2 Black, 438; *Bayard v. Lombard*, 9 How., 530 (APPEALS, § 160); *Riggs v. Johnson County*, 6 Wall., 166.

Different regulations, however, prevailed in different states, and in some neither a judgment nor a decree for the payment of money, except in cases of attachment or mesne process, created any preference in favor of the creditor until the execution was issued and had been levied on the land. Where the lien is recognized, it confers a right to levy on the land to the exclusion of other adverse interests acquired subsequently to the judgment; but the lien constitutes no property or right in the land itself. *Conard v. Atlantic Ins. Co.*, 1 Pet., 443; *Massingill v. Downs*, 7 How., 767.

Such judgments and decrees were made liens by the process acts in the federal districts where they have that effect under the state laws, and congress has since provided that they shall cease to have that operation in the same manner, and at the same periods, in the respective federal districts, as like processes do when issued from the state courts. Federal judgments and decrees are liens, therefore, in all cases, and to the same extent, as similar judgments and decrees are when rendered in the courts of the state.

Express decision of this court is, that the lien of a judgment constitutes no property in the land; that it is merely a general lien securing a preference over subsequently acquired interests in the property; but the settled rule in chancery is, that a general lien is controlled in such courts so as to protect the rights of those who were previously entitled to an equitable interest in the lands or in the proceeds thereof.

§ 800. *A judgment being only a general lien, the creditor acquires no higher or better right to the property of the debtor than the debtor himself had when the judgment was rendered.*

Specific liens stand upon a different footing, but it is well settled that a judgment creates only a general lien, and that the judgment creditor acquires thereby no higher or better right to the property or assets of the debtor than the debtor himself had when the judgment was rendered, unless he can show some fraud or collusion to impair his rights. *Drake on Attachments*, § 223. Correct statement of the rule is, that the lien of a judgment creates a preference over subsequently acquired rights, but in equity it does not attach to the mere legal title to the land, as existing in the defendant at its rendition, to the exclusion of a prior equitable title in a third person. *Howe*, Petitioner, 1 Paige, Ch., 128; *Ells v. Tousley*, id., 283; *White v. Carpenter*, 2 Paige, 219; *Buchan v. Sumner*, 2 Barb. Ch., 181; *Lounsbury v. Purdy*, 11 Barb., 494;

Keirsted v. Avery, 4 Paige, Ch., 15. Guided by these considerations, the court of chancery will protect the equitable rights of third persons against the legal lien, and will limit that lien to the actual interest which the judgment debtor had in the estate at the time the judgment was rendered. *Averill v. Loucks*, 6 Barb., 27.

Objection is also made that the affidavit showing that the defendants were non-residents was not in due form, and that the order of notice, and the publication of the same, were insufficient to give the court jurisdiction; but the proposition is not supported by the record, and must be overruled.

Decree affirmed.

McKAY v. CARRINGTON.

(Circuit Court for Ohio: 1 McLean, 50-68. 1829.)

Opinion of the Court.

STATEMENT OF FACTS.—This controversy arises on a contract dated the 13th December, 1817, by which the defendant, a resident of Virginia, sold to the complainant two thousand three hundred and sixty-seven acres of land in two tracts, in Ohio, which the defendant had purchased under a decree of this court against Samuel G. Martin. Martin had purchased the land of Edward Carrington, deceased, in his life-time, the husband of the defendant; but had paid only a small part of the consideration money.

To compel the payment of the balance a suit in chancery was brought by the defendant, as administratrix of her husband's estate, and the land was ordered to be sold. The complainant was to pay for the land \$10,000; the first payment of \$3,000 to be made immediately; the second, of \$3,150.50, the 1st January, 1819, and the balance the 1st January, 1820. And if the complainant failed to make payment, the defendant had the right to sell the land under a decree of court for the balance of the purchase money, the surplus, if any, to be paid to the complainant.

There being no provision in the contract that the complainant might enter into the possession of the land, he alleges that he obtained a writing from the defendant authorizing him to take possession; but that he was unable to do so, as possession was held by various persons under Martin. This operated, it is alleged, greatly to the injury of the complainant, and he had no means of maintaining an action at law for the recovery of the possession.

The bill further states, Edward Carrington left several heirs, some of whom are yet not of age. That the complainant, at the instance of the defendant, or with her approbation, advanced \$324 to pay expenses incurred by her in prosecuting suits in the circuit court to perfect her title to the land. It appears from the proof that the land has greatly deteriorated in value, and on that ground, connected with the lapse of time and the inability of the defendant, even on the filing of the bill, to make a clear title, he prays the contract may be rescinded, and the money paid, with the sum paid for costs, may be decreed to him, with interest; and that the land may be ordered to be sold for the payment thereof.

The defendant in her answer states that the purchase was made by the complainant with a full knowledge of the state of the title. That she made no representations to mislead him, and that all the facts relating to the land and the title were as well known to the complainant as to herself. That she has not attempted to coerce the payment of the money, but has brought an

ejectment and recovered judgment against the persons in possession under Martin, and had them turned out of possession. And that so soon as she could ascertain the residence of all the heirs of her deceased husband, she caused a bill to be filed against them in the county where the land lies, and obtained a decree of the court of common pleas for a title; and that she is now ready and willing to make a deed for the land, on the payment of the balance of the purchase money.

It appears that a part of the land was taken possession of by the complainant, and that for some time he received the rents and profits thereof; and then declined receiving them, as he did the entire possession of the land after the recovery of it under the suit in ejectment.

The first question which may be considered as arising out of the foregoing facts is, whether a court of chancery, under all the circumstances of the case, would, at the instance of the vendor, decree a specific execution of this contract. It is contended that Martin having failed to comply with his contract for the purchase of the land, the estate both equitable and legal, on the decease of Carrington, descended to his heirs; and consequently the administratrix, who represents the personalty only, had no control over the contract.

This contract was entered into the 11th October, 1805. The purchase money amounted to \$3,550.50, to be paid by Martin as follows: \$50 in hand, \$1,000 the 1st of May ensuing, and the balance on or before the 1st May, 1807; the said Carrington, his heirs, etc., to retain the title in the land until the payment of the purchase money, and then he was to convey the land in fee-simple by special warranty. Should Martin fail in making any one of the payments, Carrington, his heirs, executors or administrators, had the option, at any time thereafter, to annul the bargain by giving notice thereof and paying into the Bank of Virginia, on account of said Martin, his heirs, etc., any sum or sums of money without interest, which had been paid on the purchase.

There is a receipt on the agreement for the payment of \$50, and one for \$500, dated 30th March, 1807. Thirty dollars, it seems, were sometime afterwards loaned by the vendor to Martin, which was indorsed on the contract. Carrington died on or about the 29th October, 1810.

§ 801. *Where a contract for the sale of land becomes void by the laches of the vendee, the title descends, on the death of the vendor, to his heirs.*

The principle laid down by the counsel for the complainant is correct, that where a contract for the sale of land is void, or cannot be enforced, on account of laches in the vendee, on the death of the vendor the land descends to his heirs, and the contract is not considered as forming a part of the personal estate which goes to the executor or administrator.

By the contract under consideration, Carrington, in his life-time, had the power expressly to annul it; as there was a failure to make the payment, it seems he did not think proper to exercise the power, but nearly two years after the second payment became due, he received from Martin \$500 in part of it. This is conclusive that on the 30th March, 1807, the contract was considered by Carrington as of binding force; and until the day of his decease he failed to put an end to it in the mode provided.

His administratrix had the same power as the deceased in his life-time to annul the contract, by giving notice and repaying the moneys received. This she did not do, but, on the contrary, treated the contract as if it were in full force; and called upon a court of equity to decree a specific execution of it. When an estate is contracted to be sold, equity considers it as converted into

personalty. And this is the case although the election to purchase rests merely with the purchaser. 7 Ves. Jun., 436.

§ 802. *Where in a contract for the sale of land a mode of annulment is provided, it can be annulled in no other manner.*

Equity considers things agreed to be done as performed. The vendor is viewed as a trustee for the purchaser of the estate sold, and the purchaser as a trustee of the purchase money for the vendor; consequently the purchase money goes to the executor or administrator of the vendor, and the interest of the vendee descends to his heirs. As Carrington in his life-time had given no indication of an intention to annul the contract, and as he had the power to do so, in a mode expressly provided, and as he received a part of the purchase money after he had a right to put an end to the contract, no doubt can exist that he considered it in full force.

§ 803. *The purchase money on an outstanding contract for the sale of land is personality and goes to the administrator.*

If in the contract a particular mode is provided, by which a party may rescind it, as in the present case, by giving notice and repaying the money received, it can only be done in the mode provided. The repayment of the money by express agreement is a condition precedent to the rescission of the contract, and must be so considered in equity as well as at law. This step not being taken, may be considered as indicating a determination to enforce the contract, and an acquiescence in the delay of payment. The equity of Martin, therefore, was not extinguished at or before the decease of Carrington. This being the case, there can be no doubt that the purchase money went to the administratrix, and formed a part of the assets in her hands.

This view is greatly strengthened from the fact that the heirs took no step to annul the contract; nor the administratrix, either of whom might have done so; but on the contrary, called the aid of a court of chancery to enforce it.

By the third section of the act of this state, "for the execution of real contracts," it is provided, "that any person who has made a contract for the sale of land, and dies before the completion of it, leaving heirs under the age of twenty-one years, his executors or administrators being desirous of completing such contract, for and on behalf of such minor children and heirs, may apply to the court of common pleas who have power to authorize a conveyance, where the consideration money has been paid or secured to be paid, to be made in pursuance of the contract."

This statute would seem to give the representatives of the personal estate a control over contracts for the sale of real property, which authorizes them to enforce such contracts, in all cases, where they may be considered for the advantage of the heirs. No application was made under this statute, by the defendant, it is presumed; because Martin had not paid, and was believed to be unable to pay, the consideration money. A final decree was entered against him for the balance of the purchase money and interest, and on his failing to pay it, within a given time, the land was ordered to be sold.

§ 804. *A contract sanctioned by a court of chancery cannot be treated as a nullity.*

A contract thus sanctioned by a court of chancery, by the administratrix of Carrington, and by Carrington in his life-time, cannot be considered or treated as a nullity. Chancery has enforced it, and given the heirs the full benefit of its provisions. Under the sale directed by the decree against Martin, the de-

fendant became the purchaser of the land, for the sum of \$5,440.25, as appears from the marshal's deed.

§ 805. *Upon a sale for purchase money, if the administrator buy he only gets the purchaser's equity. Quære.*

What right did the defendant acquire by this purchase? The equitable interest of Martin was all that could be sold, or that the defendant under the sale could purchase. The marshal's deed, therefore, could only invest her with this equity. The defendant prosecuted the suit against Martin as the administratrix of her husband's estate, but the purchase at the sale seems to have been made on her own account. Being the trustee of her husband's estate, I should entertain doubts whether chancery ought to aid a purchase made under such circumstances. There is no intimation, however, of any unfairness, and the high character of the party forbids any presumption that she did not intend to act in good faith.

It appears that in November, 1823, the defendant filed a bill in the court of common pleas for Clinton county, setting forth the contract with Martin, the proceedings under it, the sale of the land by the marshal, and her purchase of it. She also stated that the purchase money had been paid to the heirs, and she prayed that a decree investing her with a title might be made. As the defendants were non-residents, and one of them a minor, notice was given as the statute requires. A decree *pro confesso* was obtained at a subsequent term.

It is a principle well settled in chancery, that where a person purchases a title, known to be defective by him, at the time, he shall not afterwards object to it, on account of such defect. Where a purchaser under a decree objected to a specific execution of the contract, because a part of the defendants, being minors, might open the decree after they became of age, and perhaps set it aside, it was ruled not to be a valid objection, as the purchaser was bound to know the circumstances under which the decree was rendered.

And it is contended that the complainant purchased with a full knowledge of the defendant's title, and that he cannot therefore avail himself of the objections urged against it. He must be presumed to have been acquainted, at least to some extent, with the nature of the title which the defendant acquired by the purchase under the decree against Martin, as in the contract there is an express reference to it. But it would be, perhaps, in the absence of proof, carrying the presumption too far to say that he was bound to know the full legal import of that title. As a high price was to be paid for the land, it is not to be presumed that the complainant considered himself as purchasing a mere equity. Nor does such a construction seem to have been given to the contract by the defendant.

§ 806. *When a purchaser, during the pendency of a negotiation for the purchase of lands, becomes aware of the defects of its title, he cannot, for such defects, disaffirm the contract.*

The agent of the defendant who made a verbal arrangement with the complainant respecting the land states that he did not consider the defendant as having the legal title, though it does not appear that his impressions were communicated to the complainant. From the sum advanced by the complainant to defray expenses of suits, prosecuted by the defendant to perfect the title, it appears that when the defects in the title were known to him, he took no step to disaffirm the contract, but aided the defendant in her efforts to remove the objections to it.

It has been decided, where a defect in a title becomes known to a vendee during a treaty for the purchase, although he was ignorant of it before, yet, if afterwards he continues the treaty, he shall not, on account of such defect, disaffirm the contract and recover his deposit. The same principle would have a strong application to the complainant if, after he was fully apprised of the objections to the title, he exercised acts of ownership over the land by the receipt of rents, and advanced money to defendant to assist her in procuring a good title. These facts would evince a determination, it would seem, to waive any advantage which a defect in the title might give him, and to abide by the contract. They were certainly calculated to make this impression on the vendor.

By the contract there was no time fixed when the conveyance should be executed. The defendant agreed to "sell and convey" the land to complainant, and he agreed to make certain payments. Under this contract the defendant is not bound to make the conveyance until the purchase money be paid.

On the 1st January, 1819, the second instalment of \$3,550.50 was due, and on the 1st of the succeeding January the balance became payable. Neither of these payments has been made. Although there is a great want of certainty as to time, in the facts proved, yet from their connection it is to be inferred that no step was taken by complainant evincive of a disposition to rescind the contract, on account of the defects in the title, until a considerable time after the last instalment of the purchase money became due. At what time he abandoned the possession of a part of the land, which he admitted to one of the witnesses he had enjoyed, does not appear. He refused the possession when it was tendered to him, after the suits in ejectment had been decided.

From the nature of the contract and the circumstances connected with it, it does not appear, if the vendor now claimed a specific performance of it, that the delay in making the conveyance could be urged as an objection by the complainant. He has neglected to fix the time himself, by paying the purchase money, or offering to pay it. Until this was done the vendor was not bound to convey. But the complainant has not only failed to make payment, but he has done several affirmative acts, which showed an acquiescence in the course taken by the vendor to clear the title.

§ 807. *Importance of time and the circumstances of parties, etc., in a contract.*

But there are still two objections to be considered against the right of the vendor to a specific execution of the contract. First, the great change in the value of the land. Second, the defect which remains in the title. Although modern decisions in England seem to consider a performance as to time with more strictness than former decisions, still it is admitted that time is of far less importance than a change in the circumstances of the parties, or in the value of the property embraced by the contract.

§ 808. *A specific performance will not be granted where injury or loss has accrued to the other party by the laches of the party demanding it.*

Where the property has not materially changed in value, and the circumstances of the parties in relation to it remain substantially as they were when the contract was made or was to have been performed, time is seldom considered material. But when a specific execution of the contract will give the purchaser the property, greatly deteriorated from the value it bore when he should have received it, it would be unjust to compel him to receive it. Chan-

cery will never interpose its powers, under such circumstances, to carry the contract into effect.

But it may be said that in the case under consideration, no time being fixed for the conveyance, the complainant should have fixed the time by the payment or tender of the purchase money, and not having done either, he ought not to be permitted to take advantage of his own negligence. That by failing to place himself in an attitude to demand a title from the vendor, he has acquiesced in the delay and justly incurred the risk of the rise or fall of the land. There is undoubtedly great force in this suggestion, and it is difficult to obviate the objection it presents.

McKay, it is alleged, made this purchase for purposes of speculation; at least that he bought under the hope of selling without much delay, at a profit. The purchase and sale of lands, it is known, were made extensively some years ago, by many persons in this state and elsewhere. And I do not know any objection to this business, which does not equally apply to the buying and selling of any other description of property. Land is a fair object of traffic, as well as personal property.

Chancery will not aid what may be called a speculating contract, but a fair purchase of land with a view of again disposing of it, at an advance, does not come within the objection. The object with which any description of property is purchased being lawful, may be considered by a court of chancery. The purchase of a reversionary interest, it has been decided, makes time a material part of the contract. So where an estate is sold to pay off an incumbrance bearing a higher rate of interest than the vendor is entitled to receive. And it may well be said that time is of the essence of the contract where the vendor has purchased to sell. But to this consideration is opposed the fact that McKay has not entitled himself to the conveyance. It may, however, be fairly presumed, that the embarrassments of the title, and his failure to obtain possession of the land for a number of years, essentially injured his interests by preventing a sale of it.

Though he had but the equitable title, still if that title had been accompanied by possession, it is probable he might have sold the land, if not at an advance, at least so as to indemnify himself. But the purchasers under Martin retained the possession some seven or eight years after the purchase of McKay, and until they were removed by legal process. Before this was accomplished, and a full possession of the land tendered, it had become less valuable by nearly fifty per cent. than it was when the purchase was made.

Although it may be said, therefore, that the vendor was not bound to make the conveyance until the purchase money was paid, yet, from the manifest object of McKay in purchasing, the full possession of the land was essential to his interests. This he failed to obtain, and the consequences have been extremely injurious to him. This fact, taken in connection with the defect in the title under the decree in Clinton county, is sufficient to refuse a specific performance in behalf of the vendor. There is one infant defendant against whom the decree was entered, who may open it up, and perhaps, as it regards his interests, reverse it when he shall become of age. This, it has often been ruled, constitutes a fatal objection to a title, in a court of chancery, except by purchasers under the decree.

§ 809. *The refusal of a specific performance of a contract does not imply that, on the other hand, a rescission of it will be granted.*

But if a court of chancery would not, under the circumstances of this case,

at the instance of the vendor, decree a specific performance of the contract, still it does not necessarily follow that on the application of the vendee the contract will be canceled. The cases are numerous where both parties, having been grossly negligent in the performance of the contract, have been refused the aid of a court of chancery and left to their legal remedies.

The remaining questions for consideration are, whether under the facts of the case the complainant is entitled to the interposition of a court of chancery, and if so, what relief can be given him. It is a rule in chancery that he who claims its interposition must not only show himself entitled to it by the fairness of the contract, but also by having done on his part what in equity he was bound to do.

§ 810. *When the title to land sold fails, and there are outstanding notes for purchase money, a court of equity will take jurisdiction.*

In this case it is contended: That the relief sought is at law and not in chancery; and that if chancery take jurisdiction, the relief to the extent prayed for cannot be given. Where the vendor of land has no title, or a defective title, and there are outstanding notes or bonds given for the purchase money, which may be assigned, chancery will take jurisdiction of the case and order the notes or bonds to be delivered up and canceled. In such a case the remedy at law is inadequate, because the vendor may delay the commencement of an action for the purchase money at his pleasure, and if the obligations were assigned without notice, they being negotiable, a failure of consideration could not be set up against the assignee.

No reference to authority need be made to sustain this position. It involves the exercise of a power which exclusively belongs to a court of chancery, and which has been exercised on numerous occasions. But the question arises, whether the powers of a court of equity can be extended, beyond that of rescinding the contract. The damages to which the vendor, by his failure, has subjected himself, it is insisted, must be ascertained in a court of law.

In the case of *Denton v. Stewart*, 1 Fon., 44, note 2, Lord Kenyon, master of the rolls, sitting for the chancellor, directed the master to inquire what damages the plaintiff had sustained by the defendant's not performing his agreement, of which a specific performance was prayed by the bill, but which could not be decreed; the defendant having by sale of the estate put it out of his power to perform his agreement with the plaintiff.

On the authority of this decision was the case of *Greenway v. Adams*, 12 Ves., 395. In that case the master of the rolls observes: "The party injured by the non-performance of a contract has the choice to revert either to a court of law for damages, or to a court of equity for a specific performance. If the court does not think fit to decree a specific performance, or finds that the contract cannot be specifically performed, either way he should have thought there was equally an end of its jurisdiction; for in the one case the court does not see reason to exercise the jurisdiction; in the other the court finds no cause for the exercise of it. However, the case of *Denton v. Stewart* is a decision in point against that proposition."

In the case of *Gwillim v. Stone*, 14 Ves., 128, which was a bill to have a contract delivered up, on the ground of the defective title of the defendant, and for compensation for the injury to the plaintiff by the failure of the contract, the decree was made for delivering up the contract without prejudice to an action, instead of an inquiry before the master. In this case the master of the rolls observes, that in the case of *Denton v. Stewart*, and *Greenway v.*

Adams, above cited, the object of the bill was a specific performance; and in the latter he had some doubt upon the principle. This bill, he stated, is of a different nature, asserting from the first that the defendant cannot make a good title. It is more proper for an action. The equitable relief is obtained by a decree for the delivering up the instrument.

The bill in the case of *Todd v. Gee*, 17 Ves., 275, prayed for the specific performance of an agreement for the sale of an estate to the plaintiff by the defendant; or if the defendant cannot perform it, that the plaintiff may receive satisfaction for the damages and injury sustained by the non-performance. And the lord chancellor observes in the case "that he should be inclined to support the whole course of previous authority against *Denton v. Stewart*, not being aware that the court would give relief in the shape of damages, which is very different from giving compensation out of the purchase money. That court, he states, except under very particular circumstances, as these may be, upon a bill for the specific performance of a contract to direct an issue or a reference to the master to ascertain the damages. That is purely at law. It has no resemblance to compensation."

Upon an adjournment of this case, the lord chancellor again observes "that his opinion on the three cases cited (*Denton v. Stewart*, *Greenway v. Adams*, and *Gwillim v. Stone*) was confirmed by reflection; that, excepting any special cases, it is not the course of proceeding in equity to file a bill for a specific performance of an agreement, praying in the alternative, if it cannot be performed, an issue or an inquiry before the master with a view to damages. The plaintiff must take that remedy, if he choose it, at law generally, though not universally. In *Denton v. Stewart* the defendant had it in his power to perform the agreement, and put it out of his power pending the suit. The case, if it is not to be supported on that distinction, is not according to the principles of the court."

From these authorities it appears that the decision in the case of *Denton v. Stewart* has been overruled, or at least has been considered as turning on the peculiar circumstances of the case. The circumstance of the vendor having conveyed the title during the pendency of the suit seems to be considered as the principal ground on which damages were decreed.

The decision in that case cannot derive much support from the case of *Greenway v. Adams*, for the master of the rolls seems to have yielded to the authority of the former case contrary to his own convictions, without advert- ing to the circumstances of the case, as stated afterwards in the case of *Todd v. Gee*. The objection to a decree for damages seems to be considered from the above authorities as stronger where a rescission of the contract is asked than where a specific execution of it is prayed, and damages in the event of the vendor not being able to make a good title. But in either case, by the authorities cited, except under peculiar circumstances, damages will not be decreed.

In a bill for a specific performance, if the vendor be not able to make a conveyance for the entire estate sold, the purchaser may insist for the specific thing so far as the right of the vendor extends, and compensation out of the purchase money for any embarrassment of the title or deficiency in the number of acres sold. If in such a case, however, the whole of the purchase money has been paid, it is difficult to distinguish it in principle from a case where the rescission of the contract is prayed.

In the one case one-half of the land is deficient, and a decree is entered for

the one-half, and the return of the purchase money paid, with interest, for the other half. In the other case the vendor having no title to the land, the whole of the purchase money paid is decreed with interest. If in the one case it may be said that chancery acquires jurisdiction by decreeing a specific execution of the contract in part, and consequently may put an end to the matter in controversy by doing full justice between the parties, may it not be said in the other that jurisdiction is equally acquired by the court where there are outstanding negotiable notes or bonds given for the purchase money, which, if assigned, may be enforced against the vendee, and which should therefore be delivered up and canceled.

In the case of *Law v. Pratt*, 9 Cranch, 469, the court observe that "to obtain a specific performance is no object of Law's bill; it is incumbent on the opposite party, therefore, to show some ground of right to force such a decree upon him. But considering as we do that Law is not in default, there can be no reason to decree a specific performance when everything shows that it would be productive of nothing but loss. Besides, a specific performance, such as would answer the ends of justice between these parties, has now become impossible."

"An issue *quantum damnificatus* it is certainly competent for this court to order in this case, but it is not consistent with the equity practice to order it in any case in which the court can lay hold of a simple equitable and precise rule to ascertain the amount which it ought to decree." The court in that case decreed that the defendant should refund for the deficient lots at the rate of the purchase.

In a subsequent case between *Dunlop v. Hepburn*, 1 Wheat., 197, the court say, "there are many cases in which a court of equity, although it would not decree a specific performance, will yet refuse to order a contract to be canceled. The inability of the vendor to make a good title at the time the decree is to be pronounced furnishes a very good reason for excluding him from relief in a court of equity; and yet it does not follow that the court will for this reason merely set aside the contract. Generally speaking a court of law is competent to afford an adequate remedy to either party for a breach of the contract by the other, from whatever cause it may have proceeded; and whenever this is the case a resort to a court of equity is improper."

"But if the contract ought not in conscience to bind one of the parties, as if he had acted under a mistake, or was imposed upon by the other party, or the like, a court of equity will interpose and afford a relief which a court of law cannot, by setting aside the contract; and having thus obtained jurisdiction of the principal question, that court will proceed to make such other decree as the justice and equity of the case may require."

§ 811. *To obtain a rescission of a contract it is not necessary to pay the whole of the money.*

In the case under consideration the second instalment became due the 1st January, 1819, and the third the 1st January, 1820. Neither of these instalments were paid by the complainant, but he filed his bill the 13th April, 1821, for a rescission of the contract. Has he, by a failure to pay these instalments, been guilty of such negligence as to prevent the interposition of a court of chancery in his behalf? Did equity require that he should part with his money before he obtained possession of the land agreeably to contract, when it was apparent the vendor could not make him a title?

The first default seems to have been with the vendor in not putting the com-

plainant into possession of the land. Had the complainant called upon the vendor for a specific execution of the contract, it would have been essential for him to have paid or offered to pay the whole of the purchase money; but as he goes for a rescission of the contract on account of a defect of title in the vendor, connected with other circumstances, a payment of the purchase money was unnecessary. To have paid the balance of the purchase money could not have strengthened the equity of the complainant. Chancery requires no act to be done in vain; it therefore could not require the payment of the purchase money in this case after the defects in the title had become fully known to the complainant.

More than two years were suffered to elapse from the time the second instalment became due to the filing of this bill. Was it incumbent on the complainant to give notice to the vendor of his determination to rescind the contract so soon as he discovered the defect in the title? In ordinary cases this might be necessary, but in this case the possession in part of the land was given to the complainant, and he, no doubt, entertained the hope that the entire possession would soon be relinquished to him. And under this expectation he seems to have given time to the vendor to clear the title.

This bill was filed in April, 1821, and it was not until November that the vendor took the first step to perfect her title by filing a bill against the heirs of her deceased husband. In August, 1824, a decree was obtained in her behalf. Whether this bill embraced the whole of the heirs or not is left to conjecture. The only evidence of the fact seems to be that they were called the heirs of Edward Carrington, deceased, in the bill. A decree *pro confesso* was entered against them, one of them being a minor, for whom a guardian *ad litem* was appointed.

As before remarked, the court do not consider the vendor in an attitude to demand a specific performance of the agreement. The delay, the failure to give possession, the change in the value of the property, and the intrinsic defect in the title, are insuperable objections to such a demand. And these considerations, together with the fact that the notes for the balance of the consideration are outstanding, and being negotiable may be assigned, constitute a ground, as we think, for the equitable interposition of this court. And taking jurisdiction of the case on these grounds, the court will not stop short of settling the matter in controversy. They will decree a rescission of the contract, that the outstanding notes be delivered up and canceled, and that the money paid on the purchase be repaid with interest.

This appears to be within the spirit of the decisions cited from Cranch and Wheaton, and it cannot be considered in opposition to the English adjudications referred to, unless it be supposed that there are no particular circumstances to vary this case from that of *Tood v. Gee*, in 17 Vesey. The outstanding negotiable notes, and the great change in the value of the land, are believed to bring this case within the English decisions.

To rescind the contract and send the complainant to a court of law to recover back the money paid would seem to be unnecessary, as the rule of damages, the money paid with interest, is the same at law as in equity. There is here, then, a certain and unvarying rule for the ascertainment of damages, and they can as well be ascertained by the court as by a jury. But the court will go no further in this case. They will not decree a payment of the money alleged by the complainant to have been expended by him, at the instance of the vendor, in the prosecution of certain suits to perfect the title.

There is no evidence of the amount of money thus expended, and if there were the complainant could resort to his legal remedy. This money is not alleged to have been advanced as a part of the purchase money. It may have been advanced under an agreement which is only properly examinable at law. At all events there are no special circumstances made known which connect this expenditure with the original contract, so as to bring it within the jurisdiction of the court.

Nor will the court order the land to be sold to satisfy the amount decreed to be repaid. There is no allegation that the vendor is in doubtful circumstances, or that the decree will not be complied with, or may not be satisfied in the ordinary mode. The costs of the suit to be paid by the defendant.

PEIRSOLL v. ELLIOTT.

(6 Peters, 95-100. 1882.)

Opinion by MARSHALL, C. J.

STATEMENT OF FACTS.— This is an appeal from a decree of the court of the United States for the seventh circuit and district of Kentucky, dismissing the plaintiffs' bill filed in that court, with costs.

The bill states that the plaintiffs are the heirs and representatives of Sarah G. Elliott, deceased, who departed this life intestate, seized of a valuable estate in the county of Woodford, which descended to them. That in her lifetime, in the year 1813, James Elliott, her husband, caused a deed to be made and recorded, purporting to be executed by the said Sarah G. and himself, for the purpose of conveying the said land to Benjamin Elliott, who immediately reconveyed the same to the said James Elliott. The complainants allege that this deed was never properly executed by their ancestor; that she was induced by the said James to believe that it conveyed only an estate for her life; that she was prevailed on under this belief to accompany him to the clerk's office, where she acknowledged the said deed without any privy examination, which is required by law. The deed was recorded on her acknowledgment without any certificate of privy examination. The said Sarah G. departed this life in the year 1820, soon after which her heirs brought an ejectment in the circuit court for the recovery of the land. While it was depending, in November, 1823, the said James Elliott, having failed in an attempt to induce the clerk to alter the record, prevailed on the county court of Woodford, on the motion of Benjamin Elliott, to make the following order:

“ Woodford County, *scd.*

November County Court, 1823.

“ On motion of Benjamin Elliott, by his attorney, and it appearing to the satisfaction of the court by the indorsement on the deed from James Elliott and wife to him, under date of the 12th of June, 1813, and by parol proof, that the said deed was acknowledged in due form of law by Sarah Elliott, before the clerk of this court, on the 11th day of September, 1813, but that the certificate thereof was defectively made out, it is ordered that the said certificate be amended to conform to the provisions of the law in such cases, and that said deed and certificate, as amended, be again recorded; whereupon the said certificate was directed to be amended to read in the words and figures following, to wit:

“ Woodford County, *scd.*

September 11, 1813.

“ This day the within-named James Elliott, and Sarah, his wife, appeared before me, the clerk of the court for the county aforesaid, and acknowledged

the within indenture to be their act and deed; and the said Sarah, being first examined privily and apart from her said husband, did declare that she freely and willingly sealed and delivered said writing, which was then shown and explained to her by me, and wished not to retract it, but consented that it should be recorded." The said deed, order of court and certificate, as directed to be amended, is all duly recorded in my office.

Teste,

JOHN MCKINNEY, JR., C. W. C. C.

Indorsements on the back of the foregoing deed, to wit: James Elliott *et ux.* to Benjamin Elliott. Deed.

Acknowledged by James Elliott and Sarah G. Elliott, September 11, 1813.

Att.

J. MCKINNEY, JR., C. W. C. C.

R. B. F., page 199. Recorded deed-book K, pages 56, 57.

Att.

C. H. Mc., D. Clk.

The said James Elliott departed this life during the pendency of the ejectment; it was revived against James Elliott, his son, as terre tenant, and determined in favor of the plaintiffs in November, 1823. The bill, which was filed during the term at which the judgment in ejectment was rendered, alleges that the defendants retain possession of the premises by themselves and their tenants, who are doing great waste by cutting and destroying the timber, and who threaten to continue their possession by suing out a writ of error to the judgment of the court. It charges that the defendants are receiving the rents, which some of them will be unable to repay; prays for an injunction to stay waste; that a receiver may be appointed; that the rents, from the death of Sarah G. Elliott, may be accounted for; that the deed may be surrendered up to be canceled, and for further relief. The injunction was awarded.

The writ of error to the judgment of the circuit court came on to be heard in this court, at January term, 1828 (1 Pet., 328), when the judgment was affirmed; this court being of opinion that the deed from James Elliott and Sarah G., his wife, was totally incompetent to convey the title of the said Sarah G. to the tract of land therein mentioned. In November, 1828, the defendants filed their answer, in which they claim the land in controversy as heirs of James Elliott, deceased. They insist that the deed from James Elliott and Sarah G., his wife, recorded in the court of Woodford county, was fairly and legally executed, and conveyed the land it purports to convey. That Sarah G. Elliott was privily examined, according to law, and that the omission to record her privy examination was the error of the clerk, which was afterwards corrected by order of the court, so as to conform to the truth of the case. They deny that the deed from Sarah G. Elliott was obtained by any misrepresentation; and say they have heard that the judgment of the circuit court has been affirmed in the supreme court, and that they have not determined to prosecute any other suit, but hope they will be left free on that subject. In May term, 1829, the cause came on to be heard, when the bill of the plaintiffs was dismissed with costs. They appeal from the decree to this court.

The principal object of the bill was to quiet the title, by removing the cloud hanging over it in consequence of the outstanding deed executed by James Elliott and Sarah G., his wife. This application is resisted in the argument, upon the principle that the deed, having been declared by this court to be void on its face, can do no injury to the plaintiffs, who ought not, therefore, to be countenanced by a court of equity in an application to obtain the surrender of a paper from which they can have nothing to apprehend, by which application the defendants are exposed, without reasonable cause, to unnecessary

expense. That under such circumstances a court of equity can have no jurisdiction over the cause.

The court is well satisfied that this would be a proper case for a decree, according to the prayer of the bill, if the defectiveness of the conveyance was not apparent on its face, but was to be proved by extrinsic testimony. The doubt respecting the propriety of the interference of a court of equity is produced by the facts that the deed is void upon its face, and has been declared to be void by this court. It is, therefore, an unimportant paper, which cannot avail its possessor. The question whether a court of equity ought, in any case, to decree the possessor of such a paper to surrender it, is involved in considerable doubt; and is one on which the chancellors of England seem to have entertained different opinions. Lord Thurlow was rather opposed to the exercise of this jurisdiction (3 Bro. Ch., 15, 18); and Lord Loughborough appears to have concurred with him (3 Ves., 368); and in *Gray v. Matthias*, 5 Ves., 286, the court of exchequer refused to decree that a bond which was void upon its face should be delivered up, principally on account of the expense of such a remedy in equity, when the defense at law was unquestionable. In this case, Chief Baron McDonald said that the defendant should have demurred to the action upon that bond. Instead of that, he comes here professing that it is a piece of waste paper. He goes through a whole course of equitable litigation, at the expense of two or three hundred pounds. In such a case, though equity may have concurrent jurisdiction, it is not fit in the particular case that equity should entertain the bill.

Lord Eldon inclined to favor the jurisdiction. 7 Ves., 3; 13 Ves., 581. He thought the power to make vexatious demands upon an instrument, as often as the purpose of vexation may urge the party to make them, furnished a reason for decreeing its surrender. In 1 Johns. Ch., 517, Chancellor Kent concludes a very able review of the cases on this subject with observing: "I am inclined to think that the weight of authority and the reason of the thing are equally in favor of the jurisdiction of the court, whether the instrument is or is not void at law, and whether it be void from matter appearing on its face, or from proof taken in the cause, and that these assumed distinctions are not well founded."

The opinion of this learned chancellor is greatly respected by this court. He modifies it in some degree by afterwards saying, "but while I assert the authority of the court to sustain such bills, I am not to be understood as encouraging applications where the fitness of the exercise of the power of the court is not pretty strongly displayed. Perhaps the cases may all be reconciled on the general principle that the exercise of this power is to be regulated by sound discretion, as the circumstances of the individual case may dictate; and that the resort to equity, to be sustained, must be expedient, either because the instrument is liable to abuse from its negotiable nature, or because the defense not arising on its face may be difficult or uncertain at law, or from some other special circumstance peculiar to the case, and rendering a resort here highly proper, and clear of all suspicion of any design to promote expense or litigation. If, however, the defect appears on the bond itself, the interference of this court will still depend on a question of expediency, and not on a question of jurisdiction."

§ 812. *Where a bill brought to cancel a deed void upon its face is dismissed, the order should express the reason of the dismissal and should not award costs.*

The court forbears to analyze and compare the various decisions which have

been made on this subject in England; because, after considering them, much contrariety of opinion still prevails, both on the general question of jurisdiction, where the instrument is void at law on its face, and on the expediency in this particular case of granting a perpetual injunction, or decreeing the deed to be delivered up and canceled; and because we think that, although the prayer of the bill be rejected, the decree of dismissal ought to be modified.

The defendants, in their answer, insist upon their title, both at law and in equity, and on being left free to assert that title, if they shall choose so to do. A general dismissal of the bill with costs, the court assigning no reason for that dismissal, may be considered as a decree affirming the principles asserted in the answer, as leaving the defendants at full liberty to assert their title in another ejectment, and as giving some countenance to that title.

We also think that the bill ought not to have been dismissed with costs. In addition to the fact that the controversy respecting the title was not abandoned by the defendants, a fact which is entitled to some influence on the question of costs, other considerations bear on this point. The bill prays that the defendants might be enjoined from committing waste whilst they retained possession of the premises; that a receiver might be appointed, and that an account of rents might be taken. These are proper objects of equity jurisdiction. If they had been accomplished when the decree was pronounced, the bill might have been dismissed, but not so far as is disclosed by the record, with costs. The defendants were not, we think, entitled to costs. We are, therefore, of opinion that the decree of the circuit court ought to be so modified as to express the principles on which the bill of the plaintiffs is to be dismissed, and ought to be reversed as respects costs.

TYLER v. BLACK.

(18 Howard, 230-244. 1851.)

Opinion by MR. JUSTICE WAYNE.

STATEMENT OF FACTS.—This is an appeal from the circuit court of the United States for the district of Maine, sitting as a court of equity. The complainants, Tyler and wife, filed their bill to set aside a sale of land made by them to Black, upon the ground of fraud, concealment and fraudulent representations made to them by Black; and also upon the ground of inadequacy of price as furnishing evidence of fraud.

Towards the latter end of the last century, the state of Massachusetts established a lottery for the sale of some lands in Maine; and one Zenos Parsons drew a prize of one thousand nine hundred and twenty acres, being lot No. 1, in township No. 33. On the 25th of March, 1799, Parsons conveyed to Aaron Putnam, of Charlestown, Massachusetts, for the consideration of \$600, twelve hundred and twelve acres of the said land, being an undivided interest. Putnam had three children, two sons and a daughter. The daughter married Tyler, and they were the complainants and appellants in the present cause. One of the sons died without issue, and the other son left two children, namely, Edward and Elizabeth, who married Soule, who resided in Fairfield, Vermont.

At the time of the death of Aaron Putnam, his daughter was a minor, and resided in Massachusetts. When the transaction occurred which gave rise to the present suit, she was residing with her husband, Tyler, at Hopkinton, in New Hampshire. Black resided near the land in Maine, and had acted as the agent of the owner of the remaining undivided interest for upwards of twenty years.

In November, 1846, Black went to Fairfield in Vermont, and offered to purchase the share of Edward and Elizabeth, who were ignorant of their title to the land; but they refused to sell. Black there learned that Tyler and his wife were the owners of one half of the one thousand two hundred and twelve acres which had been conveyed by Parsons to Putnam, and immediately proceeded to Hopkinton to see them. At this time Black's position was this: He resided at the town of Ellsworth, which communicated, by a navigable stream, with the land in question; he had been connected, since 1833, with his father, John Black, in the business of agency for the proprietors of nearly all the lots in the townships in which the land in question was situated; and in the seasons of 1844-5 and 1845-6 there had been lumbering operations upon lands in the neighborhood.

The interview between Black and Tyler is thus described by Joseph Stanwood in his deposition. Second. To the second interrogatory he saith: "I was present at the public house when Mr. Black came here and took the deed, as before stated; my father-in-law and I were then keeping a public house; Mr. Black came in and inquired for Doctor Tyler; what sort of a man was he, and what were his circumstances as to property; I told him he was a physician, doing a tolerable good share of business; had his house and other buildings clear of debt, as I supposed." Third. To the third interrogatory he saith: "I was not present at the commencement of the interview betwixt Tyler and Black. I left the room soon after Tyler came in; after they had been together perhaps an hour, Tyler came out and told, in substance, that Black and he had been talking about some land in Maine. I went into the room with them; Black said there was a tract of land in Maine, and he could find no person that had any claim to it, unless it belonged to the heirs of Doctor Putnam; Black said he would give Tyler \$50 for a deed of the land from Tyler and his wife; or, if they would give him \$50, he would tell them all he knew about the land; they came to no agreement at that time, but separated late at night; the next morning Black said he had concluded to make Tyler another offer for the land; he would give him \$100 for a deed; I went to Doctor Tyler, told what Black had offered, and he came in and concluded to take it."

Fourth. To the fourth interrogatory he saith: "The inquiries in the first part of this interrogatory were not made, if made at all, in my presence, but I inferred from their conversation that these questions had been settled before I came into the room. Black represented that the land was situated in a township, and gave the number of the township, but refused to name the county; when the deed was made he directed me to insert a different number from that he had represented in the previous conversation; he either represented that the township in which the land was situated was thirty-one, and directed me to insert thirty-three in the deed, or represented thirty-three as the number of the township, and had thirty-one inserted in the deed, but which I cannot now recollect."

Fifth. To the fifth interrogatory he saith: "That Black said the land was holden, if held at all, by virtue of a lottery ticket, the form of which he attempted to describe; it was made of pasteboard or thick paper, as I understood; he said he had lately seen one in the hands of a Mr. Webster, I think, but I am not certain about the name. Black said he had made many inquiries about the title to this land; he had been to Springfield, Mass., and other places, for this purpose, but could find no record of the title anywhere; and he did

not suppose there was any deed of this land on record, but that the whole claim to it depended upon the lottery ticket, and that alone."

Sixth. To the sixth interrogatory he saith: "When Tyler inquired how many acres Doctor Putnam owned, Black answered, about five hundred."

Seventh. To the seventh interrogatory he saith: "Black said he had a claim on this land for the taxes he had paid on it; he said he had paid taxes on this land twenty-eight or twenty-nine years; think he said twenty nine years; the amount I do not recollect, if he stated it; he said Tyler must pay him the amount of these taxes, and twenty-five per cent. interest, at all events, before he could avail himself of any title to this land, and this he required in addition to the \$50 mentioned in my answer to the third interrogatory; he said he would have the land sold for taxes, and get a good title."

Eighth. To the eighth interrogatory he saith: "I do not recollect that Black represented what was the value of this particular piece of land, but he said a part of the same tract had been sold for twelve and a half cents per acre, and was still undivided; so that if Tyler should ever be able to find and get possession of the land, he would find himself an owner in common with others, and it would become necessary for him to get a division before he could do anything with the land; he said a road had been, or would be, laid out through this township, which would much increase the taxes; he assigned as a reason why he wished to purchase the land that another person had appeared and claimed a large part of it, and he thought it was best for him to be looking out for the remainder; and he had traced it back to Doctor Putnam, and had not found that he had parted with his title; till this claim was made to a part of the land, he had supposed he was in quiet possession, and that the claimants were all dead."

Ninth. To the ninth interrogatory he saith: "Black's first offer was \$50, and he did not vary from this till the morning; when he offered \$100; whether he professed to be liberal or not I do not recollect, but said it was all he would give till the morning."

Tenth. To the tenth interrogatory he saith: "Black said he could have had the land sold for taxes, and obtained a title that way. I asked him why he had not done so; he said he was afraid other speculators would come in and trouble him, or get the land; I think he mentioned Norcross."

Eleventh. To the eleventh interrogatory he saith: "I made the deed for Tyler and his wife to sign; when I commenced writing the deed, Black took from his pocket a memorandum, and dictated to me a description of the land, and caused me to use words different from those I should have used; he then, for the first time, gave the name of the county in which the land is situated, and the number of the township, which was different from the number he had before given, as I have before stated in my answer to the fourth interrogatory; and he directed me to put in a much larger sum for the consideration in the deed than he gave Tyler, which I did."

It appeared afterwards, in evidence, that the deed from Parsons to Putnam was on record in the office for registering deeds for land in Hancock county, kept in the town of Ellsworth; and it also appeared that Black had no lien upon the land for taxes paid by him.

In December, 1846, Edward Putnam wrote to Tyler, giving an account of Black's visit to him and his ineffectual efforts to purchase his share of the land.

In June, 1847, Tyler and wife filed their bill against Black in the circuit

court of the United States for the district of Maine. It set out their title; averred their entire ignorance of it until informed by Black; charged that he had deceived them by false representations as to their title, and as to the character, quantity and value of the land, and also by setting up false pretensions to a lien upon it held by him on account of his having paid the taxes. The bill further charged that the land was heavily covered with timber, which could easily be carried to market, and was worth \$20,000; and that, confiding in the fraudulent representations of Black, they had been induced to sell it for the grossly inadequate consideration of \$100.

In October, 1849, Black filed his answer. He admitted the title of the complainants, his interview with them; their allegation to him of their ignorance respecting their title; his agency for lands in the neighborhood; but he denied ever having been upon that particular lot, or that he had caused an exploration of it to be made, or that he had any particular knowledge of it; denied that he had ever claimed to have a title or lien for taxes paid; averred that in 1844, or 1845, he accidentally learned that Tilden (whom he had supposed to be the owner of the whole lot, and for whom he had been the agent) was the owner of only an undivided part, and that thereupon he had examined the records of the registry of deeds for Hancock county, for the purpose of ascertaining in whom the title was vested, but could find nothing there relative to it. That he then examined a plan-book, and there found the name of Zenos Parsons, Springfield, set down against this lot as the owner of it; that, in the summer of 1846, he was informed by Tilden that said Parsons conveyed to one Dr. Putnam, of Charlestown, a part of this lot.

Both the bill and answer contained other particulars, which it is not necessary to mention. Much evidence was taken under commissions. At September term, 1849, the cause came up for hearing upon the bill, answer, pleadings and evidence, when the circuit court dismissed the bill, and the complainants appealed to this court.

In the argument of the cause here it was insisted by the counsel for the defendant that this court had not jurisdiction, as it did not appear in the evidence that the value of the land in controversy was enough to justify the appeal. We think otherwise; one of the witnesses gives an exaggerated estimate, and others not enough to enable us to say what the value of the land is; but the exploration made at the instance of the complainants satisfies us that the land for its timber alone, if it had no other uses, is worth more than \$2,000.

§ 813. *Deed obtained by fraudulent representations, from one ignorant of the facts, set aside.*

If we look, too, at its value at the time when Black bargained for it, we think it must be admitted that the sum which he offered, and which the complainants accepted upon his representations, was an inadequate price.

But the ground upon which we shall put this case is, that the defendant did not act fairly in the representations made by him to the complainants of the quantity and quality of the land, and in his statement to them that he had a claim upon the land for taxes, which was not true. The quantity of the land is larger than he said it was, and from his agency for the owner of a part of it for many years, and his knowledge how the title was acquired, he must have known what the grant called for. In representing it to be less, he could only have done so to diminish, in the view of the complainants, its value. The untruth in regard to his claim for taxes, without anything else, is sufficient for us to cancel the deed for a fraudulent misrepresentation.

Stanwood's testimony has been given in detail because it corresponds with the averments in the bill, and is confirmed in all essential particulars by the admissions of the defendant in his answer, especially in two, which we think decisive of the decree which ought to be made in this case. Those are the defendant's repeated misrepresentations, made at different times and to different persons, and to these complainants when he was bargaining with them for the land, as to the quantity, and his misstatements concerning the taxes paid upon it by his father and himself for many years, especially used by him to the complainant as an inducement for him to sell the land for the small sum which he offered for it.

It cannot be doubted that the defendant knew, when he went to Fairfield to buy this land, where he learned that the wife of this complainant was a daughter of Aaron Putnam, that he knew the latter's interest in the Parsons grant exceeded five hundred acres; indeed, that he positively knew it could not be short of twelve hundred acres. He stated, however, to Stanwood, that it did not exceed five hundred; to Louisa Stanwood the same. When he went to Fairfield to buy the land, he said, in reply to Edward Putnam's inquiry as to the number of acres, that he did not know anything about the amount of the land, that he did not know the number of acres, and said there were four or five hundred acres. Soule, another witness, represents that, when questioned concerning the quantity, he answered that he did not know, that there was probably two or three hundred acres, and that the value was merely nominal. Phebe Hendrick says that Black said that the number of acres might be two hundred and fifty, but could not exceed three hundred acres. Mrs. Soule says the same. These statements are so inconsistent with the narrative given by Black in his answer of his and his father's agency for many years for Tilden, who was the owner of a part of the Parsons grant, for which, as the agent of Tilden, they had paid the taxes for more than twenty-seven years, that it must be concluded he concealed and misrepresented the quantity to the complainants to induce them to sell. He states that he had learned, as early as February, 1846, that Tilden's interest in the land did not exceed seven hundred and seven acres. That Tilden afterwards told him that Parsons had conveyed to Putnam a part of the lot, but denies that he had, prior to November, 1846, when he went to have the deed of the complainants to him recorded, any knowledge that Aaron Putnam was the owner of one thousand two hundred acres of the Parsons lot or grant. Now this last may very well be so; but whether he had that knowledge or not, he must have misrepresented as to the quantity of the land, when he so repeatedly undertook to speak of it as not being more than from three to five hundred acres. It is not the less a misrepresentation because he did not know how much Parsons had conveyed to Putnam. He undertook to speak of it as if he did, as an inducement to the complainant to sell to him, and in that way misled him to do so.

The defendant's answer in respect to the averment in the bill of his statement to them of the payment of taxes upon this land is evasive, and directly at variance with the proofs in the cause. He states that his father had been the agent for the owners of land in the township for more than thirty years, and that he had been his associate in such agencies since the year 1833; that it was a part of their agency to pay the taxes assessed on the land under their care; that the taxes on this township have, during all the time of their agency for Tilden, been paid by his father and himself, as though the whole of said

lottery lot had been the property of Tilden, and that he did not know until recently that Tilden did not own the whole of it. And in what he means to be a direct denial of the plaintiff's bill in this particular, he denies that he ever claimed any title to the land by virtue of a tax sale and deed therefor, or that he had any lien on the same for taxes paid by himself, but that he told them that he might have allowed the land to be sold for taxes, and that we, meaning his father and himself, had paid the taxes and ought to be reimbursed in the sums so paid, with such interest as the law allowed in cases where land was sold for taxes, which he believed to be twenty-five per cent., and that Tyler replied that was right, and that whoever owned the land ought to pay them.

The proofs in the cause, of the use which he made of this payment of taxes, is, that he represented to the complainant when bargaining for the land that he had a claim upon the land for the taxes he had paid for twenty-eight or twenty-nine years; that Tyler must pay him the amount of the taxes and twenty-five per cent. interest before he could avail himself of any title to the land, and this he required in addition to the \$50 which he asked, for the information he had concerning the land, for which he would tell them all he knew about the land. This is a part of Stanwood's evidence. Louisa Stanwood testifies that the defendant said that Tyler would have to pay the taxes at any rate before he could do anything with the land, and he could go home and have the land sold for taxes and get a good title, and Tyler would never be the wiser for it. To Putnam he said the taxes he had paid on the land were \$200 or over; that he claimed a lien upon the land on account of it. Albert G. Soule says that Black stated, having ascertained that Edward F. Putnam and his wife were heirs to a quantity of land in Maine, which came by their grandfather, Dr. Putnam, that he had come to get a conveyance of it; "that he had paid the taxes on the land for twenty-seven years, and he wanted either that they should convey to him their interest, or refund the amount which he had paid for taxes. Being asked what the amount was, he replied he did not know, but thought \$200. He was asked for his account; he answered he had it not with him. Another witness, Phebe Hendrick, says that Black said he had paid the taxes for a long time, amounting to about \$200. Mrs. Soule repeats the same.

We have, then, from these witnesses, a confirmation of what was said by Black to these complainants when he was bargaining with them for their share of this land. His object evidently was to induce them to take his small offer for the land in consideration of their obligation to repay him taxes, which there is no proof in the cause he ever paid.

In the two particulars stated, we think the entire proceedings of Black in this transaction were inconsistent with fair dealing, and that what was said by him, both as respects the quantity of the land, and the taxes he had paid upon it, amount to a fraudulent misrepresentation, entitling the complainant to the relief of having the deed of conveyance to Black canceled. We shall direct it to be done.

We shall direct the deed from the complainants to the defendant to be canceled, and that the defendant reconvey to the complainants all the right, title and interest acquired of him from them in said land. And we further direct that an account shall be taken in the court below of such profits as the defendant may have made from said land, and that he shall account for the same to the complainants, subject to a deduction therefrom of the sum of

\$100, paid by the defendant to the complainants as the consideration of their transfer to him of their interest in the land, if the said profits exceed the said \$100, and if no profits have been made, then that the complainants repay to the defendant the aforesaid \$100.

NEBLETT v. MACFARLAND.

(2 Otto, 101-105. 1875.)

APPEAL from U. S. Circuit Court, District of Louisiana.

Opinion by MR. JUSTICE HUNT.

STATEMENT OF FACTS.—The allegation of error in this case is confined to a single point. In his brief the counsel for the appellant says: "The court erred in not making the payment of our bond a condition precedent to the reconveyance of the plantation, as set forth in our motion for a new trial; and on this ground, and from this point of the decree, do we appeal and ask for relief."

The action was brought to set aside the conveyance of a plantation in Louisiana, made by Macfarland to the appellant Neblett, upon the allegation that the conveyance was obtained by the fraudulent acts and representations of Neblett and his father. The only consideration given, or professed to be given, by Neblett for the conveyance, was the cancellation of a certain bond for the sum of \$14,464.51, executed by Macfarland to Sterling Neblett, the father, and alleged to be the property of Henry Neblett.

The court below adjudged the transaction to be fraudulent, directed the execution of a deed reconveying the property, and ordered the return and redelivery of the bond for \$14,464.51, unaffected by any indorsement of credit or payment thereon, and the same, with the mortgage made for its security, to retain the same lien thereon and the same force and effect as if the deed had not been made, or any cancellation of the bond taken place. The complaint now made is that, instead of directing a return of the bond in specie as a condition for the return of the land, the court should have directed the payment of the amount of money secured thereby.

§ 814. *On setting aside a conveyance, a decree which places the parties in their original condition is proper.*

In cases of this character, the general principle is that he who seeks equity must do equity; that the party against whom relief is sought shall be remitted to the position he occupied before the transaction complained of. The court proceeds on the principle that, as the transaction ought never to have taken place, the parties are to be placed, as far as possible, in the situation in which they would have stood if there had never been any such transaction. *Bellamy v. Sabine*, 2 Phil., 425; *Samy v. King*, 5 H. L., 627; *W. B. of Scotland v. Addie*, L. R., 1 Scotch App. Cas., 162; *Gatley v. Newell*, 9 Ind., 572; *Johnson v. Jones*, 13 Sm. & M., 580; *Kerr on Fraud*, 335, 343. This is, no doubt, the general rule. We do not, however, perceive that the principle will benefit the complaining party in this suit.

1. He is restored here to his property that he had and parted with when he received his deed; to wit, his bond and mortgage. If he had paid \$14,500 in money and received in return only a bond for the like amount, of doubtful security and impaired by the lapse of time, he might well have complained. But he paid no money. He surrendered a bond against an insolvent debtor who had left the country, and a mortgage upon an estate abandoned by the

owner, and in relation to which the Nebletts, father and son, make the most bitter complaints of its insufficient security.

In his letter of September 29, 1869, Henry Neblett says: "Your deed lay in the hands of your uncle as an escrow. . . . I have hesitated whether to abandon the place or struggle to save something by borrowing a large sum, and risk of forced culture in latitude 30 $\frac{1}{4}$." Sterling Neblett, the father, writes: "If Mendoza be correct, as he just advised, that there are numerous debts and some judgments against Mossland" (the plantation in question), "liens on the property that Henry nor I did not know of, the trust deed on record at St. Martins give the only protection against them. . . . Henry is absent and has long been the true owner of James Edward's bond. I thought of you if interested, and my deed to Henry could arrange matters. But alas! so far unsuccessful,—debts to others, less and less probability of buying the Bruossade bonds. . . . How much money will you provide Henry if he decides to go?"

The letter of the same person of February, 1869, is filled with the accounts of the embarrassments and difficulties, of the depreciation of the estate, the claims for taxes, judgments and general creditors. Among other things, he says: "I know Henry would let you have his debt" (the bond in question) "for fifty cents on the dollar." We are not able to say, nor is it very material to know, whether these statements were false and fraudulent, or whether the security was really so inadequate as is here represented. Whether good or bad, he receives now the same security that he then gave to his vendor. It would be a perversion of justice to give him the full amount in money for a security then worth but fifty cents on the dollar. If, on the other hand, it was then an adequate security, it is the same now.

§ 815. *No objection to a restoration of property received on a fraudulent sale that it has fallen in value since the transaction, or is perishable.*

2. It is no objection to a restoration of property received on a fraudulent sale that it has fallen in value since the date of the transaction. *Blake v. Morrell*, 21 Beav., 613; *Veazie v. Williams*, 8 How., 134, 158. Nor, if the property is of a perishable nature, is the holder bound to keep it in a state of preservation until the bill is filed. *Scott v. Perrin*, 4 Bibb, 360; *Kerr*, 337. A party seeking to set aside a sale of shares is not bound to pay calls on them to prevent forfeiture after filing his bill; nor is it fatal to his right of rescission that some of the shares have been thus perfected.

We have no means of knowing whether there can be a defense made to the bond arising from the statute of limitations. When the bond has been so recently adjudged by the court to be a subsisting security, and to be a lien upon the plantation directed to be reconveyed,—the party in substance re-delivering the bond as a condition of obtaining such reconveyance,—it would seem that a defense of this character could not be a good one. But of this the appellant must take his chance. If the bond has become thus impaired, it is no worse than the loss of a perishable article, or the forfeiture of shares during the litigation. These circumstances do not alter the rule of law. In *Gatley v. Newell*, *supra*, it is said: "The party defendant is not bound to rescind until the lapse of a reasonable time after discovering the fraud. Hence the parties cannot be placed *in statu quo* as to time." Parties engaged in a fraudulent attempt to obtain a neighbor's property are not the objects of the special solicitude of the courts. If they are caught in their own toils, and are

themselves the sufferers, it is a legitimate consequence of their violation of the rules of law and morality. Those who violate these laws must suffer the penalty.

Decree affirmed.

GUM v. THE EQUITABLE TRUST COMPANY.

(Circuit Court for Iowa: 1 McCrary, 51-61. 1873.)

Opinion by LOVE, J.

STATEMENT OF FACTS.— This bill is brought to cancel a certain trust deed, executed by William and Nancy Beard to said Jonathan Edwards, trustee, to secure the payment to said Edwards' co-defendant the sum of \$3,000, so far as said trust deed embraces certain lands described in the bill and claimed as the property of this complainant.

The evidence clearly shows that about the year 1865, William Beard, who was the father of Sarah E. Gum, the wife of this complainant, sold to said William Gum the following lands and tenements in Davis county, Iowa, viz.: The west half of northwest quarter of section 8, and the southwest quarter of southwest quarter of section 5, in township 68, range 15; and that said William Beard about the same time gave to said Sarah E. forty acres of land adjoining the above described, as follows: The northwest quarter of the southwest quarter of section 8, same township and range.

The sale to William Gum was for a full and valuable consideration, which was paid by said Gum. Said William and Sarah E. Gum took possession of the land and made valuable improvements upon it. They have had the open, uninterrupted and adverse occupancy of the land for about twelve years—from the year 1865 to the time of the bringing of the suit. They are illiterate and ignorant people. No conveyance was made to them of the land until the 17th day of April, 1865, when William Beard and wife executed separate deeds to them for the land in question; that through the negligence of these grantees, their deeds were not filed for record till August 26, 1876.

It also appears that about the month of February, 1876, William Beard made application through the Davis County Loan Co., of which the managing members were F. C. Overton and Amos Steckel, to the defendant Trust Co., for a loan of \$3,000; that said William Beard executed a deed of trust to secure the same to said Jonathan Edwards, as trustee for the company, which said deed of trust was delivered and duly recorded on the 30th day of March, 1876; that this deed of trust included, with some of said Beard's land, the above described land, which had been previously conveyed by Beard to this complainant and his wife.

It further clearly appears from the evidence that, so far as said Beard was concerned, the said land of the complainant and his wife was included in the deed of trust by inadvertence and mistake; that Beard did not intend to mortgage the complainant's land, or any part of it, to secure said loan, but intended and agreed to execute the mortgage upon his (Beard's) own land, being in part the land on which Beard lived.

It further appears clearly by a great preponderance of evidence, that when said Overton, after the loan had been agreed upon, was at Beard's house for the purpose of having the deed of trust executed, Gum, the complainant, was present; that both Gum and Beard cautioned Overton not to get the mort-

gage on Gum's land; that Overton called for Gum's deeds; that Gum went to his own house and returned with the two deeds from Beard to him and his wife; that he handed these two deeds to Overton; that Overton took them and compared the description, and assured Gum that his (Gum's) land was not included in the deed of trust; that neither Gum nor Beard or his wife could read or write; that the deed of trust was not read over to Beard and his wife, but that they executed and delivered the same to Overton, by whom it was taken away.

Thus it appears that the property involved in this suit did not, at the time when William Beard conveyed it by way of mortgage to respondents, belong to him. It was then, in fact, as the evidence clearly and satisfactorily shows, the property of the complainant William Gum. Beard had sold it to Gum for a valuable consideration in 1865, and executed a formal conveyance on the 17th day of April, 1875. Beard, therefore, clearly had no title to the land when he conveyed it to respondents on the 29th of March, 1876. Upon what grounds, then, do the respondents claim title under Beard as against William Gum, the real owner at the time of the execution of the deed of trust or mortgage to Jonathan Edwards?

The respondents place their claim of title upon two grounds: 1st. That they are purchasers without notice for value under the complainant's grantor. 2d. That respondent is estopped by his own action as appraiser from now setting up his title as against the respondents.

Both parties claim title under a common grantor, William Beard. The complainant's deed was first executed, but it was not filed for record until after the recording of the respondents' deed, when the respondents advanced their money and took Beard's mortgage to secure it. Beard was of record the apparent owner of the property. There was then no record of any conveyance from Beard to complainant. If this were all, the respondents would have a clear right to the property as against the unrecorded deed of the complainant.

This is undoubtedly true, if it be found that Overton was not the respondents' agent in taking the conveyance. Overton had actual notice of the conveyance from Beard to Gum under which the latter claims—of this there can be no question upon the evidence. The proof that Gum, when Overton was at Beard's house to get the mortgage executed, exhibited his deed to Overton, leaves no doubt whatever that Overton had actual notice of Gum's deed.

But respondents insist that Overton was not their agent, and they offer testimony to show that they had no agent in Iowa to effect loans for them. It would seem, if we are to credit their witnesses, that none of the middle men were acting for the respondents, or for their interest. These middle men were not the principals in the transaction. They were agents for some one, and if the testimony of respondents' witnesses be correct, they were acting as agents for Beard.

§ 816. *Actual, open, adverse possession is constructive notice to all the world.*

And from this the conclusions follow that the respondent, a moneyed corporation, was engaged in the business of lending money in this distant state, not upon information furnished by their own agents, but upon information supplied to them by the agents of the borrowers. In other words, the borrowers' agents made abstracts of title, examined and valued the land, and gave information of the character and responsibility of the borrowers, and

upon the information so furnished the corporation based their loans! It must be admitted that this is somewhat extraordinary, if true. But if it be conceded, then it follows that the respondents had no actual notice of Gum's prior deed; but had defendants not constructive notice of the existence of that conveyance? The complainant was at the time of the execution of the mortgage in the actual, open and notorious adverse possession of the land; he had occupied the land for a period of eleven or twelve years. Now, under the settled law of Iowa, this possession of the complainants was equivalent to constructive notice of the recording of the deed; actual possession is constructive notice to all the world. It matters not where the grantees resided, they were affected by this constructive notice of the complainant's title, the same as if the deed had been recorded. If complainant's deed had been recorded, it will not be claimed that respondents, wherever they resided, could have obtained a title from Beard, so as to have postponed the complainant. The same rule applies in case of constructive notice resulting from the actual adverse possession of the complainants. Putting, therefore, entirely out of view the matter of actual notice to Overton, or any other agent of the respondents, their claim of title as innocent purchasers for value without notice cannot be sustained.

§ 817. *When an appraiser is not estopped.*

The respondents' principal reliance, however, would seem to be upon the ground of estoppel. Let us consider the facts upon which that defense rests. William Beard, in order to obtain a loan of \$3,000 from the respondents, proposed to secure them by a deed of trust upon his home farm, or so much of it as might be required for that purpose. It is perfectly clear from the evidence that he had no purpose whatever to mortgage the complainant's land; but in the written and printed application which it became necessary for him to make in order to comply with the rules of the defendant company, he by mistake included the land involved in this suit, which he had previously conveyed to William Gum and Sarah E. Gum, his wife. Beard's application for the loan was made through F. C. Overton and Amos Steckel, loan agents in Bloomfield; the application was made by Beard upon a printed blank, filled up by the loan agents and signed by Beard, or by some one for him. It was necessary to have the land valued by two appraisers, which was evidenced by their signatures upon another page of the same printed blank.

It appears that Beard had signed the application, and that one Luther Hunt had subscribed the appraisement, and that afterwards William Gum, at the request of Beard, went to the office of Overton and Steckel to give his appraisement of the land. It is perfectly clear from the evidence that Gum supposed and believed that he was to appraise Beard's homestead land. Beard told him what land he was to appraise, and pointed it out to him. Gum clearly had no thought that his own land or any part of it was to be included in the appraisement, but only the land of Beard, which the latter had shown him. Gum, with this understanding, went at Beard's request to Overton and Steckel's office to make the appraisement.

Upon the face of the appraisement it appears that Gum signed it and swore to it, but Gum swears that neither the application nor appraisement was read to him, and that no oath was administered. He was an ignorant man, and could neither read nor write. There is very good reason to believe Gum's statement as to what happened at the loan agent's office when he went to appraise the land. But let us assume that the appraisement was signed by

Gum, as it appears to be, and that both the application and appraisement were read over to him. The application contained, as I have said, a description of the land by numbers, with a plat of the same. The description by numbers erroneously and by mistake included Gum's land, but the plat showed that Beard's land, and not Gum's, was the land intended to be appraised and mortgaged.

Beard, in the application, makes the following answers: 11. By whom are the premises occupied? Ans. By applicant. 14. In whom is the title vested? Ans. "Applicant."

The appraisers appear upon the face of the paper, after giving their valuation of the land, to affirm (the same being in printed form) as follows: "We also state that the condition of the property is truly set forth in the applicant's statement in said application, and that his answers to the questions contained therein are true, as we verily believe."

This is what constitutes the estoppel asserted by the respondents. They insist that the appraisement is an essential part of the application, and that they took the loan on the faith of it, believing what the appraisers affirmed under oath to be true, and that they would not have parted with their money but for their belief in the truth of the statement contained in the appraisement.

How far the lenders of money rely upon the statements of appraisers respecting the borrower's title to land is certainly very questionable. Appraisers are generally understood to be freeholders of the neighborhood, called to place a value upon the land. They are not supposed to be acquainted with land titles. Anything they are made to answer in an indirect way to printed questions as to their belief in the truth of what the borrower affirms respecting his title would, we should think, have very little weight with the lender in determining the matter of title. The lender must surely rest his determination as to the title upon more certain, direct and reliable information than the answers which he thus obtains from persons called upon to make a gratuitous valuation of the land. What the appraiser may affirm in regard to the title must be regarded, I think, as a mere make-weight by the lender in making up his judgment.

But however this may be, it is perfectly clear upon the evidence in this case that William Gum, if the application was read to him, and if he did affirm that Beard occupied and owned the land described by numbers in that application, was laboring under a mistake of fact. Gum believed that he was speaking with reference to the land which Beard had pointed out to him, and which he came to appraise. The mistake was perfectly innocent on his part. He was a volunteer, acting at the request of and for the accommodation of other parties; his services were gratuitous; he had no interest whatever in the transaction. Now it would certainly strike any one as a severe measure of justice if a mere appraiser of land, serving gratuitously for the benefit of others, without any interest whatever of his own involved, should lose his homestead and his farm in consequence of an innocent mistake respecting the description of the land.

If in such a case the appraiser's own land should be inadvertently described by numbers in the borrower's application, and the appraiser should innocently and without the least semblance of fraud, by mere mistake, untruly affirm that the borrower is in possession of the land, and has good title to it, is he to be visited with the heavy penalty of the loss of his farm and his homestead?

§ 818. *Upon what estoppel is founded.*

Certainly nothing but fraud or gross negligence on the part of the appraiser could justify so severe a judgment against him. Indeed, estoppel must proceed upon the ground of fraud or gross negligence. These elements lie at the very foundation of the doctrine of estoppel. It is at best a severe doctrine that closes the mouth of a party and denies him the right to assert the truth respecting his title. That there was any fraud on the part of Gum in this appraisement will not be asserted. It is clear that he acted in perfect good faith.

There is no evidence to warrant the imputation of gross negligence on the part of Gum. Admitting that the application and appraisement were read to him, and that he did not, from the reading of the numbers, see that his own land was described, it does by no means follow that he can be charged with negligence. There are many careful men who do not retain in memory the numbers describing their land, and who would not, from the mere reading of the numbers, know that their own land was described. If any one doubts this, let him make the experiment upon himself, and I think he will be convinced. Moreover, Gum came to the loan office to appraise Beard's land, which had been pointed out to him. Beard and Overton both told him the land was Beard's. They described the land in the application, and Overton, as we assume, read it to him. Had he any reason to suppose that they had inserted wrong numbers in the paper read to him, and least of all, that they had inserted numbers describing his (Gum's) own land? What Gum came for was to value, not describe the land or verify the description. To have scrutinized the numbers, to have verified them by comparison with deeds and records, or with the plat which accompanied the application, would indeed have been acts of extraordinary care and diligence. But the failure to do these acts falls very far short of gross negligence.

There is another circumstance which goes very far to relieve Gum of the imputation of gross negligence, or, indeed, of any negligence at all. There was a plat attached to the application; indeed, it was on the same sheet of paper. This plat had been made by Luther Hunt. Upon this plat the land which was to be appraised was marked out. If Gum, who could neither read nor write, is to be strictly bound by the printed and written parts of the application, by much greater reason is he entitled to the benefit of any inference justly to be drawn from the fact apparent on the face of the plat in question. Was it not perfectly natural for Gum, an illiterate man, to look to the plat as truly showing the land to be appraised, and for that reason give less attention to the numbers as read off to him? Is there one man in a thousand who, if called upon to appraise land, and to affirm anything respecting it, would not rely rather upon the plat of the land exhibited to him by the parties interested for a true description, than upon the numbers of the land?

Now upon the plat thus exhibited to Gum, the land marked for appraisement was Beard's land, not Gum's. What the plat showed corresponded with what Gum had been informed by Beard respecting the land to be appraised. It may doubtless be said that the respondents have been mistaken and injured by the false and negligent statements of the complainant, and that the complainant ought to be responsible for the consequences; that if one of two innocent parties must suffer, the damages should fall upon him who causes the injury, though ever so innocently, etc.

But in the first place the respondents cannot fairly trace their injury to the appraisalment. They must look behind it to Overton, who was really the party whose misconduct led to the whole difficulty. I am satisfied, from the evidence, that all the parties except Overton labored under an honest mistake as to the land conveyed. It would seem that even Overton labored under the same mistake until the deeds of the complainant and his wife were exhibited to him at Beard's house.

§ 819. *Rule as to sub-agents.*

Now Overton was certainly not the complainant's agent. Whether he acted as agent for Beard or for the respondents may admit of question. If I found it necessary to decide this question I would be compelled to say that, in my opinion, the preponderance of evidence tends to establish the fact that Overton was, as to that transaction, acting for the respondents.

It is not necessary that a sub-agent should be known to his principal, or in any way recognized by his principal, in order to bind the latter. The innumerable sub-agents of railroads and other corporations are entirely unknown to their principals. Authority is sometimes implied from the very nature of the duties and powers committed to a general agent to employ sub-agents, and when this is the case, the principal is bound by the acts of the sub-agent, although the latter may never be known or recognized by the principal. It would be difficult to affirm that, from the very nature of the business committed to Underwood and Clark, they did not have implied power to employ sub-agents in effecting loans for respondents. It is not, however, necessary, in my view of this case, to determine whether or not the middle men in this case were, in fact, the agents of the respondents.

Lastly, if the respondents have received injury, they have a plain and adequate remedy. Beard is not insolvent, and he has not, it seems, conveyed the land which he intended to mortgage to respondents. The respondents can undoubtedly file their bill to correct the mistake, and subject the land intended to be conveyed to the payment of their mortgage debt. Thus exact justice may be meted out to all parties. Decree for the complainant.

§ 820. *In general.*—A court of chancery will decree the cancellation of a contract only for fraud or mistake. It cannot alter the contract, but must act upon it as it is. *Brooks v. Stolley*, 3 McL., 528.

§ 821. Equity will not cancel a contract because by lapse of time it has become more burdensome in its operations than was anticipated, and especially will a court of equity not interfere with it when it is part of the consideration of a conveyance of land not sought to be affected. *Marble Company v. Ripley*, 10 Wall., 354.

§ 822. But it is not always necessary for the injured party, even where fraud taints a contract, to rescind it in order to resist its specific enforcement in a court of equity. He may permit the contract to be amended so as to conform to fair dealing, and if, under the pleadings and relief prayed, a court of equity can render a decree which will be just and fair, and in accordance with equity, it will do so. *Elfelt v. Hart*, 1 McC., 11.

§ 823. *Grounds for—Misrepresentation.*—To set aside a contract in equity on the ground of misrepresentation, the misrepresentation must be of something material, constituting an inducement or motive to the act or omission of the other, and by which he is actually misled to his injury. It must be something in regard to which the injured party places a known trust or confidence in the other. It must not be a mere matter of opinion, equally open to both parties for examination and inquiry; and when neither party is presumed to trust the other, but to rely on his own judgment. *Smith v. Richards*, 13 Pet., 26.

§ 824. A misrepresentation made by a vendor with regard to the property is a ground of rescission in equity, if the other party is misled by it, though it was innocently made. *Ibid.*

§ 825. If, upon a treaty for the sale of property, the vendor makes representations touching the nature and character and value of that property, which he knows to be false, the falsehood of which the purchaser has no means of knowing, but he relies on them, a court of equity

will rescind the contract so entered into, although it may not contain the misrepresentations. But it will not rescind except upon the clearest proof of fraudulent misrepresentations, and that they were made under such circumstances as show that the contract was based on them. But if the purchaser, choosing to judge for himself, does not avail himself of the means of knowledge open to him or to his agents, he cannot be heard to say that he was deceived by the vendor's representations. *Hough v. Richardson*, 3 Story, 659.

§ 826. Where one purchased land, relying on false certificates of third persons, which were procured by the seller, that the land contained a certain amount of timber, when in fact it did not contain one-tenth of the amount represented, and the purchaser was prevented from exploring the land by the artifices of the seller, it was held to be a proper case for the rescission of the sale in equity. *Mason v. Crosby*, Dav., 808 (AGENCY, §§ 23-29).

§ 827. Misrepresentations, and obtaining a bargain in consequence thereof disadvantageous to the party deceived by them, is a ground in equity for setting aside the conveyance, although the party imposed upon was of sound understanding and had time enough to detect the falsehood before he made the contract. *McAlister v. Barry*, * 2 Hayw. (N. C.), 290.

§ 828. And the grantee will be allowed for improvements on the estate. *Ibid.*

§ 829. To a proceeding in equity to rescind a contract on the ground of fraudulent misrepresentations a plea of bankruptcy cannot be sustained. *Smith v. Babcock*, 2 Woodb. & M., 246.

§ 830. — mutual mistake. — Where one having a claim against a foreign government for the illegal capture of a vessel, entered into a written contract with an agent to prosecute his claim, agreeing to pay him nearly one-third of the amount recovered, and, unknown to the claimant or the agent, the claim had already been allowed, a court of equity ordered the contract to be delivered up to be canceled. *Allen v. Hammond*, 11 Pet., 63.

§ 831. T., acting for the owners of certain pine lands, conveyed the lands to the complainants in his own name, under the mistaken belief on their part, induced by his representations as to his belief and by inaccurate explorations made by him and their agent jointly, that there were about sixty million feet of timber on the tract, whereas in truth there was thereon only about from three to five million feet. *Held*, that whether the representations of T. were fraudulent or not, and whether he was honestly mistaken or not as to the quantity of timber on the lands, yet there was so gross a mistake that the original contract ought to be set aside, and the purchaser ought to recover back the payments made by him, deducting whatever he had received from the proceeds of timber cut on the lands, and that T., having received the money, ought to be primarily liable to repay it, but that in his aid such of the owners as he acted for, and as recovered part of the purchase price, ought to be decreed to repay to him the proportions respectively received by them. *Daniel v. Mitchell*, * 1 Story, 172.

§ 832. — undue influence. — Against the consequences of mistaken judgment or mere impudence and folly on the part of one making a contract, courts of equity can grant no relief. But contracts of persons who are of weak understanding, and therefore liable to imposition, will be held void in courts of equity, where the nature of the contract justifies the conclusion that the party has not exercised a deliberate judgment, but has been imposed upon by undue influence. Thus where the plaintiff, while driving his coach and horses to the place of the defendant for the purpose of trading them, was thrown from his coach with such violence as to produce concussion of the brain, and to so weaken and derange his faculties as to render him incapable of comprehending the subject of the contract, and in this condition he traded his coach and horses to the defendant for a carriage of about half the value of his own property, and which was unfit for the plaintiff's business, the contract was rescinded by the court on the plaintiff's recovery from his injuries, and his demand of his property and return of the carriage uninjured. *Kilgore v. Cross*, 1 McC., 144 (CONTRACTS, §§ 678-81).

§ 833. A bill in equity was filed by creditors of C. to set aside a deed made by him shortly before his death and while lying sick at the house of his brother, to M., his brother's partner, on the ground (1) that it was procured of C. by the undue influence of M. and his brother, and (2) because it was without consideration. The court held on the proof that there was no undue influence shown, and that the deed was founded upon a debt due from the brother for which C. was liable, and was therefore founded upon a good consideration and was valid, although a preference. *Pomeroy v. Manin*, * 2 Paine, 476.

§ 834. Where a party is feeble in body and mind and incapable of making any contracts in regard to his property, and is unduly influenced to assign certain notes and mortgages for an interest in a patent right of doubtful utility, equity will set the contract aside and give full relief. *Colburn v. Van Velzer*, * 3 McC., 650.

§ 835. Equity will set aside and order to be canceled a conveyance procured from the complainant by the respondent without consideration, by threats of taking his life. *Baker v. Morton*, * 12 Wall., 150.

§ 836. In this case a deed from a young daughter to a wealthy father, of all of her property, and leaving herself entirely destitute, was set aside in equity on account of the relation of the

parties, and also of the fact that the father had a life estate in the property conveyed and no adequate consideration was paid; all restraint and undue influence being disproved, and the deed having been made with full knowledge by the daughter of the nature and extent of her rights. The court reviewed the authorities. *Pye v. Jenkins*,* 4 Cr. C. C., 541. Reversed in *Jenkins v. Pye*, 12 Pet., 241.

§ 837. — *Inadequacy of price.*—Inadequacy of price, in connection with other circumstances, is not sufficient to authorize a court of equity to set aside a sale, unless it is so great that the mind revolts at it; then the court will lay hold of the slightest circumstances of oppression or advantage to rescind the contract. And where a person gives \$25,000 worth of property for \$1,000, the fact itself furnishes good ground to conclude that the party was laboring under some controlling necessity, or was oppressed, or was ignorant of the true value of the property. *Holmes v. Holmes*, 1 Abb., 525 (Dom. Rel., §§ 18-27).

§ 838. In 1850 congress passed an act granting all the swamp and overflowed lands to the states in which they were situated, with a proviso that their proceeds should be used in reclaiming said lands. The secretary of the interior failed to make such selections and lists of swamp lands as he was required to do by this act. In 1858 the state of Iowa granted its swamp lands thus acquired to the counties of the state in which they might be found, the lands and their proceeds to be used in reclaiming swamp lands and in making public improvements. The agent through whom Wright county was urging her claim to swamp lands before the interior department informed the authorities of the county that their claim had been rejected, and that this rejection was accomplished by a rule which left little to be hoped for on the part of the county. Shortly after this the county sold all its swamp lands or interest therein or claims against the government for swamp lands which had been sold by the government, to the American Emigrant Company, for the sum of \$500 in public improvements, which improvements were never made. The question was voted upon by the people, but the vote was exceedingly light. The contract also provided that the purchaser should take the lands subject to the provisions of the swamp land act, and release the county from all liability in that respect. The officers and agents of the county were in gross ignorance of the nature and value of what they were selling, and the Emigrant Company were informed as to both, and withheld the information from the officers of the county. Whisky was freely used by the agent of the Emigrant Company in procuring the contract. After the contract the unsuccessful agent of the county became the successful agent of the Emigrant Company in procuring a reversal of the rule of the interior department, and securing an allowance of the claim for several hundred acres still unsold and money and scrip for six thousand acres to be located elsewhere in lieu of swamp lands sold by the government. The court held that the fact that all the parties knew they were dealing with a trust fund devoted by the donor to a specific purpose demanded the utmost good faith on the part of the purchaser, as there was a provision for the diversion of the fund to other purposes; and as there was a gross inadequacy of consideration and a successful speculation at the expense of the rights of the public, the contract should be rescinded, and the Emigrant Company should account and reconvey, saving the rights of intermediate purchasers. *Emigrant Company v. County of Wright*,* 7 Otto, 389.

§ 839. — *want of "clean hands."*—The complainant in this case came into court to enforce a deed to property of which he was never in possession, against the heirs of the grantor, who were very young at the time of the transaction, twenty-five years after the execution of the deed, and after every actor in the premises except himself, and every one who could speak against him from actual knowledge of the facts, had died. After considerable evidence was taken, an agreement of the complainant was discovered and proved by which he promised the grantor in the deed to convey to these very heirs upon payment of a specified sum, the greater part of which he subsequently admitted had been paid. The heirs thereupon filed a cross-bill alleging this newly discovered evidence and the complainant's concealment thereof, and praying a cancellation of the deed, specific performance of the contract, or a return of the purchase money. The complainant was called upon to disclose the facts in his answers but refused to do so. The court held that the complainant had not come into court with clean hands, and being satisfied from the evidence that, as a part of the original transaction, the right of the wife of the grantor (she having been the actual owner of the estate) was in some form secured to her children, and that it was never intended that the complainant should be the owner, ordered the deed to be canceled. *Crosby v. Buchanan*,* 23 Wall., 420.

§ 840. — *abandonment of contract.*—The owner of a farm made a contract with T. by which the latter was put into possession as manager, one-third of the profits to go to T. and the other two to the owner. T. sold the stock on the farm and the farming implements, and made a lease of the premises, except a small part which he reserved as a homestead, and became unable to pay over the amount received on the sales on account of insolvency. No rent was ever paid to the owner. The court held the contract to have been abandoned by T. and ordered it to be delivered up and canceled. *Tibbatts v. Tibbatts*, 6 McL., 80.

§ 841. **Cancellation of insurance policy.**—The rule that equity will not interfere to enforce a forfeiture, or divest an estate for breach of covenant or condition subsequent, does not apply to the cancellation of a policy of insurance upon the life of a living person. *Connecticut Mu. L. Ins. Co. v. Home Ins. Co.*, 17 Blatch., 142.

§ 842. A court of equity will exercise its power of setting aside contracts for defects not apparent on their face, although such defects arose after the execution of the contracts, in cases where special circumstances render it inequitable or unjust, or a hardship, to compel the plaintiff to await a suit at law at the instance of the other party. A mutual life insurance company may maintain a bill in equity, to compel the surrender of a policy upon payment of its cash surrender value, where it has become void according to the terms of the contract on account of the intemperance of the insured. It is important, both to the company and all its insured, to know, in the life-time of the insured, whether it is still bound to receive the premiums, and whether the insured has a right to share in the dividends, or profits, or surplus. The postponement of the determination of this question, until the death of the insured, is unjust and inequitable. *Ibid.*

§ 843. **As between vendor and vendee.**—Where the vendor of land had tendered the vendee a conveyance, which was refused on other grounds than defects in the title; and when defects were pointed out they were removed, and an unexceptional title offered, which if offered a month sooner would have prevented the dismissal of a suit by the vendor for specific performance, it was held that the rescinding of the contract would, under such circumstances, be inequitable. *Hepburn v. Dunlop*, 1 Wheat., 179. See LAND.

§ 844. A purchaser of land, who pays a part of the price and gives a bond for the balance, agreeing to secure the bond by mortgage on the land, but failing to do so, is entitled in equity, upon a conveyance of the land by the vendor to a third person, to cancellation of the bond and repayment of the money paid. *Castor v. Mitchel*, 4 Wash., 191.

§ 845. C. purchased certain land of B., agreeing to pay therefor at the rate of \$1 per thousand feet for all the good pine timber contained on it, to be ascertained by the report of certain appraisers to be appointed by B. The appraisers were appointed and made their report. C. afterwards conveyed a part of his purchase to A. And A. entered into an agreement with B. to pay for his part of the land partly in money and partly in his notes, B. giving a bond to convey the land to A. upon full payment of the notes. After paying the sum in cash and making large payments on the notes A. died, leaving his estate insolvent. C. took administration on the estate, and, as such, made a settlement with B. by which B. surrendered the notes against A., and C. surrendered the bond for conveyance to A. C. afterwards brought a bill in equity to set aside the settlement and the original bargain of A., and to recover the amount of the money paid to B. by A., alleging gross error and mistake on the part of the appraisers in their estimate of the timber, unknown to A. at the time of his bargain, and unknown to C. at the time of the settlement. *Held*, that there was no ground for setting aside or canceling the original contract. *Carter v. Treadwell*, 3 Story, 25.

§ 846. Inability of the vendor to make a good title at the time the decree is pronounced, though it furnishes a good reason for refusing a specific performance, is not necessarily a ground for setting aside the contract. *Hepburn v. Dunlop*, 1 Wheat., 179.

§ 847. The alienage of the vendee in a contract for the sale of lands is not a sufficient reason for rescinding the contract in equity. *Ibid.*

§ 848. A vendee is not entitled to the aid of a court of equity to rescind the contract after he has procured the true title, upon being made aware by the vendor of a defect in the title of the latter. *Galloway v. Finley*, 12 Pet., 264.

§ 849. **Of land patent issued by mistake.**—A proceeding in chancery is the proper remedy for the United States to avoid and cancel a patent for lands, which is void because the lands covered by it were reserved from sale for the use of the government, and which was issued ignorantly or by mistake, although no fraud is alleged in the bill. *United States v. Stone*, 2 Wall., 525.

§ 850. **Of wrongfully issued certificate of stock.**—A stockholder in a corporation whose stock was sequestered under an act of the Confederate government and sold during the civil war, and certificates issued to the purchasers, is entitled to file a bill in equity in behalf of himself and his co-stockholders, to have such outstanding certificates canceled, to restrain the holders thereof from bringing suits for their transfer, and the company from allowing such transfer and from payment of dividends thereon. *Perdicoris v. Charleston Gaslight Co.*, Chase's Dec., 435.

§ 851. **Of conveyance to fraudulent uses.**—After executing a mortgage, but before it was recorded, the mortgagor conveyed the land to his brother by a deed absolute on its face upon certain secret trusts for the benefit of the grantor. The grantee in the deed had notice also of the mortgage. *Held*, that upon a suit by the mortgagee for that purpose, the deed will be declared void as against the creditors of the mortgagor, and the grantee in the deed will be de-

creed to execute to the mortgagee a release of his title under the conveyance, and he and his heirs and assigns perpetually enjoined against setting up any title under the deed as against the mortgagee or his heirs or assigns. *Burbank v. Hammond*,* 3 Sumn., 429.

§ 852. *Of negotiable instruments.*—A court of equity has jurisdiction to compel the surrender of negotiable instruments unconscientiously withheld. Thus where the maker of negotiable notes agreed with the holder to pay them in goods at the rate of seventy cents on the dollar, and fulfilled his part of the agreement by delivering a large part of the goods and offering to deliver the remainder, but a delivery of the notes was refused, the court ordered the notes to be delivered up and canceled. *White v. Clark*, 5 Cr. C. C., 102.

§ 853. *Degree of proof required.*—A court of equity ought not to exercise its power to cancel an executed contract except in a clear case, and never for an alleged fraud, unless the fraud be made clearly to appear, and never for alleged false representations, unless their falsity be certainly proved, and the complainant has been deceived and injured by them. *Atlantic Delaine Co. v. James*,* 4 Otto, 207.

§ 854. *Parties must be placed in statu quo.*—A court of equity is always reluctant to rescind a contract, unless the parties can be put back *in statu quo*. If this cannot be done, it will give such relief only where the clearest and strongest equity imperatively demands it. *Grymes v. Sanders*, 3 Otto, 55.

§ 855. There can be no decree for the rescission of a contract for the purchase of land, on account of fraud, where the purchaser does not tender a reconveyance, or offer to surrender possession. *Murphy v. McVicker*, 4 McL., 252.

§ 856. It would at least be inequitable for a court of equity to rescind a contract for the purchase of land on the ground of mistake, where the grantee (the party seeking a rescission) has taken timber from the land since the purchase, and allowed others to take off still more, and thus rendered himself incapable of restoring the land in the condition in which it was received; and beyond this, has parted with the title entirely by allowing a mortgage placed on it by himself to be foreclosed in the hands of a third person not a party to the proceedings. *Ferson v. Sanger*, 1 Woodb. & M., 188.

§ 857. *Delay as a defense.*—The allegations of a bill in equity brought to set aside a title to land derived from the decree of a probate court made more than eighty years previously, because of fraud in its inception, must be clear and positive as to the commission of the fraud, and must satisfactorily account for the delay and show when the fraud was discovered. The proof in such a case must also be clear and satisfactory. *Moore v. Greene*,* 19 How., 69.

§ 858. No delay for the purpose of enabling a defrauded party to speculate upon the chances which the future may give him of deciding profitably to himself whether he will abide by his bargain or rescind it is allowed in a court of equity. *Twin-Lick Oil Co. v. Marbury*, 1 Otto, 687 (Corp., §§ 686-90).

II. JURISDICTION.

1. In General.

SUMMARY—Section 16 of judiciary act, § 859.—Power of congress to confer equity jurisdiction, § 860.—Scope of the jurisdiction of the federal courts, §§ 861, 863.—Bill by non-resident distributee, § 861.—Right and remedy under state laws, § 862; lien on adjoining property for street improvement, § 862.—Where there are no state chancery courts, § 863.—Creditor's bill based on a state statute, § 863.—District court of Louisiana, § 864.—Parties, § 865.—Citizenship; absent parties, §§ 866, 874, 876.—Next friend not a party, § 867.—Auxiliary proceedings, § 868.—Injunction to stay proceedings, §§ 869, 874, 875.—Land lying in another jurisdiction, § 870.—Bill by distributee against administrator, §§ 871, 872.—Bill to charge executors of deceased partner, § 873.—Enjoining proceeding by trustee to prejudice of *cestui que trust*, § 875.—Where jurisdiction attaches it will be retained, § 876.—Construction of will and execution of trust, § 877.—Remedy at law; want of privity, § 878.—Enforcing mortgages in Louisiana, § 879.—Claim of foreign creditor against representatives of decedent; local laws, § 880; judgment at law on administration bond not necessary, § 881.—Right of assignee of chose in action, § 882.—Relief of patentee against infringer, § 883.

§ 859. The sixteenth section of the judiciary act of 1796, defining the equity jurisdiction of the federal courts, is declaratory of the common law. *Baker v. Biddle*, §§ 884-96.

§ 860. That congress has power to establish circuit and district courts in any and all of the states, and confer upon them equitable jurisdiction in cases coming within the constitution, cannot admit of doubt. *Livingston v. Story*, §§ 897-901.

§ 861. The chancery jurisdiction of the federal courts is uniform throughout the United States, unlimited and unrestrained by state legislation; and the circuit court of the United States has jurisdiction of a bill by a non-resident distributee against an administrator to compel an accounting and payment of his distributive share in the estate, though under the state law such a suit could not be maintained in the state court on account of no final settlement having been made in the probate court. *Payne v. Hook*, §§ 918-18.

§ 862. Where a state statute has created a right and given a remedy to enforce it which is substantially consistent with the ordinary modes of proceeding on the chancery side of the federal courts, the right may be enforced in the form prescribed in the circuit court of the United States in equity. It was so held where a state statute had given a lien for work on streets against owners of abutting property and authorized a suit at law or in chancery to enforce it, the remedy in chancery being deemed the appropriate mode. *Fitch v. Creighton*, §§ 902, 908.

§ 863. No state court can increase or diminish the jurisdiction of the courts of the United States sitting in chancery. They derive their jurisdiction in this respect under the acts of congress, and it is exercised in the same manner in the states, whether those states have courts of chancery or not. But where a new mode of procedure is authorized by a state which is appropriate to chancery powers, relief will be given in the mode provided by the courts of the United States. The circuit court of the United States will therefore sustain a creditor's bill based on a state statute allowing a proceeding by the creditor to reach every description of interest which the debtor may have, and which cannot be affected by execution. *Laumon v. Clark*, § 904.

§ 864. The district court of Louisiana has, by the constitution and laws of the United States, the same equity powers as a circuit court of the United States has in other states. But according to the provisions of the act of 1824, the mode of proceeding in the exercise of such powers must be conformably to the laws directing the mode of practice in the district court of that state, if any such exist, and according to such rules as may be established by the judge of the district court, under the authority of the act of 1824; and if no such laws and rules applicable to the case exist in Louisiana, then such equity powers must be exercised according to the principles and rules and usages of the circuit courts of the United States, as regulated and prescribed for the circuit courts in other states. It is therefore held that a bill in equity to set aside an absolute deed, on the ground that it was given as a pledge for the repayment of money loaned, and for a discovery and account of the profits, may be maintained in said district court, the bill being unobjectionable, according to the ordinary mode of proceedings in chancery, and sufficient in the state courts under the laws of Louisiana. *Livingston v. Story*, §§ 897-901.

§ 865. Bills in equity in the federal courts must show jurisdiction over the parties, and the court will not entertain jurisdiction in the absence of such a showing, although no objection is made by the parties. *Heriot v. Davis*, §§ 905, 906.

§ 866. Where a bill in equity describes the complainant, and some of the defendants who have not been served with process and who have not appeared, as being of one state, and the other defendant who has been served with process and who has appeared as a citizen of the state in which suit is brought, the court still has jurisdiction, and if the interest of the defendant who has appeared can be determined without bringing in the others, the suit will be proceeded with without prejudice to the rights of those not appearing. *Ibid.*

§ 867. The next friend, who brings a suit in chancery for and in the name of an infant, is not a party to the suit in the sense of the eleventh section of the judiciary act, which requires the adverse parties to be citizens of different states in order to give the circuit court of the United States jurisdiction. *Williams v. Ritchey*, § 907.

§ 868. A bill in the circuit court of the United States to stay proceedings at law in that court is auxiliary to that action and may be maintained there to that end, although the court may not have jurisdiction over the parties for other relief. *St. Luke's Hospital v. Barclay*, §§ 980-82.

§ 869. Where a party applying in the circuit court of the United States for an injunction to stay proceedings at law in that court is not a party to those proceedings, or is incapable of maintaining an original action in his own name against the one he seeks to enjoin, equity will entertain a bill in his favor for this purpose, when, on facts of which the court cannot take cognizance between the parties to the action at law, it is made to appear to be against conscience that the party prosecuting at law should proceed in his cause. *Ibid.*

§ 870. In a case of fraud, of trust, or of contract, the jurisdiction of a court of chancery is sustainable wherever the person be found, although lands not within the jurisdiction of the court may be affected by the decree. But where the contest presents a naked question of title to real property outside of the jurisdiction, the jurisdiction cannot be sustained. The complainants filed a bill in the circuit court of the United States for the district of Michigan, alleging that the defendants had built a railroad, crossing their road several times; had entered upon their grounds, and, by building a parallel road so near as to carry the same line of pas-

sengers and freight, had impaired the franchises of the complainant; and that the complainant had the exclusive right to run a railroad on the route stated. The bill prayed for relief by injunction against such injuries threatened and done to their real estate in Indiana, and to their franchise, which was inseparably connected with their real estate in that state. The case involved the determination of rights to real estate which had been acquired by purchase, or by summary proceeding under the law of Indiana, and also of the chartered rights of the defendants, and the right asserted by them to construct their road as they had done, crossing the complainants' road and running parallel to it. It was decided that the court had no jurisdiction to grant the relief asked. *Northern Indiana R. Co. v. Michigan Central R. Co.*, §§ 908-912.

§ 871. Equity has jurisdiction of a suit by a distributee against an administrator, charging him with gross mismanagement of the estate, and seeking to compel him to account and pay over to the complainant his distributive share in the estate. There is no adequate and complete remedy at law. *Payne v. Hook*, §§ 918-918.

§ 872. In a suit by one entitled to a distributive share in an estate against the administrator for an accounting and payment of such share, charging him with gross misconduct in managing the estate, equity has also jurisdiction, where the bill seeks it, to fix the liabilities of the sureties on his official bond. *Ibid.*

§ 873. A bill in equity to charge the executors of a deceased partner upon a partnership liability must show the absolute discharge or insolvency of the other partners or it confers no jurisdiction. *Van Reimsdyk v. Kane*, §§ 919-29.

§ 874. Where plaintiffs prosecuting a suit in the circuit court of the United States, for the recovery of a fund, are sought to be enjoined by a third party claiming title to it, their capacity as suitors in the court fixes upon them the liability to be controlled in the management of that suit, at the discretion of the court as a court of equity. The court, as a court of equity, for the purposes of the injunction, will therefore acquire jurisdiction over them in their character as parties to the record, without regard to their citizenship. *St. Luke's Hospital v. Barclay*, §§ 930-32.

§ 875. The case of a trustee attempting to pervert his trust, or employ it to the prejudice of the *cestui que trust*, by a proceeding at law in which the *cestui que trust* would be barred of adequate protection, is particularly appropriate for the interference of equity to restrain the proceeding by injunction. Thus, where the defendants were suitors at law prosecuting for the possession of a fund which the bill to enjoin the suit averred to be a charity belonging to the plaintiff to distribute, and the effect of the suit, if successful, would be to transfer the fund from a public depository to the hands of individuals, the case was held to be one proper for the interference of the court to stay such change of possession until the question of fiduciary right could be settled; and especially as in this case the defendants held the certificates of deposit for the fund in their individual names, and the depository against whom the suit at law was pending could not question their legal title as against the certificates. *Ibid.*

§ 876. The United States, both by the terms of the conveyance and by operation of the statute, were *cestui que trust* in a deed of trust for creditors made by one indebted to them on duty bonds. At the instance of the surety on these bonds, they brought a suit in equity to recover their debt out of the trust fund thus created, the jurisdiction of the court attaching, as a federal court, from the character of the plaintiffs. The debtor, the trustees in the deed (one of whom was the surety on the bonds), and an agent employed to collect a foreign demand, were made defendants. It was objected that, when the claim of the United States was satisfied, the court could not go further and adjudge the controversy as between the defendants. *Held*, that the court, having acquired jurisdiction, could proceed to do complete justice as between the defendants, although, on account of their citizenship, one of them could not have maintained an original suit in that court against another. *United States v. Myers*, §§ 933-41.

§ 877. A court of equity has jurisdiction, at the suit of *cestui que trust* under a will, to construe the will, and to direct the executors and trustees in regard to the proper execution of the trust, and may, as auxiliary to this, require an account in order to ascertain the amount of the estate available for the purposes of the trust. *United States v. Gillespie*, § 942.

§ 878. The holder of certain bonds of a corporation, which with others were secured by a mortgage, brought a bill in the circuit court of the United States alleging that the mortgage had been enforced by executory process in a state court by a holder of other of the bonds and the property sold by the sheriff to defendant C.; that out of the purchase price a certain sum was paid by C. to the sheriff in cash, and the remainder was retained by him to be applied under the stipulations of the sheriff's deed and according to law to the payment *pro tanto* of the bonds other than those held by the plaintiff in that proceeding; that to this extent C. became personally liable to the holders of said bonds; and that subsequent to the purchase C. entered into a written agreement with other parties, made defendants, wherein it was recited

that he had purchased said property for the other defendants, and that the same was thereby transferred to them upon the stipulation that the latter should assume the liability of C. to the holders of the bonds not represented in the proceedings under which the property was sold. The bill sought to enforce this personal liability against these other defendants and also for a sale of the property under the mortgage. The mortgage was according to the laws of Louisiana, being a public act before a notary public, importing a confession of judgment, and enforceable by writ of seizure and sale. It was held (1), as against an objection to the equity of the bill on the ground that the complainant had a remedy at law by seizure and sale, that this writ could only be granted where the evidence submitted to the court was authentic and made full proof of every allegation in the petition, and that the complainant held no such evidence against any of the defendants except C., the proof against the others being an agreement under private signature; and (2) as against the objection of want of privity between the complainants and the defendants to whom C. sold, that the jurisprudence of the state having given a right in favor of one for whose benefit a contract had been made with another, this right could be enforced in a federal court of chancery. *Benjamin v. Cavaroc*, §§ 943-45.

§ 879. Although by statute a mortgage in Louisiana is a public act before a notary, importing a confession of judgment, and enforceable by writ of seizure and sale, this does not oust the equitable jurisdiction of the courts of the United States to enforce it. *Ibid*.

§ 880. The circuit court of the United States, as a court of equity, has jurisdiction to establish and enforce the claim of a foreign creditor against the representatives of a decedent, notwithstanding local laws relative to the administration and settlement of the estate, and notwithstanding the pendency of proceedings in insolvency in the probate court, and the court will interpose to arrest the distribution of any surplus among the heirs. *Green v. Creighton*, §§ 946-49.

§ 881. The plaintiff, claiming, as heir of G. and by assignment from the remaining heirs, the entire estate, filed a bill in the circuit court of the United States against the defendant as administrator of W. and executor of McC., alleging that T. became the administrator of G., and gave bond with W. as his surety; that T. received a large amount of property belonging to the estate and committed a *devastavit*; that he had summoned T. before the probate court to account, and he was found indebted to him as heir in a certain sum, which sum he was required to pay, and authority was given to prosecute a suit upon the administration bond; and that T. and W., his surety, were both dead, and the other sureties insolvent. The bill charged that the defendant, as administrator of W., had assets in his hands for administration, and that a portion of the assets was in the hands of McC., the surety of the defendant on his bond as administrator of W. The object of the bill was to establish the claim of the plaintiff, arising from the judgment against T. and the breach of the administration bond, on which W. was surety, against the administrator of W. and his surety, to the extent of the assets in their hands belonging to that estate; and for this purpose, it sought a discovery and account and payment. It was held that the court, as a court of equity, had jurisdiction; and that a prior judgment at law against the administrator on the administration bond was not necessary, the jurisdiction of a court of equity to enforce the bond arising from its jurisdiction over administrators, its disposition to prevent multiplicity of suits, and its power to adapt its decrees to the substantial justice of the case. *Ibid*.

§ 882. The assignee of a chose in action cannot proceed by bill in equity to enforce for his own use the legal right of his assignor, merely because he cannot sue at law in his own name. He may maintain an action at law in the name of the assignor. It was so held where the assignee of the right to all damages which had before the assignment arisen out of infringements of a certain patent, brought a bill in equity for the recovery of such damages. *Hayward v. Andrews*, §§ 950-51.

§ 883. The relief granted to a patentee in equity, by the recovery of profits and damages against an infringer, is incidental to some other equity, the right to enforce which secures to the patentee his standing in court. *Ibid*.

[NOTES.— See §§ 952-1082.]

BAKER v. BIDDLE.

(Circuit Court for Pennsylvania: 1 Baldwin, 394-423. 1881.)

STATEMENT OF FACTS.—Eckert was the owner of a valuable farm in Berks county, Pennsylvania, but was much embarrassed. His son-in-law, Baker, of Virginia, forwarded to defendant \$2,800, with instructions to buy up judgments against Eckert to prevent a sacrifice of the property. Defendant bought up the judgments, but nevertheless the property was sold at sheriff's sale in

1821, and bought by defendant, who offered to let Baker have it at the same price, but he declined to take it. This bill was filed more than ten years after the transactions which are in question, by the son and administrator of Baker, who had died in the interim. It seeks from the defendant a discovery and an account of the \$2,800, and a decree for the balance due to Baker's estate. The answer of Biddle denies generally the equity of the bill, alleges that he had pursued the instructions of Baker and paid off some of the judgments which were prior in date to the deed which Baker held for the property from Eckert. He stated that he had, years before, rendered an account to Baker, and had paid plaintiff \$1,000, and put into the hands of plaintiff's counsel \$695, which was all that he owed on the transaction, except \$131, and that he was ready to pay upon being indemnified.

Opinion by BALDWIN, J.

The first question made in this cause is jurisdiction, which is an important one that ought to be settled to prevent its recurrence.

§ 884. *Equity jurisdiction of United States circuit courts, under section 16 of the judiciary act of 1789. That section is declaratory of the common law.*

By the second section of the third article of the constitution, the judicial power of the United States is extended to all *cases in equity* between persons therein described; it also authorizes congress to establish inferior courts. In execution of this power circuit courts have been established by the judiciary act of 1798, with jurisdiction over all cases in equity, by the eleventh section, but it must be exercised within the limits prescribed by the organic law creating this power, and confined to the cases and subjects defined. 1 Cranch, 173; 3 Cranch, 172; 7 Cranch, 32, 44, 108, 287; 1 Wheat., 337; 6 Wheat., 395, 604; 9 Wheat., 820; 12 Wheat., 117, 131, 203. By the sixteenth section of this act it is declared that "suits in equity shall not be sustained in either of the courts of the United States, in any case where plain, adequate and complete remedy may be had at law." 1 Story, 59. It has been decided by the supreme court that this section introduced no rule, but was declaratory of the common law (3 Pet., 215); so this court must take it; but we must give it the effect of a declaratory law, which is to declare it for the past and settle it for the future. *Vide* 4 Co. Inst., 87; Keb. Stat., 807; 2 Ruff., 539. "Whereas some question hath of late risen, whether, etc.; for declaration whereof, and in avoiding such question hereafter, be it enacted and declared, That the common law of this realm is, and always was, and ought to be taken." Such is the form and effect of a statute declaratory of the common law; so taking the sixteenth section it is a proviso, a limitation and exception to the jurisdiction of the court, declaring that the case defined is not a suit in equity, cognizable under the eleventh section.

There can be no doubt of the power of congress to define what should be a case in equity, by declaring what the common law was which drew the line between courts of law and equity, nor that when declared it was obligatory upon all the federal courts, by superadding the authority of the legislature to that of the common law, so as not to leave the line of separation discretionary with the judges. To give any other effect to a declaratory law than settling a rule and standard for all cases coming within it would annul it; for if it leaves the common law as it was before, doubtful or discretionary in any way with the court, it is to all intents and purposes a dead letter.

In looking to the seventh amendment to the constitution, proposed by congress at the same session as the judiciary act, their intention is most manifest

to connect the sixteenth section with this amendment, which declares that "in suits at common law, where the value in controversy shall exceed \$20, the right of trial by jury shall be preserved." By the adoption of this amendment, the people of the states and congress have declared that the right of jury trial shall depend neither on legislative or judicial discretion. There were two modes in which this right might be impaired: 1, by an organization of courts in such a manner as not to secure it to suitors; 2, by authorizing courts to exercise, or their assumption of equity or admiralty jurisdiction over cases at law; this amendment preserves the right of jury trial against any infringement by any department of the government, and the sixteenth section prohibits all courts from sustaining a suit in equity where the remedy is complete at law. Connecting this with the ninth section, directing the trial of all issues in fact in the district court to be by jury, with the twelfth, giving the same directions in cases in the circuit court, and the thirteenth in the supreme court, the judiciary act was intended to preserve a right deemed too invaluable and sacred to be left to any other guardianship than the supreme law of the land.

When congress intended to make an exception, it was declared in the ninth section, "except civil causes of admiralty and maritime jurisdiction;" in the twelfth, "except those of equity, and of admiralty and maritime jurisdiction;" in the thirteenth the provision extended only to "actions at law." It thus became necessary to define what were "suits in equity so excepted;" this was done by the sixteenth section, so that to bring a case within the exception it must be, 1, a suit of equity jurisdiction; 2, a suit in which a complete remedy cannot be had at law, for if such remedy could be had, then it was a "suit at common law," within the seventh amendment.

§ 885. *Where a plaintiff has a plain, adequate and complete remedy at law, the case is not a suit in equity.*

This view of the constitution and law is the same as taken by the supreme court. "It is well known that in civil cases in courts of equity and admiralty juries do not intervene, and that courts of equity use the trial by jury only in extraordinary cases, to inform the conscience of the court; when, therefore, we find the amendment requires that the right of trial by jury shall be preserved 'in suits at common law,' the natural conclusion is, that the distinction was present in the minds of the framers of the amendment. By common law they meant what the constitution denominated in the third article, 'law,' not merely suits which the common law recognizes among its old and settled proceedings, but suits in which legal rights were to be determined and ascertained, in contradistinction to those where equitable rights alone were recognized, and equitable remedies were administered, or where, as in the admiralty, a mixture of public law, and of maritime law and equity, was often found in the same suit." *Parsons v. Bedford*, 3 Pet., 446, 447. Taking the amendment, the law and their construction as the one law, it follows that whenever a court of law is competent to take cognizance of a right, and has power to proceed to a final judgment, which affords a remedy, plain, adequate and complete, without the aid of a court of equity, the plaintiff must proceed at law, because the defendant has a constitutional right of trial by jury. If the right is only an equitable one, or, if legal, the remedy is only equitable, or both legal and equitable, partaking of the character of both, and a court of law is unable to afford a remedy according to its old and settled proceedings, commensurate with the right, the suit for its assertion may be in equity. This distinction is strongly illustrated in a case on the occupying claimant law of Ohio, directing compensation to be

made for improvements on land recovered by ejectment, to be ascertained by commissioners appointed by the court which tried the cause. The supreme court held the law valid so far as respected the right of compensation, but unconstitutional as respected the mode of ascertainment, inasmuch as the circuit courts of the United States, in a suit at law, must submit every question of fact to a jury. *Bank of Hamilton v. Dudley*, 2 Pet., 492, 525.

The tests of the relative jurisdiction over suits at law and equity are: 1. The subject-matter. 2. The relief. 3. Its application. 4. The competency of a court of law to afford it. Their application is not to be regulated by the decision of state or foreign courts, where their judicial system is organized on principles wholly inconsistent with a federal government of limited jurisdiction in all its departments.

§ 886. *The jurisdiction of courts of the United States is special and limited.*

All the courts of the United States are of limited jurisdiction, which, whether appellate or original, must be exercised in the mode pointed out by the constitution; an act of congress directing a different mode is void. 1 Cr., 175. Their jurisdiction is special, limited to certain cases; the facts necessary to its exercise must appear on the record, or their judgment is erroneous, as in inferior courts in England (1 Saund., 174; 1 Ves. Sen., 204), though their proceedings are not nullities because their jurisdiction does not appear. 5 Cr., 184, 185. An enumeration of cases on which the federal courts may act is an exclusion of all others (1 Cr., 174; 3 Cr., 172; 6 Cr., 313; 7 Cr., 32; 6 Wh., 603; 9 Wh., 820; 12 Wh., 132); a legislative exception from its appellate constitutional power is implied from a legislative affirmative description of the powers of the court (6 Cr., 314); if the law describes the power in general terms, embracing the case, without making any exception, it will be liberally construed and acted on (1 Cr., 91; 6 Wh., 400), but a strict construction is adopted in other cases. 3 Dall., 324; 7 Cr., 110. These are the rules on which the supreme court acts, whether on an appeal, writ of error or a certificate of division. 6 Wh., 363, 547; 10 Wh., 20; 12 Wh., 132. So as to the appellate jurisdiction of the circuit court, the time, the manner of its exercise, and its process must be subject to the absolute legislative control of congress. 1 Wh., 349, S. P., 7 Cr., 500; 2 Wh., 225. It cannot have been intended to leave the original equity jurisdiction subject to different rules, or capable of being exercised in opposition to them.

State courts are organized on contrary principles; the supreme court of this state has all the powers of the court of exchequer, common pleas and king's bench (1 Dall. L., 180); so has the supreme court of New York. 6 J. R., 280. In England the "king hath delegated his whole judicial power to the judges;" "all matters of judicature according to his laws." 4 Co. Inst., 70, 74; Stat. 20 Ed. 3, ch. 1; 1 Ruff., 246. Hence the jurisdiction of the courts was general and supreme over all matters subject to their respective cognizances. That of the court of chancery, proceeding *secundum equum et bonum*, was original, not delegated (4 Co. Inst., 73, 74); it is difficult to discover its origin (Mit., 1); it can be traced to no act of parliament, but had existed time out of mind; it had become very extensive, and being extraordinary, was governed by no certain rules. 4 Co. Inst., 89. It extends to all cases not taken from it, and transferred to some other court of equity. •

Professing to act only in aid of the law in curing its defects, chancery adopted a general rule, not to interfere where the remedy at law was complete, but have not always adhered to it; the only test of jurisdiction being usage, they would not suffer it to be arrested because courts of common law gave the

same relief. 3 B. C., 73, 224; 2 C. C. E., 40; 5 Ves., 784. Repeated attempts were made by the commons of England to define and limit this jurisdiction "to such cases as have no remedy by the common law," but were defeated by the king's answer, "the usages heretofore shall stand so as the king's royalty be saved." 4 Co. Inst., 82, 83. Chancery has thus been left to define its own jurisdiction by its own usages and precedents, never giving up what it had once exercised, and struggling for its extension over cases cognizable at law; courts of law, too, judging likewise of their own jurisdiction, have in modern times assumed the powers of equity, so that from their respective decisions it has become difficult to draw the line between them. 2 Sch. & Lef., 630; 6 Ves., 86; 7 Ves., 18; 2 Eq. C. Ab., 382; P. C., 111, 244; 4 B. C., 296; 2 Ves., 122; 7 Mod., 43; 2 L. R., 785; 3 D. & E., 53, 151.

To avoid the confusion arising from this conflicting struggle for jurisdiction between the different courts of common law and equity, congress vested the powers of both courts in the circuit courts, and did what the commons of England could not effect, prohibited their exercise of equity powers in cases where the legal remedy was complete. Usage, therefore, is no test of jurisdiction in the federal courts; they cannot act (in the language of Buller, Justice), as the lord chancellor does, "in the plenitude of his power" (3 D. & E., 161), but must proceed by the line drawn by the constitution, the law and the supreme court. It is no excuse for disregarding it, because courts of equity elsewhere act on another rule; as a matter of constitutional right, a defendant is entitled to a jury trial on an issue of fact in a suit at common law, and to his oath in his answer to a bill in equity, of which he cannot be deprived at the option of a plaintiff. 6 Ves., 184. It is enough for the purposes of justice that one tribunal is open to every party competent to give a remedy for every wrong; he ought to be compelled to resort to that which is appropriate to his case, and ask his remedy with the incidents attached to it. This court has been organized on this principle, with limited powers; it cannot sustain a suit at law on an equitable right only, adjudge a remedy appropriate only to equity, or sustain a suit in equity on a mere legal right for which the law affords a complete remedy (2 Cr., 444); this has been made our duty by a more imperative and safe rule than the usage or discretion of a chancellor.

§ 887. *Courts of equity will proceed in aid of courts of law in cases in which the remedy at law is doubtful, difficult or incomplete.*

A case, however, may be sustained in equity on a legal right, if the object and nature of the remedy sought are equitable (10 Ves., 14); the rights and rules of property are the same at law as in equity, the remedy for their violation is different; if damages are sought for a breach of contract, it must be by a suit at law; if a specific execution is asked, it must be in equity, so to annul and set it aside for fraud. 1 Wheat., 197. The right may be clear at law, but as a court of law cannot, by assuming cognizance of the conscience, act on the person of a party (1 Ves. Sen., 446), if the remedy is doubtful, difficult, not adequate to the object, not so complete as in equity (9 Wheat., 842), not so efficient and practicable to the ends of justice and its prompt administration, the sixteenth section does not preclude the jurisdiction of equity. 3 Pet., 215. Nor where it is necessary to bring before the court persons who are interested or actors in the case, though not parties to the suit, and cannot be made parties to a suit at law (9 Wheat., 843, 844); where the competency of law falls short of the *equum et bonum* of the case (4 Wash., 352); where there is some difference in the remedy, and some equitable circumstances call-

ing for its application. 9 Wheat., 534, 535. But there must be some head or branch of equity jurisdiction under which the case comes, independently of the remedy being more complete. 4 Wash., 206; 7 Cranch, 376; 9 Wheat., 842; 1 Ves., 423. In such cases equity acts to supply the defects of the law as to the remedy to which the party is entitled, and will administer its own appropriate relief by a final decree on the whole merits because cognizance cannot be effectually taken at law. 1 Sch. & Lef., 205.

§ 888. *A bill for discovery, if sustained, does not give power to make a final decree unless the relief is incidental to the discovery. And so with other heads of equity jurisdiction.*

When the jurisdiction of equity attaches, the extent of its exercise depends on the nature and object of the suit; if required only as preliminary, or auxiliary to a legal remedy, its power ceases when that is effected by the aid of equity; a subpoena in equity does not operate like a *capias* from the king's bench with a clause of *ac etiam* or a *quo minus* in the exchequer, to draw from law the cognizance of legal rights or legal remedies, when an auxiliary relief was alone called for (3 Conn. Rep., 140, 170), or be abused as a pretext for bringing causes proper for a court of law into equity. 7 Cranch, 89. A bill for discovery, for instance, must present a case of defect of proof (1 Wash., 129), and relief must be an incident or consequence of the discovery, or the party, after obtaining it, will be sent to law for his final remedy (3 P. Wms., 150; 2 B. C., 61; 1 B. C., 194; 6 Ves., 689; 3 Conn. Rep., 140, 170); equity will not render a final decree in a case of fraud, unless the object of the bill is to obtain something besides mere compensation (3 Pet., 221), nor on an injunction unless the object is to arrest the injury and prevent the wrong (9 Wheat., 845), or on a bill for an account, unless the justice of the case appears on the account. 1 Sch. & Lef., 308, 309. If the question of discovery, fraud, injunction or account involves the essence and merits of the whole case, as to right and remedy, and the court is competent to decide on the one and administer the other, it will, when put in possession of the materials to enable it to make a final decree, proceed to make it, to avoid multiplicity of suits. 3 Atk., 263; Amb., 541; 10 Johns. Rep., 596. So where a contract is made by fraud and imposition or the like, equity gives relief, which the law cannot, and having thus possession of the principal question, makes a final decree on the question and equity of the whole case. 1 Wheat., 197. The court being once rightly in possession of the whole cause, will determine the controversy, although in its progress it may decree on a matter which was cognizable at law (5 Pet., 278; 1 Cranch, 89); but if the answer to a bill of discovery confesses nothing, furnishes no evidence in favor of a plaintiff's claim, and denies the whole equity of the bill, this ground of jurisdiction is totally withdrawn from the case. 7 Cranch, 89, 90. The rule resulting from these cases is plain and intelligible; the principal question in a cause is the cause itself; a court of equity once having cognizance of it would not send the party back to law to settle its incidents; nor if the incidents only are before them, would they take the substance of the controversy from law.

§ 889. *The practice of the courts of the United States adopts the rules and principles of the English chancery at the time of the Revolution, except in the matter of jurisdiction, which is controlled by the sixteenth section of the judiciary act.*

It was a well established rule of chancery before the American Revolution to sustain a bill for discovery where they could not give the relief prayed for;

if the plaintiff was entitled to a discovery, and not to relief, the defendant must answer the former and might demur to the latter, but a general demurrer was uniformly overruled, if the plaintiff was entitled to an answer to either. *Mit.*, 148; 1 *Ves. Sen.*, 248; 2 *C. C. E.*, 176; 10 *Ves.*, 553; 2 *B. C.*, 281; 8 *Ves.*, 2; 2 *Atk.*, 44, 157, 284, 289; 2 *Ves. Sen.*, 357. This rule was adopted in the United States and yet prevails. 2 *C. C. E.*, 177; 1 *J. C.*, 434, 435. It was changed in England in 1787, 1788, by Lord Thurlow, and a new one introduced which has been followed since. That a demurrer, if good to the relief, is good to the discovery, if the discovery is sought for the purpose of the relief (1 *Madd. Ch.*, 216; 10 *Ves.*, 553; 2 *B. C.*, 280, 319); a plaintiff is not entitled to discovery if he goes on to pray relief to which he is not entitled, and a general demurrer is good to both. 4 *B. C.*, 480; 2 *Ves.*, 517; 3 *Ves.*, 7; 6 *Ves.*, 63; 11 *Ves.*, 510. The only reason given for so important a change in chancery proceedings is, that it was a hardship on a defendant to pay the expense of a long copy when there was only a right to a discovery, and not be able to avoid it by a general demurrer. 2 *B. C.*, 281.

Trivial as the reasons are, the rule affects the jurisdiction of the court most materially; if a general demurrer is allowed they cannot proceed; if overruled they can act on the whole case, thus doing away the distinction between incidental and final relief, and the cases where the principal question is before them, the essence and substance of the case, or only its incidents or an incidental question. A similar reason has led to an assumption of equity jurisdiction in account, wherever the relation of principal and agent exists, in the case cited by the plaintiff's counsel, because a "plaintiff can only learn from the discovery of the defendant how they have acted in the execution of their agency; and it would be most unreasonable that he should pay them for that discovery if it turned out that they had abused his confidence; yet such must be the case if a bill for relief did not lie." 4 *Madd. Rep.*, 199; *Am. ed.*, 220; *Eng. ed.*, 376, 416; 1 *Madd. Ch.*, 217. It is an old rule of chancery that plaintiff pays the costs of a bill for discovery though defendant resists it (*Bunb.*, 124; 1 *Atk.*, 286; 4 *Ves.*, 746), though Justice Buller ruled otherwise (1 *Ves.*, 423); yet it was never made a pretext for extending its jurisdiction till 1819. As costs are discretionary in equity (1 *Ch. Cas.*, 106; 1 *Eq. Cas. Ab.*, 125; 2 *Atk.*, 111; 1 *Madd. Rep.*, 190), the justice of the case could have been better answered by altering the rule as to the costs, than to make jurisdiction and final relief a mere incident to costs. In the rule of Lord Thurlow there is still less reason, for though the defendant pays the costs of a copy in the first instance he charges it in his bill against the plaintiff. Costs in *Ch.*, 106. Such are the pretexts for the assumption of jurisdiction when its extent and exercise depend on mere discretion, than which there can be no better reason for a statutory definition. Be the rule, however, as it may in England, or founded on solid or trivial reasons, it cannot be adopted by the courts of the United States; a check has wisely been provided against the assumption of equity jurisdiction by any new rule in English courts since the Revolution (*vide* 5 *Pet.*, 280), especially those which depend on the discretionary power of the court over costs. No such principle has been sanctioned by the supreme court in the cases cited by plaintiff's counsel. They have decided that the acts of congress distinguishing cases at law from those in equity refer to the principles settled in England before their passage, and not to the practice in the state courts. 3 *Wheat.*, 221; 4 *Wheat.*, 115; 1 *Pet.*, 613. In the words of Judge Washington, the judiciary act adopts the long established principles

of the court of chancery on the subject of equity jurisdiction. 4 Wash., 205, 354. It follows that new rules subversive of established principles and practice are excluded. *Vide* 7 Pet., 274.

§ 890. *An objection to jurisdiction for want of parties, or that there is a remedy at law, may be made at the hearing, and need not be set up by demurrer or plea.*

It is contended by plaintiff's counsel that the want of jurisdiction, on the ground of there being a remedy at law, ought to be by demurrer or plea, and comes too late after an answer. As a demurrer admits the facts of the bill, and can introduce no new ones, it presents only the question whether defendant shall answer it. Mit., 86, 87. It denies the equity of the bill, as a demurrer to a declaration denies the cause of action, but at law the defendant may move in arrest of judgment, or assign error for the same cause, as the defect is not cured by verdict or judgment. 5 Peters, 585.

There is no reason why a demurrer should be necessary in equity more than at law. It would be a hardship to compel the defendant in this case to admit the fact stated in the bill, that he undertook to procure an assignment of certain judgments to the plaintiffs, as the jurisdiction and relief might be consequent upon it; whereas, by denying it in his answer, the plaintiff would be out of court if he did not prove that fact. The difference between a demurrer at law and in equity is this: a judgment on a demurrer at law, if against a defendant, is final and peremptory; he puts it in at his risk, and the judgment is a perpetual bar. If a demurrer is overruled in equity, the defendant must answer over, but may insist on the same matter in his answer (2 Atk., 284; 3 P. Wms., 94; 2 Ves. Sen., 492), being the same as a *respondeas ouster* at law. 1 C. C. E., 7. If the demurrer is allowed in equity it is a bar, and goes to the merits. 1 Atk., 544.

In general, if a demurrer would hold to a bill, the court will not grant relief, though the defendant answers. 6 Ves., 686; 2 Jack. & Walk., 151. It will be done in some cases, but they are rare. Mit., 87, New York ed. The ground of a demurrer is that the bill does not disclose a case which entitles the plaintiff to the relief prayed for. If the bill does not state, or the plaintiff does not make out, such case at the hearing, or on an issue, or by the answer, he cannot have a decree. The want of equity in the bill is fatal to the plaintiff's relief. Although a demurrer or plea might have availed the defendant, he is not precluded by answering, and the precedents to this point are numerous. 3 P. Wms., 256, 257; 1 Ch. Cas., 144, 147; 2 B. C., 338, 340, 519; 4 B. C., 180, 198; 2 Ves., 56, 60; Com., 612; 1 B. C., 29, 201; 1 Atk., 451; 3 P. Wms., 94; 2 Ves. Sen., 493. After plea overruled he may answer to the same matter, or set it up in a second answer after the first has been overruled. 2 Ves. Sen., 492. The rare cases referred to in Mitford are *North v. The Countess of Stafford*, 3 P. Wms., 148, 150, where the lord chancellor allowed a demurrer, but said he would have relieved on the hearing if there had been no demurrer. This *dictum* applied to the particular case; the defendant had demurred to the relief and not to the discovery, and the plaintiff was at liberty to except, to amend his bill, and force defendant to discover. The others were the *Rector of Skedington's Case* and the case of *Pickering*, referred to in a note of the reporter in *Brewster v. Kidgil*, 12 Mod., 171, in which it is said that the difference between granting and refusing relief in the exchequer depended on there being a demurrer. As the case of *Brewster v. Kidgil* is reported in Holt, 669; Carth., 438; Comb., 424, 466; 5 Mod., 368, 374; 1 Salk.,

198, 615; 3 Salk., 340; 1 L. R., 317, 322, without noticing this point, little, if any, weight is due to this note of the reporter as evidence of a general rule, and his statement of the cases is too imperfect to ascertain their circumstances.

The counsel of the plaintiff relies upon a rule laid down by Lord Chief Baron Gilbert, that, after answering, a defendant cannot object that the plaintiff's remedy is at law. This rule, however, appears by the text and cases cited to be applied to the cases of bills filed for relief on deeds, bonds or other papers which have been lost or destroyed. Gilb. Ch., 50, 51, 52; 2 Mod., 173; 1 Ch. Cas., 11, 231; 1 Vern., 59, 180, 247. These bills are of two descriptions: 1. Such as pray only for relief, auxiliary to a final remedy at law, by a decree for a discovery and re-execution of the deed. 2. Such as, in addition, pray for payment of the money due. In the former an affidavit of the loss or destruction is necessary; in the latter, not. Mit., 42, 43. The reason of the difference is this: that, if the matter of the bill is within the jurisdiction of the court, the plaintiff need not make affidavit that he hath not the writings, but if it be to give the court jurisdiction then he must. 2 Eq. Cas. Abr., 13, pl. 1; 2 Freeman, 71, pl. 83. As a plaintiff cannot recover on a lost deed at law, it is a clear case for equity to supply the defect in aid of the law; when this is done by a decree for discovery and re-execution, the power of equity is *functus officio*, for then the remedy is complete at law to enforce payment, and a demurrer admitting the loss admits the jurisdiction to supply the defect. But as a decree for payment takes the final remedy from law to equity, there must be an affidavit to give jurisdiction for payment; if not made, and the defendant denies the deed, he may demur, because he has a right to have it tried by a jury. If the deed is confessed in the answer, he cannot demur to the relief, as it is iniquitous to afterwards litigate it on an issue at law of *non est factum*, and he has nothing to do but to pay the money; so if he denies the deed without demurring, and it is proved by two witnesses. Gilb. Ch., 50, 51, 52, 219, 220; Mit., 42. These principles are supported by the adjudged cases cited by Gilbert and 2 P. Wms., 541; 3 Atk., 17, 132; 3 Anst., 859, 861; they apply, however, only to this class of cases, which are governed by appropriate rules, not interfering with those adopted in ordinary cases. The nature of a bill on a lost deed necessarily makes it an exception to the general rule, of which this case is an illustration; for here it is admitted and cannot be controverted, that a demurrer would be good if the plaintiff has a complete remedy at law (3 B. P. C., 525), whereas it would be overruled if this was a bill on a lost bond with an affidavit annexed. In this case, as the answer admits or discloses nothing which gives any jurisdiction independently of the allegations of the bill, the defendant is not put to his demurrer; nor is the case in the bill one in which the plaintiff was bound to make affidavit, in order to give jurisdiction to equity, or where any affidavit, if made to any fact set forth, would authorize a transfer of the final remedy from a court of law, if it was a case for law, without such affidavit.

It has been thought proper to notice the rule in Gilbert the more particularly, as it was much pressed in the argument, and was the basis of the opinion of the judges in *Ludlow v. Simonds*, referred to hereafter. Admitting this rule as an exception in peculiar cases, we cannot hesitate in giving our opinion that the established general rule of chancery is as laid down by Lord Eldon: "If you could have demurred to the bill, the court will not make a decree at the hearing." The exception is: "If the defendant has the vouchers, so that the plaintiff cannot go on at law; and then the observation applies, that wanting

discovery, the court gives relief particularly in matters of account." 6 Ves., 686. Here the plaintiff asks for final relief, which must be denied him unless at the hearing he has made out a case of equity jurisdiction. It is next contended that this objection must be made by a plea to the jurisdiction of the court.

A plea differs from a demurrer in this: the latter is on the ground that the case is not cognizable in any court of equity, and can set up no new matter; a plea must set up matter not in the bill, some new fact as a reason why the bill should be delayed, dismissed or not answered, or it will be overruled. Mit., 177, 179; Beame, 2, 7; 2 Madd. Rep., 346, Am. ed. A plea to the jurisdiction does not deny the plaintiff's right, or that it is not a matter proper for the cognizance of equity, but that the court of chancery is not the proper one to decide it (Mit., 180; Beame, 57); it admits the case to be of equity jurisdiction, but asserts that some other court of equity can afford the remedy. This must be shown by matter set up in the plea, because the court of chancery being one of general jurisdiction in equity, an exception must be made out by the party who claims an exemption in order to arrest it (Mit., 183; Beame, 57, 91; 1 Vern., 59; 2 Vern., 483; 1 Ves. Sen., 264); but if no circumstance can give jurisdiction to the court of chancery, no plea is necessary; a demurrer is good. The objection that the case belongs to another court of equity cannot be taken by demurrer, it must be by plea (1 Atk., 544; Mit., 123, 124; Beame, 100, 101; 1 Saund., 74), showing what court has cognizance of the case, that it is a court of equity, and can give the plaintiff a remedy. 1 Vern., 59; 1 Dick., 129; 3 Br. Ch., 301; 1 Ves. Sen., 203; 2 Ves. Sen., 357.

It is in the nature of a plea in abatement at law which cannot be put in after general imparlance, or received when it does not give the plaintiff a better writ (1 D. C. D., 151 (146, 147); 1 P. Wms., 477; Beame, 92, 93; 1 Ves. Sen., 203, 204). The analogy, however, does not run throughout. Lord Hardwicke says, in *Penn v. Baltimore*: "First, the point of jurisdiction ought in order to be considered; and though it comes late, I am not unwilling to consider it. To be sure, a plea to the jurisdiction must be offered in the first instance, and put in *primo die*; and answering, submits to the jurisdiction; much more when there is a proceeding to a hearing on the merits, which would be conclusive at common law; yet a court of equity, which can exercise a more liberal discretion than common law courts, if a plain defect of jurisdiction appears at the hearing, will no more make a decree than where a plain want of equity appears." 1 Ves. Sen., 446, S. P., 3 Atk., 589; Beame, 56.

We have been much pressed with a contrary principle laid down by high authority, in *Ludlow v. Simonds*, 2 C. C. E. 40, 51, 56; 2 J. C., 369; 4 J. C., 290, but it is not supported by the cases referred to, and is much shaken by subsequent opinions of the same judges who asserted it. *Vide* 9 J. R., 493, by Mr. Justice Thompson, who remarked: "This objection ought not to be very favorably received in this stage of the cause;" by Chief Justice Kent, who does not notice this point in his opinion (9 J. R., 505); and by Judge Spencer, who had previously given his opinion that the bill ought to be dismissed. 9 J. R., 504. In 2 J. C., 369, Chancellor Kent rests his opinion solely on 2 C. C. E., 40, 56; in 4 J. C., 290, he repeats the rule as a general one, referring to 1 J. Cas., 434; 2 J. Cas., 431; 10 J. R., 595, 596, in neither of which cases is the rule referred to laid down by any of the judges. In *Ludlow v. Simonds*, Kent, J., quoted 1 Atk., 128; 1 Ves. Sen., 331; 3 B. P. C., 525; Mitford, *passim*; Gilb. Ch., 51, 53, 219, 221; 1 Ves. Sen., 446, neither of which supports the position;

hence he omits any reference to these cases in his two subsequent opinions in chancery, relying on the rule as one established in New York, by the case of *Ludlow v. Simonds*, which was decided in 1805.

In *Leroy v. Servis*, Judge Benson, in delivering the opinion of the court of errors in 1801, laid down the rule of chancery to be, "For it is to be remarked that a defendant does not waive or forego a single advantage as to the merits, or the point whether the plaintiff has equity, by not demurring. He may equally insist on the same matter by the answer which he may have done by the demurrer; and if he should omit them in the answer, he may still avail himself in argument on the final hearing of the case. 1 C. C. E.; 1, vii; 2 C. C. E., 176, 182. Decisive as are the terms of this opinion, it was overlooked in 1805, and a local rule to the contrary laid down, which we cannot follow when it is in opposition to the established course of equity.

The true rule as laid down by Judge Benson is analogous to proceedings at law, where an objection is made that the plaintiff's remedy is in equity. In *Paisley v. Freeman*, 3 D. & E., 53, the question whether an action founded on a fraud could be sustained at law was decided on a motion for a new trial; so in *Read v. Brackman*, whether a plaintiff could recover on a lost deed, was decided on a demurrer to the declaration for want of a profert (3 D. & E., 152, 157); surely then a court of equity, which exercises a more liberal discretion in pleading than courts of law, will not hold a defendant to stricter rules on the question whether the plaintiff has a remedy at law.

In the courts of the United States, an objection to the jurisdiction of the court, or to the want of equity in the bill, has never been overruled for the want of a demurrer or plea, but has been sustained wherever the defect appears by the bill, the answer, or the proofs in the cause; it may be made on a motion to dismiss the bill (1 Pet. C. C., 363, 383; 2 Dall., 205), though the defendant answer the merits without taking this objection (2 Cr., 419, 444); so after a decree *pro confesso*, a reference and report of a master. 5 Pet., 496, 504, S. P., 6 Cr., 158; 7 Cr., 75, 89, 376; 1 Wh., 197; 3 Wh., 591; 4 Wh., 115; 9 Wh., 739, 842; 3 Pet., 211, 215. When urged in argument, the objection "is considered in the nature of a demurrer to the bill for want of equity (1 Mas., 270); so a decree will be reversed for the want of proper parties, after a hearing on the merits in the circuit court. 4 Pet., 180, 202.

We must therefore take the law of equity to be settled, that a defendant may, at any stage of the cause, rely on the want of equity in the bill, on the ground that the plaintiff has a complete remedy at law. The nature of this case, which is one very near the dividing line between law and equity, required us to examine this question thoroughly, in order to come to a satisfactory conclusion on which side of the line it comes, as well as to settle the general rules of equity jurisdiction, so far as it could be done by this court. The labor of making up a detailed opinion is our own, the tax upon the time of the bar in listening to its delivery is voluntary and comparatively small. It is enough for us that the course we take is from the impulse of duty; of this we must be the judges.

§ 891. *Where a plaintiff has knowledge or means of proof or information, as of public records, a bill of discovery will not lie.*

The objects of the bill are threefold: First, discovery; second, account; third, the execution of a trust. They will be considered distinctly.

1. Discovery. From the bill it appears that the plaintiff's testator had received from the defendant two accounts of the receipt and disbursement of

the \$2,800 put into his hands, also of the amount of the judgments against Eckert, the sum bid at sheriff's sale, the purchase by defendant, the application of the purchase money, and that defendant had communicated his proceedings by letters received by the testator, which were read at the hearing. Thus far plaintiff, having previous knowledge of all material facts, had no need of a discovery.

The only matters disclosed in the answer, of which the plaintiff by his bill did not appear to have both knowledge and proof, were mostly of detail of what was in the accounts rendered, or would appear on the records referred to therein, in no way affecting the substance of the plaintiff's case in his bill. As the plaintiff had equal means of resorting to public records for information as the defendant, their contents are not a proper subject for a bill of discovery, as we decided in *Ross v. Gibson* at the last term. The merits of the plaintiff's claim were not changed by the answer, unless on matters merely auxiliary, or collateral to the principal question of relief; the answer has removed no legal impediment or brought out any matters peculiarly within the knowledge of the defendant, so as to present a case of equity cognizance of any matter not cognizable at law; admitting the contrary, still equity can go no further than to supply the defects of law under this head. The discovery sought and made does not carry relief in equity as an incident, so as to give the court power to decree on the whole case, and take the controversy from law to equity, but leaves all questions as to a final remedy as open as before the answer. *Vide* 5 Pet., 303; 7 Cranch, 89; Mit., 27, 42.

§ 892. *A bill for an account will not lie when an account has been rendered and received.*

2. Account. The bill does not aver any refusal to account till 1829; on the contrary, it admits that one was rendered in April, 1819, and another two years before the death of the testator, exhibiting a balance due by defendant of \$191, and its appropriation, to which no objections were made as to the items, or the application of the money, before the filing of the bill, nor is any fraud suggested. It is a good plea to an action at law for an account, that the defendant had accounted, before suit brought, to the person from whom money had been received, or to the person to whom he was bound to account or directed to pay it (Bull. N. P., 127), or that the money had been received for an object which had been accomplished (1 Vern., 95, 136, 208), or that he never was the plaintiff's bailiff or receiver to render an account. 1 D. C. D., 189; E., 3, 4, 5.

§ 893. *When an account may be considered a "stated account."*

The object of the suit being to compel the settlement of the account, the plea of fully accounted is good at law (4 Serg. & Rawle, 44; 3 Wils., 113), and a stated account is a good plea in equity. 4 Cranch, 309; 4 Dess., 175; 1 Atk., 1; 2 Atk., 1; Mit., 210, 211. If plaintiff has agreed to the account his only remedy is at law for the balance. Unless there is some legal impediment, equity will not interfere when the sum is certain. 1 Ves. Sen., 160, 163; 6 Ves., 141. In this case the account must be considered as settled by its long retention, without objection made in a reasonable time. 2 Vern., 276; 2 Ves. Sen., 239. Though not signed by the party it is a stated account, if it is in writing and shows a balance or that there is none. Mit., 21; 2 Atk., 251, 399. The burthen of showing errors in such an account is on the person who receives it without objections. 7 Cranch, 151. A settled account can be opened only for fraud or errors specified, and which are palpable or clearly proved.

2 Atk., 189; 4 Cranch, 309; 1 Ch. Cas., 299; 1 Vern., 180; 2 Atk., 119; 9 Ves., 265; 2 J. C., 216. It can only be surcharged or falsified by the plaintiff (11 Wheat., 256), and is not affected by being introduced into a subsequent account. 4 Cranch, 316.

§ 894. *The staleness of a demand may be relied on at the hearing without plea or demurrer.*

Long acquiescence in an account makes it a settled one; stale demands are not favored in equity when the party acquiesces for a length of time and sleeps on his rights. 1 J. & W., 59, 62; 2 J. & W., 152; 2 Sch. & Lef., 627. Conscience, good faith and reasonable diligence are required to call the powers of equity into action. 6 J. C., 369; Amb., 645; 3 B. C., 640; 2 Ves., 583. A trustee's account with an infant cannot be opened after eleven years' acquiescence in a settlement, unless by falsifying an item. 2 B. C., 62. An account is barred in eleven years. 2 Johns. Ch., 437; 3 Johns. Ch., 586. The bar from lapse of time is a conclusion from acquiescence, an inference from facts, which need not be set up by demurrer, answer or plea, but may be suggested at the hearing (3 B. C., 646; 4 B. C., 268; 2 Ves., 87, 572, 582; 2 Sch. & Lef., 637); there is no fixed time when it operates in equity; it is applied by analogy to the statute of limitation (10 Wheat., 149, 168; 3 Peters, 52, 53), or rather in obedience to them, as Lord Redesdale expresses it (2 Sch. & Lef., 629, 636; 2 J. & W., 191); the effect, however, is the same as at law. 7 Johns. Ch., 122. In this state six years bars an action of account (1 Dall. L., 95, 96); an infant is barred from an account of rents and profits, unless brought in six years after he comes of age (P. C., 518; 7 J. C., 113, 114); and the same rule applies to an account of all trusts which are not the peculiar creatures of a court of equity. 7 J. C., 114; 3 Pet., 52; 2 J. & W., 147, 152, 191; 5 Pet., 491.

We think this case comes within the spirit of all these decisions; the act of limitations has twice run over the plaintiff's claim, and, being barred at law, we can see no equitable circumstance to take it out of the rule; the account must therefore be considered both at law and in equity as closed, so far as respects the receipt of the \$2,800.

The next ground for an account is an allegation in the bill that the defendant undertook to procure an assignment of certain judgments against Eckert, to be made to plaintiff's testator; this is explicitly denied by the answer, and in our opinion the plaintiff has failed in doing away this denial (which is directly responsive to this part of the bill), though the answer was unsupported.

Vide 5 Pet., 110, 111. The defendant also avers in his answer that he acted not as the agent, attorney or trustee of the testator, in any capacity whatever; that what he did was purely and solely to serve Eckert and family. It is then incumbent on the plaintiff to make out the defendant to have become his bailiff or receiver, by something independent of the receipt of the \$2,800; if he has succeeded in this, another difficulty occurs. Admitting that the alleged agreement was made, its obligation was a legal one, and the remedy at law upon it, so far as we can perceive, complete. The evidence of this agreement was in writing in possession of the plaintiff, and, connected with the answer, presents the whole case; no evidence has been given at the hearing which gives any new turn to it, or presents any matter for equitable relief on the ground that defendant was the bailiff or receiver of the plaintiff, in anything but the receipt of the money for which he had accounted, and the account was settled by acquiescence. No change of circumstances could open this account for revision; all future accountability rested on the subsequent agree-

ment, which related to the performance of certain acts, and cannot be carried back into the original account so as to make the performance or non-performance of the agreement a matter of account. As a settled account cannot be opened directly, it cannot be done collaterally; the only pretext for it is, that defendant acted in both transactions as plaintiff's agent; consequently they make but one account, which cannot be closed without embracing the whole conduct of the defendant. The answer denying the agency not having been disproved, excludes the jurisdiction of equity (7 Cr., 89; 3 Ves., 446), and the defendant has rendered a full account of both transactions; it was not to open the old account, or to attach any responsibility not existing when it was rendered, nor can the court give it that effect; for though a defendant does not demur, but answers, it does not give the plaintiff a right to any relief to which he is not entitled by his bill. 1 Pet. C. C., 363, 383; Mit., 87.

That part of the plaintiff's claim which grows out of the agreement in October, 1819, is for damages for its non-performance, not for money pretended to be actually in the hands of the defendant. The sole question is whether the money was applied according to the agreement; if it was, the plaintiff has no case on his own showing; if not, the amount misapplied is a mere matter of calculation, as easy for a jury as a master. To sustain a bill for an account, there must be a series of demands and payments (2 C. C. E., 51), mutual dealings (2 Johns. Ch., 171; 6 Ves., 139, 141; 9 Ves., 473), great complexity in the accounts, some doubt or difficulty in proceeding at law, or some discovery required (5 Pet., 503; 6 Ves., 89; 10 Johns. Rep., 595; 2 Str., 733; 1 Ves., 424; 13 Ves., 278, 279), so that a court of law would not be competent to try it at *nisi prius*, and where the justice of the case depended on the account. 1 Sch. & Lef., 308, 309. The case must be one proper for an action of account at law, and involve an account (5 Pet., 503; 2 C. C. E., 54); if the bill show a liquidated sum incapable of being entangled, it will be dismissed, as all difficulty of proceeding at law will be removed. 6 Ves., 688; 2 Rand., 450; 2 Cr., 444; 2 Mason, 270; 4 Wash., 352. So where the facts are within the knowledge of plaintiff, and the answer confesses nothing, or furnishes no evidence to support the bill. 7 Cr., 89. So where the object of the bill is to recover damages for the breach of an agreement, and not its specific performance (Mit., 95; 1 Wh., 197; 3 Pet., 214, etc.), or the plaintiff has a remedy by statute. 3 Atk., 740. Different reasons are assigned for the jurisdiction of equity in account; by Lord Redesdale, the difficulty of proceeding to the full extent of justice in courts of common law (Mit., 96); by Lord Eldon, to avoid multiplicity of suits (5 Ves., 687); by Chancellor Kent, that it originated in discovery. 2 C. C. E., 52. Assuming either as the ground, neither exists in this case; there must be some appropriate head of equity jurisdiction under which an account must be decreed (1 Mad. Ch., 89; 1 Ves. Jr., 424; 3 Conn., 141; 1 B. C., 194); it is not enough to charge it in the bill; to change the jurisdiction it must be distinctly made out (3 B. P. C., 525; 2 B. C., 340, 519; 1 Ves. Sr., 172; 1 Atk., 598; 1 Vern., 359; 2 Vern., 382, 386; 1 Ch. Cas., 144, 147, 184), or some ground of equity exist, growing out of the conduct of the defendant. 1 Br. Ch., 40, 201; 2 Cox, 362; 2 Mas., 417, 418.

There are cases affirming the broad principle that courts of law and equity have a concurrent jurisdiction in account (13 Ves., 279); it has been carried so far as to embrace all cases of principal and agent. 4 Madd. Rep., 199, 220. So it has been held in late cases of dower, though they seem to be considered as exceptions rather than as falling within the principle of concurrent jurisdiction,

as the interference of equity is on the ground of discovery, the removal of legal impediments, or some equitable circumstance to regulate its exercise. 3 B. C., 630; 5 J. C., 488; P. C., 244, 248; 7 Cr., 376; 3 Atk., 130. The law had been explicitly laid down, that the chancellor had nothing to do in assigning dower, but in case of lands held in chivalry (2 L. R., 785; 7 Mod., 43; P. C., 111); yet, in 1793, Lord Thurlow sustained a bill for dower, solely on the ground that the title was admitted by the answer. 4 B. C., 296; 2 Ves., 122. This was the establishment of a new rule abrogating an established one, and forcibly illustrating the gradual assumption of jurisdiction by the court of chancery, in cases which, by the ancient landmarks of the law, were cognizable only at law. We cannot adopt these or other innovations as guides, but must consider them as beacons, in the administration of the equity jurisprudence of this court. We cannot adopt any rules or principles of the law which are in contradiction to those which were settled and established before the Revolution (5 Pet., 280), nor extend our jurisdiction in account beyond the rules prescribed by the supreme court in 5 Pet., 503; they result from the provisions of the constitution and judiciary act, which cannot be affected by any subsequent adjudications of any courts in England, or in those states which adopt them. In the present case there is nothing in the nature of the agreement, or in the conduct of the defendant, which can give any equitable jurisdiction over it; nor does the defendant stand in that relation to the plaintiff as to make him liable to a bill or action to account. He is neither bailiff nor guardian, and as the account is not between merchant and merchant, the plaintiff must make him out to be receiver before there can be a case for account. Co. Litt., 172a; 2 Co. Inst., 379; Bull. N. P., 127. A receiver is one who receiveth the money of another to render an account (C. L., 172), but a party cannot have account of money in which he has no property; as if A. directs B. to borrow money from C. to pay D., the account lies not by A., but D. (Hob., 36); if defendant has paid over the money as a trustee, the trust is executed and an account does not lie (3 Wils., 114); there must be a privity between the parties, continuing till suit brought; account lies not by an executor or administrator at common law for want of privity; it is given by statute. Co. Litt., 89, 90, 96; 1 D. C. D., 192. Here all privity arising from the receipt of the money ceased on its payment to the persons directed, and rendering an account not objected to; there remained no subject-matter to which the relation of receiver could apply at the time of the agreement, and as the money had passed from the testator for certain purposes, the property in it could only revest on their non-performance. Dy., 22, b.

For these reasons we cannot sustain the bill under the head of account.

§ 895. *Equity has cognizance only of executory trusts, not of such as can be enforced at law.*

3. Trust. Where the legal right of property, real or personal, is in one person for the use of another, there is a trust resting in confidence and conscience, on which a court of law cannot act, as it looks only to the legal right; hence a trustee is accountable only in equity, which acts on the conscience according to the justice of the case. 2 J. & W., 147 to 191. If a trustee gives a covenant to perform the trust, he is suable at law (2 Wh., 56); if A. assigns goods to B., to sell and pay the proceeds to C., and B. receive them without a promise to pay C., his remedy is in equity; if B. promises to pay C., the remedy is at law; so if A. consigns goods to B. to deliver to C., and B. accepts the consignment, or any agreement is made to perform the trust (5 Pet., 594, 602), or

the trust is executed (3 Wils., 114), the right to the property is then a legal one. To give jurisdiction to equity, some part of the trust must remain unexecuted, some act remain to be done which rests in confidence; the mere relation between the parties of trustee and *cestui que trust* is not enough; there must be that trust which is a creature of a court of equity not cognizable at law (7 J. C., 114), on which no action lies, but is only for the consideration of equity (2 Atk., 612); which acts to carry into effect the principles of law where it provides no adequate remedy and supplies its defects. 1 Mad. Ch., 450; 2 Sch. & Lef., 630; 4 J. C., 654. For the breach of all other trusts an action lies at law. 1 Salk., 9; Wills., 204. It is a simple contract for which the remedy is personal. 2 Ves. Sen., 19; 2 W. Bl., 1269, 1272. Wherever the money or property of another is held on a legal trust, the right being legal, the legal remedy is adequate. 1 B. & P., 286, 288; 2 B. & P., 279, 281; 1 M. & S., 714, 720; 7 Taunt., 403; 2 C. L., 154; 9 E., 378; 14 E., 590.

§ 896. *An agency wholly closed is not cognizable in equity.*

Where there is a special agency, and the contract is closed wholly or as to any particular object, if the agreement or its further execution has been ended by the death or act of the other party, it is a subject for law if the matters are distinct and can be separately executed. 11 Wh., 250, etc.

In considering the transactions between the parties we can discern no right in the plaintiff resting in confidence; if there was any trust it was a legal one; the answer discloses nothing of an equitable nature; the case is one where any discovery would be merely auxiliary to law, to enable the plaintiff to recover damages for the breach of the agreement alleged to have been made. As matter of mere trust, any which has ever existed has been executed, so far as confidence was reposed in the discretion of the defendant; if we sustain this suit on the deposit in April, 1819, it will be on the principle that every bailment is a trust involving an account in equity. If it is sustained on the alleged agreement in October, we assume equity jurisdiction in all cases of principal and agent where one agrees to do an act or receives money or property for another, though there is a complete remedy at law to recover damages for the breach of the undertaking. Being satisfied that the plaintiff has not made out a case for the relief prayed for in his bill under the head of discovery, account, trust or other appropriate branch of equity jurisdiction, the bill must be dismissed.

LIVINGSTON v. STORY.

(9 Peters, 662-662. 1835.)

Opinion by MR. JUSTICE THOMPSON.

STATEMENT OF FACTS.—The appellant, Edward Livingston, filed his bill of complaint in the district court of the United States for the eastern district of Louisiana, against the appellee, Benjamin Story, to set aside a conveyance made by him of certain lots of land in the city of New Orleans, and to be restored to the possession of said lots, alleging that the deed was given on a contract for the loan of money. Although in the form of a sale, it was in reality a pledge for the repayment of the money loaned, and calling for an account of the rents and profits of the property.

To this bill the defendant demurred, and the court sustained the demurrer and dismissed the complainant's bill, and the cause comes into this court on appeal. It will be enough, for the purpose of disposing of the questions

which have been made in this case, to state only some of the leading facts which are set forth and stated in the bill.

The bill alleges that on or about the 25th of July, 1832, the defendant and John A. Fort loaned to him, the complainant, the sum of \$22,936, to secure the payment of which, with interest at the rate of eighteen per cent. per annum, he conveyed to them a lot of ground in New Orleans with the buildings and improvements thereon. That a counter letter or instrument was, at the same time, executed by the other parties, by which they stipulated to reconvey the property on certain conditions. That the lot was covered with fifteen stores, in an unfinished state, and the object of the loan was to complete them. The property is stated to have been worth at that time \$60,000, and is now worth double that sum. That the complainant, soon after the said transaction, left New Orleans, where he then resided, on a visit to the state of New York, expecting that during his absence some of the stores would have been finished, or in a state to let. That, on his return, he found that Story and Fort had paid \$8,000 to a contractor, who had failed to finish the buildings, the rent of each of the three smallest of which would be the interest of \$10,000 a year, when finished. A further time was requested for the payment of the money, which Story and Fort would not agree to, but upon condition that the property should be advertised for sale on a certain day named; that the sum due should be increased from \$25,000 to \$27,000, which sum was made up by adding to the \$25,000 the following sums: \$1,500 for interest for the delay of four months, at eighteen per cent., \$800 for auctioneer's commissions, \$50 for advertising, and \$200 arbitrarily added without any designation; and that he, the complainant, should annul the counter letter given to him by Story and Fort. That the complainant, being entirely at the mercy of the said Story and Fort, consented to these terms, in hopes of being able to relieve himself before the day fixed for the sale of his property; but being disappointed, he was on that day, in order to obtain a delay of sixty days, forced to consent to sign a paper, by which it was agreed that the debt should be augmented to the sum of \$27,830, and that if the same was not paid at the expiration of the sixty days, the property should belong to the said Fort and Story without any sale. The bill contains some other allegations of hardship and oppression, and alleges that the rents and profits of the property received by Fort and Story in the life-time of Fort, and by Story since the death of Fort, amount, at least, to \$60,000. The bill then prays that the said Benjamin Story may be cited to appear to the bill of complaint, and answer the interrogatories therein propounded.

The defendant in the court below demurs to the whole bill, and for cause shows that the complainant has not by his said bill made such a case as entitles him, in a court of equity in this state, to any discovery from this defendant, touching the matters contained in the said bill, or any or either of such matters, nor to entitle the said complainant to any relief in this court, touching any of the matters therein complained of. The want of proper parties is also assigned for cause of demurrer.

The court below did not notice the want of parties, but sustained the demurrer on the other causes assigned.

The argument addressed to this court has been confined principally to the general question whether the district court of the United States, in Louisiana, has equity powers; and, if so, what are the modes of proceeding in the exercise of such powers? The great earnestness with which this power has been denied

at the bar to the district court may make it proper briefly to state the origin of the district court of that state, and the jurisdiction conferred upon it by the laws of the United States. When the constitution was adopted, and the courts of the Union organized, and their jurisdiction distributed, Louisiana formed no part of this Union. It is not reasonable, therefore, to conclude that any phraseology has been adopted with a view to the peculiar local system of laws in that state. She was admitted into the Union in the year 1812; and, by the act of congress (2 Stats. at Large, 701), passed for that purpose (4 Laws U. S., 402), it is declared that there shall be established a district court, to consist of one judge, to be called the district judge, who shall, in all things, have and exercise the same jurisdiction and powers, which, by the act, the title whereof is in this section recited, were given to the district judge of the territory of Orleans. By the act here referred to for the jurisdiction and powers of the court (2 Stats. at Large, 283; 3 Laws U. S., 606), a district court is established to consist of one judge; and it declares that he shall, in all things, have and exercise the same jurisdiction and powers which are by law given to, or may be exercised by, the judge of the Kentucky district. And, by the judiciary act of 1789 (1 Stats. at Large, 73; 2 Laws U. S., 60), it is declared that the district court in Kentucky shall, besides the jurisdiction given to other district courts, have jurisdiction of all other causes, except of appeals and writs of error, hereinafter made cognizable in a circuit court, and shall proceed therein in the same manner as a circuit court. And such manner of proceeding is pointed out by the process act of 1792 (1 Stats. at Large, 275; 2 Laws U. S., 299), which declares that the modes of proceeding in suits of common law shall be the same as are now used in the said courts respectively, in pursuance of the act entitled "An act to regulate process in the courts of the United States;" namely, the same as are now used and allowed in the supreme courts of the respective states (2 Laws U. S., 72; 1 Stats. at Large, 93), and in suits of equity, and those of admiralty and maritime jurisdiction, according to the principles, rules and usages which belong to courts of equity and courts of admiralty respectively, as contradistinguished from courts of common law; subject to such alteration by the courts as may be thought expedient, etc.

§ 897. *Powers of the United States court of Louisiana prior to act of 1824.*

From this view of the acts of congress it will be seen that, prior to the act of 1824, which will be noticed hereafter, Louisiana, when she came into the Union, had organized therein a district court of the United States, having the same jurisdiction, except as to appeals and writs of error, as the circuit courts of the United States in the other states. And that, in the modes of proceeding, that court was required to proceed according to the principles, rules and usages which belong to courts of equity, as contradistinguished from courts of common law. And whether there were or not, in the several states, courts of equity proceeding according to such principles and usages made no difference, according to the construction uniformly adopted by this court.

§ 898. *Remedies in the federal courts are at common law or in equity according to these distinctions as defined in the courts of England.*

In the case of *Robinson v. Campbell*, 3 Wheat., 222, it is said that, in some states in the Union, no court of chancery exists to administer equitable relief. In some of these states courts of law recognize and enforce, in suits at law, all equitable claims and rights which a court of equity would recognize and enforce; and in others all relief is denied, and such equitable claims and rights

are to be considered as mere nullities at law; and a construction, therefore, that would adopt the state practice in all its extent would at once extinguish in such states the exercise of equitable jurisdiction. That the acts of congress have distinguished between remedies at common law and in equity, and that, to effectuate the purposes of the legislature, the remedies in the courts of the United States are to be at common law or in equity, not according to the practice of the state courts, but according to the principles of common law and equity, as distinguished and defined in that country from which we derive our knowledge of those principles. So, also, in the case of the *United States v. Howland*, 4 Wheat., 114, the bill was filed on the equity side of the circuit court of the United States in Massachusetts, in which state there was no court of chancery; and, in answer to this objection, the court says: "As the courts of the Union have a chancery jurisdiction in every state, and the judiciary act confers the same chancery powers on all, and gives the same rule of decision, its jurisdiction in Massachusetts must be the same as in other states."

That congress has the power to establish circuit and district courts in any and all the states, and confer on them equitable jurisdiction in cases coming within the constitution, cannot admit of a doubt. It falls within the express words of the constitution: "The judicial power of the United States shall be vested in one supreme court, and in such inferior courts as the congress may, from time to time, ordain and establish." Article 3.

§ 899. *The act of congress of 1824, to regulate practice in the federal courts in Louisiana, did not repeal their chancery jurisdiction or powers.*

And that the power to ordain and establish carries with it the power to prescribe and regulate the modes of proceeding in such courts admits of as little doubt. And, indeed, upon no other ground can the appellee in this case claim the benefit of the act of 1824. Session Laws, 56. The very title of that act is to regulate the mode of practice in the courts of the United States in the district of Louisiana; and it professes no more than to regulate the practice. It declares that the mode of proceeding in civil causes in the courts of the United States that now are or hereafter may be established in the state of Louisiana shall be conformable to the laws directing the mode of proceeding in the district courts of said state. And power is given to the judge of the United States court to make, by rule, such provisions as are necessary to adapt the laws of procedure in the state court to the organization of the courts of the United States, so as to avoid any discrepancy, if any such should exist, between such state laws and the laws of the United States. The descriptive terms here used, civil actions, are broad enough to embrace cases at law and in equity; and may very fairly be construed as used in contradistinction to criminal causes. There are no restrictive or explanatory words employed, limiting the terms to actions at law. They apply equally to cases in equity; and if there are any laws in Louisiana directing the mode of procedure in equity causes, they are adopted by the act of 1824, and will govern the practice in the courts of the United States. But the question arises, What is to be done if there are no equity state courts, nor any laws regulating the practice in equity causes? This question would seem to be answered by the cases already referred to, of *Robinson v. Campbell*, 3 Wheat., 222, and *The United States v. Howland*, 4 Wheat., 114. And also by the case of *Parsons v. Bedford*, 3 Pet., 444. In the latter case the court say: "That the course of proceeding, under the state law of Louisiana, could not, of itself, have any intrinsic force or obligation in the courts of the United States organ-

ized in that state, except so far as the act of 1824 adopted the state practice; that no absolute repeal was intended of the antecedent modes of proceeding authorized in the courts of the United States under the former acts of congress."

If, then, as has been asserted at the bar, there are no equitable claims or rights recognized in that state, nor any courts of equity, nor state laws regulating the practice in equity causes, the law of 1824 does not apply to the case now before this court; and the district court was bound to adopt the antecedent mode of proceeding authorized under the former acts of congress; otherwise, as is said in the case of *Robinson v. Campbell*, the exercise of equitable jurisdiction would be extinguished in that state, because no equitable claims or rights which a court of equity would enforce are there recognized. And there being no court of equity in that state, does not prevent the exercise of equity jurisdiction in the courts of the United States, according to the doctrine of this court in the case of *The United States v. Howland*, which arose in the state of Massachusetts, where there are no equity state courts. We have not been referred to any state law of Louisiana, establishing any state practice in equity cases, nor to any rules adopted by the district judge in relation to such practice; and we have some reason to conclude that no such rules exist. For, in a record now before us from that court, in the case of *Hiriart v. Ballon*, 9 Pet., 156, we find a set of rules purporting to have been adopted by the court on the 14th of December, 1829, with the following caption: "General rules for the government of the United States court in the eastern district of Louisiana in civil cases or suits at law, as contradistinguished from admiralty and equity cases, and criminal prosecutions; made in pursuance of the seventeenth section of the judiciary act of 1789, and of the first section of the act of congress of the 26th of May, 1824, entitled 'An act to regulate the mode of practice in the courts of the United States for the district of Louisiana.'" And all other rules are annulled; and these rules relate to suits at law and in admiralty only, and not to suits in equity. From which it is reasonable to infer that the district judge did not consider the act of 1824 as extending to suits in equity; and if so, it is very certain that the demurrer ought to have been overruled. For, according to the ordinary mode of proceeding in courts of equity, the matters stated in the bill are abundantly sufficient to entitle the complainant both to a discovery and relief; and by the demurrer, everything well set forth, and which was necessary to support the demand in the bill, must be taken to be true. 1 Ves. Sen., 426; 1 Ves. Jr., 289.

§ 900. *Where any part of the bill is good and entitles the plaintiff to any relief, a demurrer to the whole bill should not be sustained..*

And if any part of the bill is good, and entitles the complainant either to relief or discovery, a demurrer to the whole bill cannot be sustained. It is an established and universal rule of pleading in chancery, that a defendant may meet a complainant's bill by several modes of defense. He may demur, answer, and plead to different parts of a bill. So that if a bill for discovery and relief contains proper matter for the one, and not for the other, the defendant should answer the proper and demur to the improper matter. But if he demurs to the whole bill, the demurrer must be overruled. 5 Johns. Ch., 186; 1 Johns. Cas., 433.

But if we test this bill by any law of Louisiana which has been shown at the bar, or that has fallen under our observation, the demurrer cannot be sustained. The objection founded on the alleged want of proper parties, because

the heir and residuary legatee of John A. Fort is not made a party, is not well founded. The bill states that in the year 1828, after the death of Fort, the defendant, Benjamin Story, took the whole of the property, by some arrangement with the heirs of Fort; and that he ever since has been, and is now, in the sole possession thereof, and has received the rents and profits of the same. This fact the demurrer admits. Whereby Benjamin Story became the sole party in interest.

The causes of demurrer assigned are general; that the complainant has not, by his bill, made such a case as entitles him, in a court of equity in that state, either to a discovery or relief. In the argument at the bar there has been no attempt to point out in what respect the bill is defective, either in form or substance, as to the discovery; if it is to be governed by the ordinary rules of pleading in a court of chancery. And if the objection rests upon the want of the right in the complainant to call upon the defendant for any discovery at all, the objection is not sustained even by the laws of Louisiana. But on the contrary, it is expressly provided by a law of that state, that when any plaintiff shall wish to obtain a discovery from the defendant, on oath, such plaintiff may insert in his petition pertinent interrogatories, and may call upon the defendant to answer them on oath; and that the defendant shall distinctly answer to such interrogatories, provided they do not tend to charge him with any crime or offense against any penal law, neither of which has been pretended in this case. 2 Martin's Dig., 158.

Nor has it been attempted to point out in what respect the bill of complaint is defective, either in form or substance, as to the matters of relief prayed. In this respect also, the bill, according to the ordinary course of proceeding in a court of chancery, is unobjectionable; and indeed would be amply sufficient in the state courts, under the law of Louisiana; which declares that all suits in the supreme court shall be commenced by petition, addressed to the court, which shall state the names of the parties, their places of residence, and the cause of action, with the necessary circumstances of places and dates; and shall conclude with a prayer for relief adapted to the circumstances of the case. 2 Martin's Dig., 148. These are the essential requisites in an ordinary bill in chancery. It can certainly not be pretended that it is any objection in the case before us that the bill filed is called a bill of complaint, instead of a petition.

§ 901. *Equity powers and mode of procedure in the district court of Louisiana.*

The sufficiency of the objections, therefore, must turn upon the general question whether the district court of Louisiana has, by the constitution and laws of the United States, the same equity powers as a circuit court of the United States has in the other states of the Union; and we think it has been already shown that it has; but that, according to the provisions of the act of 1824, the mode of proceeding in the exercise of such powers must be conformably to the laws directing the mode of practice in the district courts of that state, if any such exist; and according to such rules as may be established by the judge of the district court, under the authority of the act of 1824. And if no such laws and rules applicable to the case exist in the state of Louisiana, then such equity powers must be exercised according to the principles, rules and usages of the circuit courts of the United States, as regulated and prescribed for the circuit courts in the other states of the Union.

The decree of the district court must accordingly be reversed, and the cause sent back for further proceedings.

FITCH v. CREIGHTON.

(24 Howard, 159-164. 1860.)

Opinion by MR. JUSTICE McLEAN.

STATEMENT OF FACTS.—This is an appeal from the circuit court of the United States for the northern district of Ohio. The bill was filed by Edward Creighton, a citizen of the state of Iowa, against John Fitch, a citizen of the state of Ohio.

By the act of March 11, 1853 (Swan's Statutes Ohio), it is provided "that the city council shall have power to lay off, open, widen, straighten, extend and establish, to improve, keep in order and repair, and to light streets, alleys, public grounds, wharves, landing places and market spaces; to open and construct, and put in order and repair, sewers and drains; to enter upon or take for such of the above purposes as may require it, land and material; and to assess and collect and charge on the owners of any lots or lands, through or by which a street, alley or public highway shall pass, for the purpose of defraying the expenses of constructing, improving and repairing said street, alley or public highway, to be in proportion either to the foot front of the lot or land abutting on such street, alley or highway, or the value of said lot or land as assessed for taxation under the general law of the state, as such municipal corporation may in each case determine."

Each municipal corporation may, either by a general or special law or ordinance, prescribe the mode in which the charge on the respective owners of lots or lands shall be assessed and charged to the owner, which shall be enforced by a proceeding at law or in equity, either in the name of the corporation or of any person to whom it shall be directed to be paid, but the judgment or decree was required to be entered severally; and a charge was required to be enforced for the value of the work or material on such lot or land; and where payment shall have been neglected or refused when required, the corporation shall be entitled to recover the amount assessed, and five per cent. from the time of the assessment. Swan's Stat., 963.

On the 7th of April, 1855, the city of Toledo entered into a contract with Creighton, and one Edward Connelly, who bound themselves to do certain work on the streets, for the sums named in the contract; and that so soon as the work was completed, the street commissioner should give them a certificate to the effect, and on the presentation of the same to the council, it would assess the cost and expenses of the improvement on the lots or lands made liable by law to pay the same, and make out and deliver to the contractors a certified copy of said assessments, and authorize them or assigns to collect the several amounts due and payable for the work and improvement.

Creighton purchased from Connelly his interest in the contract, and went on and performed the work under it, to the acceptance of the city. On the 14th of July, 1856, the council made an assessment on the lots abutting on the improvement in Monroe street, to pay the expenses of that work, and directed that the owners of the lots make payment of the assessments to Creighton. Among the rest, lot 640, belonging to John Fitch, was assessed for this work \$84.56.

On the 20th May, 1856, the council made an assessment upon the lots abutting on said improvement in Michigan street, to pay for the same, and also directed the owners of these lots to make payments of such assessments to Creighton. Among the lots so assessed were the following, owned by defend-

ant, numbered 547, 538, 539, 544, 1,461; the assessments of the respective lots amounted to the sum of \$1,791.76; and subsequently a further assessment was made on the contract of three lots, numbered 686, 751 and 855, which amounted to the sum of \$266.47. The above sums were ordered to be paid to the complainant, with five per centum allowed by law. To this bill the defendant demurred, which, on argument, was overruled. And the court ordered the above sums to be paid in ten days, or in default thereof that the lots be sold, etc.

§ 902. *Federal courts have jurisdiction to enforce equitable rights growing out of state statutes.*

From this decree an appeal was taken. On the part of the appellant it is claimed that, upon the facts of the case, the circuit court had no jurisdiction; that the equity jurisdiction of the courts of the United States depends upon the principles of general equity, and cannot, therefore, be affected by any local remedy, unless that remedy has been adopted by the courts of the United States.

By the thirty-fourth section of the judiciary act of 1789, it is declared "that the laws of the several states, except where the constitution, treaties or statutes of the United States shall require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States, in cases where they apply." This section does not relate to the practice of our courts, but it constitutes a rule of property on which the courts are bound to act. The courts of the United States have jurisdiction at common law and in chancery, and wherever such jurisdiction may be appropriately exercised, there being no objection to the citizenship of the parties, the courts of the United States have jurisdiction. This is not derived from the power of the state but from the laws of the United States.

In *Clark v. Smith*, 13 Pet., 203, the court say, "the state legislatures certainly have no authority to prescribe the forms and modes of proceeding in the courts of the United States; but having created a right, and at the same time prescribed the remedy to enforce it, if the remedy prescribed is substantially consistent with the ordinary modes of proceeding on the chancery side of the federal courts, no reason exists why it should not be pursued in the same form as it is in the state courts."

In the case above cited, the legislature of Kentucky authorized a person who was in possession of land claimed by him, and some one else had a claim on the same land; the possessor was authorized to file a bill against the claimant to litigate his title and remove the cloud from it. The statute authorizes a suit at law or in equity, but from the nature of the case it would seem that chancery was the appropriate mode.

There was no necessity to make Connelly a party in this case. He made the contract jointly with Creighton. But before the work was commenced Connelly relinquished his right to Creighton, who performed the whole work, and to whom the city council promised payment. The assessments, too, were made to Creighton, and he was considered the only contractor with the city. No right was held under Connelly. By the statute the city makes an assessment which is to be paid by the owner personally, and it is also made a lien on the property charged. This charge may be collected and the lien enforced by a proceeding at law or in equity, either in the name of the city or its appointee. The claimant is the appointee for this purpose, and his right is too clear to admit of controversy.

§ 903. *A bill is not multifarious because it includes several claims of the same nature against the same person.*

This bill is not multifarious; the assessments were assessed on the lots by the foot front, and all against the same defendant. Lord Cottenham, in *Campbell v. Mackay*, 7 Simon, 564, and in *Mylne & Craig*, 603, says, to lay down any rule, applicable universally, or to say what constitutes multifariousness, as an abstract proposition, is, upon the authorities, utterly impossible. Every case must be governed by its circumstances; and as these are as diversified as the names of the parties, the court must exercise a sound discretion on the subject. Whilst parties should not be subjected to expense and inconvenience in litigating matters in which they have no interest, multiplicity of suits should be avoided by uniting in one bill all who have an interest in the principal matter in controversy, though the interests may have arisen under distinct contracts.

We think the statute of the state, and the municipal corporation of Toledo, authorize the assessment of the sums on the lots in question, and that the judgment in the circuit court must be affirmed.

LANMON v. CLARK.

(Circuit Court for Michigan: 4 McLean, 18, 19. 1845.)

Opinion of the Court.

STATEMENT OF FACTS.—This is a creditor's bill, which states that a judgment was obtained in the circuit court of the United States in this district, by the complainant against the defendant; and an execution being issued on the judgment, was returned by the marshal, no property, real or personal, to be found. And the complainant alleges that the defendant has equitable interests, things in action, and other property, which cannot be reached by execution; and that he has also debts due to him from persons unknown, etc. They therefore ask a discovery, etc., and relief. The defendant demurs to so much of the bill as seeks discovery and relief, touching the equitable interests and rights of the defendant, and to any other part of the bill which prays that the judgment may be satisfied out of them.

§ 904. *The circuit court of the United States will adopt an appropriate remedy provided by the legislation of the state, and on this principle will entertain a creditor's bill and set aside fraudulent conveyances.*

The creditor's bill is authorized by a statute of this state. No state court can increase or diminish the jurisdiction of the courts of the United States sitting in chancery. They derive their jurisdiction in this respect under the acts of congress, and it is exercised in the same manner in the states, whether the courts of those states have courts of chancery or not. But where a new mode of procedure is authorized by a state, which is appropriate to chancery powers, relief will be given in the mode provided by the courts of the United States. On this principle, this court will sustain a bill, under the creditor's act of this state, which shall reach every description of interest that the defendant may have, and which cannot be effected by an execution. This jurisdiction is appropriate to chancery, and may be exercised where there is no special statute. Similar relief is given in England. 1 Vern., 398; 1 P. Will., 445; 2 Dickens, 575; Amb., 79, 455; 20 John., 563; 2 John. Ch., 283, 296; 4 id., 671.

But these statutes in behalf of creditors adopt regulations which facilitate the progress of a cause, and the attainment of equitable relief. It is, therefore, judicious for the courts of the United States to avail themselves of these provisions, which conduce to the attainment of justice. The demurrer is overruled, and the defendant is required to answer.

HERIOT v. DAVIS.

(Circuit Court for Massachusetts: 2 Woodbury & Minot, 229-233. 1846.)

STATEMENT OF FACTS.—The bill in this case described the complainants as citizens of South Carolina, and stated that the respondents Chapman and Welsman were believed to be citizens of that state also. The respondent Davis was described as a citizen of Massachusetts. Davis was served, and appeared, and the bill contained a request that the court would give such order as to notice to the other two as might conform to its usage and practice. The bill had reference to a charge of fraud against one Smith in obtaining certain cotton of the complainants, and the respondents Chapman and Welsman were the assignees in insolvency of Smith. Davis raised the question of jurisdiction by demurrer.

§ 905. *Writs and bills in equity in the federal courts must show jurisdiction.*

Opinion by WOODBURY, J.

This being a court of limited jurisdiction as to parties, no less than matters, it is necessary to set out in writs and bills in equity enough as to the citizenship of the parties to show that the court possesses jurisdiction over or between them. Story, Eq. Pl., § 26, note 3. Nor is it required that the objection should be made by the person himself, improperly joined in the writ or bill, because this court will not take jurisdiction over a subject or person where by law it does not appear to possess any, however the matter may come to the knowledge of the court, if before trial, or even if the parties themselves make no objection. *Jackson v. Ashton*, 8 Pet., 149 (COURTS, §§ 1083-84); *United States v. New Bedford Bridge*, 1 Woodb. & M., 401, and cases cited there.

In order to be entitled to jurisdiction over this case, the constitution provides that the proceeding must be "between citizens of different states." Art. 3, § 2. The act of congress uses words somewhat different in conferring jurisdiction on the circuit court, as it introduces another limitation by providing it must be a suit "between a citizen of the state where the suit is brought and a citizen of another state." The present bill, however, so far as regards all the parties now before this court, and all who have been notified to appear, comes within both the constitution and the act of congress, and thus gives to the court undisputed jurisdiction.

§ 906. *The interests of such of the parties only who are served may be tried without, however, prejudicing the rights of the others.*

But it is argued that Chapman and Welsman, named in the bill as parties, though not served nor appearing, must be considered, notwithstanding, as parties within the meaning of the provisions about jurisdiction. I entertain some doubt as to that point. Because there can be no pleadings, nor issues, nor trial, nor binding of any person who has not been notified nor chosen to appear voluntarily in a suit.

In short, no jurisdiction has been or can be exercised over him, and how then can he be regarded as a party to give jurisdiction or defeat it in the pro-

cedings? The court do no more in respect to him or his rights than they do as to a person sometimes named in a bill as one who would have been joined and proceeded against had he not been so situated as a citizen that joining him would defeat jurisdiction over the whole case. Such a mention of a person never defeats jurisdiction.

Here Chapman and Welsman are named as parties in interest, but not to be notified or proceeded against unless the court deem it proper according to its usages and the law. But, supposing this view was not sound, and Chapman and Welsman are to be regarded as parties for the purpose of raising the question of jurisdiction, I entertain no doubt, according to some adjudged cases, that, belonging to the same state with the complainants, the bill could not proceed against them, and that unless they are severed and dismissed, a case so situated will not come within our jurisdiction. 1 Paine, 410; Strawbridge v. Curtiss, 3 Cranch, 267 (COURTS, § 881); 1 Wheat., 94; Story, Eq. Pl., §§ 490-492; 5 Cranch, 84. But the correctness of those decisions has been called in question. Louisville, Cincinnati & Charleston R. Co. v. Letson, 2 How., 497, 554 (COURTS, §§ 1346-50).

And the act of congress passed February 28, 1839 (5 Stats. at Large, 321), says expressly: when "there shall be several defendants, any one or more of whom shall not be inhabitants of or found within the district where the suit is brought, or shall not voluntarily appear thereto, it shall be lawful for the court to entertain jurisdiction and proceed to the trial and adjudication of such suit between the parties who may be properly before it," but without prejudice to others. Now, though this law has been once supposed not to change the judiciary act of 1789, as to where parties shall reside, and the former cases were upheld in Commercial and Railroad Bank of Vicksburg v. Slocomb, 14 Pet., 60, yet it manifestly meant, under certain facts, to relieve against the construction put on that act in 3 Cranch, 267, and it was suited to that very object. See 2 Howard, 497, 557.

The old cases must, therefore, now be held as to some extent overruled in the more recent one in 2 Howard, 555. Again, even before the act of 1839, it had been held that where some of the defendants could be severed, and the case proceed well against those over whom the jurisdiction was clear, it might be done both at law and in chancery. Shute v. Davis, 1 Pet. C. C., 431; Cameron v. McRoberts, 3 Wheat., 591; Carneel v. Banks, 10 Wheat., 181; Hinde v. Vattier, 1 McLean, 115 (§§ 138-43, *supra*).

Here the interests of Davis are distinct from those of Chapman and Welsman, and the claim of the complainants against Davis can be litigated and settled with him alone, leaving Chapman and Welsman in subsequent suits, if dissatisfied with the decision so far as affecting Smith or his creditors, whom they represent, to interpose their own claims and have them adjudicated on. Any decree will be without prejudice to their rights. Such, also, is virtually the forty-seventh rule of this court on this subject, and still other decisions countenance this course. See 2 Mason, 196; 8 Wheat., 451, note.

Indeed, Chapman and Welsman are here scarcely more than nominal parties, independent of Davis, for he cannot be required to pay over any balance to the complainants except on facts and frauds by Smith as to the property of the complainants, which would utterly bar them from receiving anything as his assignee. Nominal parties are little to be regarded in such cases. 5 Cranch, 303; Wormley v. Wormley, 8 Wheat., 421; Russell v. Clark's Exec., 7 Cranch, 98 (CONTRACTS, §§ 272-77). But however this last consideration may

be applicable here with much force, the reasons and decisions before alluded to, in connection with the act of 1839, require me, on the facts in this case, to overrule this demurrer and let the cause proceed only against Davis.

WILLIAMS v. RITCHEY.

(Circuit Court for Kansas: 3 Dillon, 406, 407. 1874.)

STATEMENT OF FACTS.—Bill by an infant, a citizen of New York, by her next friend, who is admitted by counsel to be a citizen of Kansas, against a citizen of Kansas. Demurrer on the ground of the citizenship of the *prochein amy*.

Opinion by DILLON, J.

The point here presented is stated by counsel to be novel, but it does not appear to the court, to be difficult of solution. If the *prochein amy* is to be considered as the *party* or even *a party* to the suit, the objection to the jurisdiction of the court would be well taken. But he is not a party. The complainant is the infant in whose name and on whose behalf the bill is exhibited by her next friend. Infants are capable of maintaining suits to assert their rights, but the practice in chancery requires that the suit of an infant should be supported by another person technically known as the next friend of the infant.

The object of this requirement is that the court may have the guaranty of a responsible person that the suit is one proper to be brought and that it is brought in good faith with the sanction of a friend of the infant who is willing to assure this by assuming a liability to the defendant for costs if the suit should prove unsuccessful. But this does not make the *prochein amy* in a legal sense the party or a party to the suit. The suit is, nevertheless, the suit of the infant. This is apparent from several considerations. Thus if the infant dies the suit abates, but not so on the death of the *prochein amy*. In this last event the court on application will appoint a new *prochein amy* and the cause proceeds. Nor does the suit abate on the infant's coming of age; he may then elect whether the cause shall go forward or not. If he goes on, no amendment or change in the bill is necessary. The *prochein amy* having served the temporary purpose for which he supported the bill, drops out of the cause, and all future proceedings are conducted without the use of his name. If the infant on attaining his majority abandons the cause, as he may do, he must as between himself and his next friend pay the costs, unless the bill was improperly filed. The next friend may be any person willing to act, even one it seems who has been outlawed, and he is subject to removal by the court for cause, and is at all times under its control. 1 Daniell, Ch. Prac., 92 *et seq.*

§ 907. The "*prochein amy*" not a party to a cause in the sense of the judiciary act, eleventh section.

A person sustaining such a relation to the cause is not a *party* in the sense of the eleventh section of the judiciary act, which requires the adverse parties to be citizens of different states in order to give this court jurisdiction. Indeed, as one of the objects of the practice in chancery requiring a suit by an infant to be brought by his next friend is to give the defendant a right to recover his costs, for which the infant is not liable, it is manifestly to the advantage of the defendant that the next friend should be a citizen of the same state as the defendant, thus rendering his property subject to the process of the court.

Demurrer overruled.

NORTHERN INDIANA RAILROAD COMPANY v. MICHIGAN CENTRAL RAILROAD COMPANY.

(15 Howard, 233-252. 1853.)

Opinion by MR. JUSTICE McLEAN.

STATEMENT OF FACTS.— This is an appeal in chancery, from the circuit court of the district of Michigan.

The Northern Indiana Railroad Company and the board of commissioners for the western division of the Buffalo & Mississippi Railroad, corporations created by, and doing business in, the state of Indiana, filed their bill in the circuit court, stating that an act of the legislature of Indiana, dated February 6, 1835, incorporated the Buffalo & Mississippi Railroad Company. That by a subsequent act of the legislature of February 6, 1837, the name of the corporation was changed to that of the "Northern Indiana Railroad Company;" that by an act of the 8th of February, 1848, the "board of commissioners for the western division of the Buffalo & Mississippi Railroad" were incorporated. That several acts of the legislature of Indiana were passed, confirming, amending and enlarging the charters and franchises of the same corporations; that by virtue of said laws the complainants are severally entitled to do and perform business in the state of Indiana, as authorized by their said charters.

That the Northern Indiana Railroad Company, after being duly organized, examined, surveyed, marked and located the route of their railroad, and, by the means specified in the aforesaid acts, procured the right of way for said railroad, as the same has been constructed, and became seized in fee of the right to the lands acquired for that purpose, with all the privileges and franchises in relation thereto, confirmed and declared by the said acts; and that the route of that part of the western division of said railroad, lying between Michigan City, in the county of Laporte, and the western line of the state of Indiana, was duly surveyed and located, and the right of way duly acquired. That a part included in said location consists of a strip of ground eighty feet in width, extending from Michigan City to the west line of the state of Indiana, and that the railroad has been constructed and is in operation from Elkhart to Laporte, and from Michigan City to the west line of the state of Indiana.

And the complainants say that they have purchased, and now own in fee-simple, certain other lands situated on or near the line of said railroad, which is deemed necessary for the business and purposes of said railroad. And they aver that they commenced their road within the time required, and have prosecuted the same, as by the several acts above referred to they were required to do. That among the rights and privileges under their charters is the sole and exclusive right and privilege of building, maintaining and using a railroad along the general route of the road. And they insist that no charter can be lawfully granted to any other company to construct any other road or roads, in the vicinity of said railroad, which would materially interfere, injuriously, with the profits of said road, without the consent of the complainants, which has not been given. That the legislature of Indiana has no power to establish such a road, there being no such power reserved in the original charter.

And the complainants allege the Michigan Central Railroad, a corporation created by, and doing business in, the state of Michigan, were incorporated for the purpose of constructing and using a railroad from Detroit, in the state of Michigan, to some point in the same state upon Lake Michigan, accessible to

steamboats navigating said lake; and with authority to extend their road to the southern boundary of the state of Michigan; that said company have constructed and now keep in use a railroad from Detroit to New Buffalo, and thence to the southern line of the state of Michigan in the direction towards Michigan City, in the state of Indiana; and that by an arrangement with the commissioners of the western division of the Buffalo & Mississippi Railroad Company, the road has been extended and is now in use to Michigan City.

And the complainants further allege that the New Albany & Salem Railroad Company is a corporation created by and under certain acts of the legislature of the state of Indiana, and doing business therein, has no power or franchise to construct, or to authorize the construction, of any railroad whatsoever, except what is contained in certain statutes referred to in the bill. That said company and the defendants, the Michigan Central Railroad Company, on or about the 24th of April, 1851, entered into a contract with each other, which contract is in the possession of the defendants, and a discovery of the same is prayed, and that it may be produced. That by color of said contract the defendants claim the right to construct and use a railroad from Michigan City to the western line of the state of Indiana, by a route nearly parallel with the complainants' railroad, and in its immediate vicinity, and several times crossing the same; and also the right and power to locate, construct and use such railroad, over and across the complainants' road, with the exclusive franchises and privileges aforesaid, as they, the defendants, shall see fit.

That the defendants have so laid out the route of their road from Michigan City to the western line of the state of Indiana, as to cross the complainants' railroad upon lands, the title of which was acquired by and is now held by the complainants, and upon which their railroad has been constructed, with the purpose and intent of obstructing and unlawfully interfering with the possession, occupancy and use of the complainants' lands, and with the intent to hinder and molest them, in the enjoyment and use of the rights and franchises granted to them by the legislative acts stated, and to defeat the exclusive right to have and use a railroad within that vicinity.

And after stating many other facts having a bearing upon the New Albany & Salem Railroad Company, and, as they allege, conducing to show a want of right in that company to extend their road to Michigan City, and from thence to the western line of the state of Indiana, near to and parallel with the complainants' road, as above stated, they pray that the defendants may be enjoined from the construction of their road, etc. The defendants filed a general demurrer to the bill, and a decree was entered in the circuit court sustaining the demurrer and dismissing the bill.

§ 908. *Jurisdiction of the circuit court considered.*

At the threshold of this case the question of jurisdiction arises. It is not controverted that the road of the defendants, against which the injunction is prayed, has been constructed, not only from Michigan City to the western line of the state of Indiana, but to Chicago, in the state of Illinois. The demurrer admits the facts charged in the bill, and they are also established in part by surveys of both roads.

The jurisdiction of the circuit court of the United States is limited to controversies between citizens of different states, except in certain cases, and to the district in which it sits. In this case we shall consider the question of jurisdiction in regard to the district only. In all cases of contract suit may be brought in the circuit court where the defendant may be found. If sued

out of the district in which he lives, under the decisions he may object, but this is a privilege which he may waive. Wherever the jurisdiction of the person will enable the circuit court to give effect to its judgment or decree, jurisdiction may be exercised. But wherever the subject-matter in controversy is local, and lies beyond the limit of the district, no jurisdiction attaches to the circuit court, sitting within it. An action of ejectment cannot be maintained in the district of Michigan for land in any other district. Nor can an action of trespass *quare clausum fregit* be prosecuted where the act complained of was not done in the district. Both of these actions are local in their character, and must be prosecuted where the process of the court can reach the *lotus in quo*.

The complainants allege that the defendants have built a railroad, crossing their road several times; have entered upon their grounds, and, by building a parallel road so near as to carry the same line of passengers and freight, their franchise has been impaired. That they have an exclusive right to run a railroad on the route stated, and that they have been seriously injured by the defendants' road.

This remedy by injunction is given to prevent a wrong for which an action at law can give no adequate redress. In its nature it is preventive justice. Where the wrong has been inflicted before an injunction was applied for, it may be a matter of doubt, in most cases, whether an action at law would not be, at first, the appropriate remedy. But whether the relief sought be at law or in chancery, the question of jurisdiction equally applies.

§ 909. *Power over land lying in another jurisdiction.*

In his Conflict of Laws, Mr. Justice Story says (§ 463): Not only real, but mixed actions, such as trespass upon real property, are properly referable to the *forum rei sitæ*. *Skinner v. East India Company*, Law Rep., 168; *Doulson v. Matthews*, 4 Term R., 503; *Watts v. Kinney*, 6 Hill (N. Y.), 82. But he says a court of chancery, having authority to act *in personam*, will act indirectly, and under qualifications, upon real estate situate in a foreign country by reason of this authority over the person, and it will compel him to give effect to its decree, by a conveyance, release or otherwise, respecting such property. *Foster v. Vassall*, 3 Atk., 589; 1 Equity Cases, Abr., 133; *Penn v. Lord Baltimore*, 1 Ves., 444; *Lord Cranstown v. Johnson*, 3 Ves., 182, 183; *White v. Hall*, 12 Ves., 323; *Lord Portarlington v. Soulby*, 3 Mylne & K., 104; *Massie v. Watts*, 6 Cranch, 148, 160. In this last case the chief justice says: "Upon the authority of these cases (cited), and of others which are to be found in the books, as well as upon general principles, this court is of opinion that, in a case of fraud of trust or of contract, the jurisdiction of a court of chancery is sustainable wherever the person be found, although lands not within the jurisdiction of that court may be affected by the decree." In another part of the opinion he says: "Was this, therefore, to be considered as involving a naked question of title; was it, for example, a contest between Watts and Powell, the jurisdiction of the circuit court of Kentucky would not be sustained."

§ 910. *A suit for trespass on a railroad is a local action, and a court of another district than that in which the trespass was committed has no jurisdiction.*

If the court had acquired jurisdiction of the person by his being within the state, they will compel him, by attachment, to do his duty under his contract or trust, and enforce the decree *in rem* by his executing and conveying, or

otherwise, as justice may require in respect to lands abroad. *White v. White*, 7 Gill & J., 208; *Vaughan v. Barclay*, 6 Whart., 392; *Watkins v. Holman*, 16 Pet., 25.

The controversy before us does not arise out of a contract, nor is it connected with a trust expressed or implied. An exclusive right is claimed by the complainants, under their charters and the legislative acts of Indiana connected therewith, to construct and use a railroad, as they have done, from the city of Michigan, to the western line of the state. And they complain that the defendants have unlawfully entered upon their grounds, constructed a road crossing the complainants' road several times, and materially injuring it, by constructing a road parallel to it. Relief is prayed for an injury threatened or done to their real estate in Indiana, and to their franchise, which is inseparably connected with the realty in that state.

In the investigation of this case, rights to real estate must be examined, which have been acquired by purchase, or by a summary proceeding under the laws of Indiana. This applies, especially, to the ground on which the complainants' road is constructed, and to other lands which have been obtained, for the erection of facilities connected with their road. And, in addition to this, the chartered rights claimed by the defendants, and the right asserted by them to construct their road as they have done, crossing the complainants' road and running parallel to it, must also be investigated. Locality is connected with every claim set up by the complainants, and with every wrong charged against the defendants. In the course of such an investigation, it may be necessary to direct an issue to try the title of the parties, or to assess the damages complained of in the bill.

It will readily be admitted that no action at law could be sustained in the district of Michigan, on such ground, for injuries done in Indiana. No action of ejectment, or for trespass on real property, could have a more decidedly local character than the appropriate remedy for the injuries complained of. And is this character changed by a bill in chancery? By such a procedure we acquire jurisdiction of the defendants, but the subject-matter being local, it cannot be reached by a chancery jurisdiction, exercised in the state of Michigan. A state court of Michigan, having chancery powers, may take the same jurisdiction, in relation to this matter, which belongs to the circuit court of the United States, sitting in the district of Michigan. And it is supposed that no court in that state could assume such a jurisdiction.

§ 911. *Where the joinder of a party would oust the jurisdiction, he may be omitted if a decree can be entered without affecting his rights.*

But there remains another ground of objection to the jurisdiction in this case. The New Albany & Salem Railroad Company is not made a party to this suit. As an excuse for this omission, it is alleged in the bill that this company, being a corporation by the laws of the state of Indiana, of the same state as the complainants, it cannot be made a party without ousting the jurisdiction of the court. This is true; and if the relief prayed for by the complainants can be given without impairing the rights of this company, under the act of 1839, the jurisdiction may be exercised.

The complainants contend that this company is not a necessary party, and that no decree is asked against it.

The right claimed by defendants to construct their road as stated in the bill, was derived solely from the New Albany & Salem Company. The contract under which this claim is made is referred to in the bill, and is, consequently,

a part of it. It is stated in the contract that this company, "both for the public good and their own interest, deem it important to extend its road to Michigan City, and thence westward by the state line of Illinois," etc. And it is also stated that the Michigan Central Railroad Company were willing to subscribe for \$500,000 of the stock of the New Albany & Salem Railroad Company, upon certain conditions, as well as to build the entire line of railroad from Michigan City to the Illinois state line, provided they can have the use and control of the same, until the costs of the same shall be reimbursed to it, etc. The payment of the stock of the New Albany road, as one of the conditions, was to be made by instalments stipulated, a large part of which are yet unpaid. And to reimburse the Michigan Company, a million of dollars were assumed as the cost of the road, from Michigan City to the western line of the state, which sum, if paid in forty years, with interest at five per cent. per annum, the railroad to be constructed by the Michigan Company, with all its equipments, shall become the property of the New Salem Company, and the mortgage or pledge of the contract shall cease.

In the argument, it was contended by the complainants that under no act or acts of the Indiana legislature have the New Albany & Salem Company a right to construct a railroad further north than Crawfordsville. That certain words used in the act of February 11, 1848, giving the company power to "extend their road to any other point or points than those indicated by the location heretofore made by the authority of the state," were necessarily limited to the points named in the previous acts, New Albany, Salem and Crawfordsville. And that in extending the road from Crawfordsville north to Michigan City, and thence west parallel with the complainants' road to the western line of the state of Indiana, it was located without any legal authority.

From the above, it appears that the validity of the New Albany & Salem charter is involved in this case, for between two and three hundred miles, from Crawfordsville to Michigan City, and thence to the western line of the state of Indiana. The construction of that road has been nearly if not entirely completed, at an expenditure of between two and three millions of dollars. And in addition to this, it appears from the contract made between this company and the Michigan Company, that, as one of the conditions of the contract, the latter company subscribed in stock to the New Albany & Salem road, half a million of dollars, a part of which sum only has been paid.

Now, if this court, in giving the relief prayed for by the complainants, should find it necessary to declare that the above charter gave no authority to the New Albany Company to locate and construct their road north of Crawfordsville, it would be ruinous to that company. And it is clear that any decision which shall declare the road from Michigan City to the western line of the state of Indiana without the protection of law must equally apply to the road from Michigan City to Crawfordsville, as they were located and built under the same authority. This question is, therefore, vitally interesting to the New Albany Company; and by the bill we are called to decide that question, although that company is not made a party to the suit. It is impossible to grant the relief prayed without deeply affecting the New Albany Company. If their charter should be held good, as claimed by that company, an injunction against the defendants would materially injure the New Albany Company, as it would not only impair the contract made with the defendants, in regard to the road from Michigan City westward to the state line, but it would, probably, release the defendants from a subscription of half a million

to the stock of the Crawfordsville road, or at least from the payment of the part of that subscription which has not been paid.

§ 912. *Joinder and non-joinder of parties under the act of 1839.*

The act of 1839 provides that: "Where, in any suit at law or in equity, commenced in any court of the United States, there shall be several defendants, any one or more of whom shall not be inhabitants of, or found within, the district, jurisdiction may be entertained; but the judgment or decree shall not conclude or preclude other parties. And the non-joinder of parties who are not inhabitants, or found within the district, shall constitute no matter of abatement, or other objection to said suit."

The provision of this act is positive, and in ordinary cases no difficulty could arise in giving effect to it; but in a case like the present, where a court cannot but see that the interest of the New Albany Company must be vitally affected if the relief prayed by the complainants be given, the court must refuse to exercise jurisdiction in the case, or become the instrument of injustice. In such an alternative we are bound to say that this case is not within the statute. On both the grounds above stated we think that the circuit court has no jurisdiction. The judgment of that court, in dismissing the bill, is therefore affirmed.

Separate opinions were delivered by JUSTICES CATRON and CAMPBELL. MR. JUSTICE DANIEL dissented.

PAYNE v. HOOK.

(7 Wallace, 425-433. 1868.)

APPEAL from U. S. Circuit Court, District of Missouri.

STATEMENT OF FACTS.—Ann Payne, a citizen of Virginia, filed a bill in the circuit court of the United States for Missouri, against Zadoc Hook, public administrator of Calloway county, and his sureties on his bond, citizens of Missouri, to obtain her distributive share of the estate of her^h brother, who died intestate, which was committed to Hook's care by the county court of Calloway county. The bill simply set forth the names of the distributees, and charged the administrator with gross misconduct in managing the estate, and sought to obtain relief and compel a true account of the administration and to be paid what was due her. Hook had not made his final settlement. Defendant demurred, and the court below sustained the demurrer.

Opinion by MR. JUSTICE DAVIS.

The jurisdiction of the circuit court for Missouri to hear this cause is denied, because, in that state, exclusive jurisdiction over all disputes concerning the duties or accounts of administrators until final settlement is given to the local county court, which is the court of probate; and as the administration complained of is still in progress in the county court of Calloway county, resort must be had to that court to correct the errors and frauds in the accounts of the administrator. The theory of the position is this: that a federal court of chancery, sitting in Missouri, will not enforce demands against an administrator or executor, if the court of the state, having general chancery powers, could not enforce similar demands. In other words, as the complainant, were she a citizen of Missouri, could obtain a redress of her grievances only through the local court of probate, she has no better or different rights because she happens to be a citizen of Virginia.

§ 913. *The equity jurisdiction of United States courts cannot be modified by state legislation.*

If this position could be maintained, an important part of the jurisdiction conferred on the federal courts by the constitution and laws of congress would be abrogated. As the citizen of one state has the constitutional right to sue a citizen of another state in the courts of the United States, instead of resorting to a state tribunal, of what value would that right be, if the court in which the suit is instituted could not proceed to judgment and afford a suitable measure of redress? The right would be worth nothing to the party entitled to its enjoyment, as it could not produce any beneficial results. But this objection to the jurisdiction of the federal tribunals has been heretofore presented to this court, and overruled.

We have repeatedly held "that the jurisdiction of the courts of the United States over controversies between citizens of different states cannot be impaired by the laws of the states which prescribe the modes of redress in their courts, or which regulate the distribution of their judicial power." *Hyde v. Stone*, 20 How., 175 (COURTS, §§ 589-91); *Suydam v. Broadnax*, 14 Pet., 67; *Union Bank v. Jolly*, 18 How., 503. If legal remedies are sometimes modified to suit the changes in the laws of the states and the practice of their courts, it is not so with equitable. The equity jurisdiction conferred on the federal courts is the same that the high court of chancery in England possesses; is subject neither to limitation or restraint by state legislation, and is uniform throughout the different states of the Union. *Green v. Creighton*, 23 How., 90 (§§ 946-49, *infra*); *Robinson v. Campbell*, 3 Wheat., 212; *United States v. Howland*, 4 Wheat., 108; *Pratt v. Northam*, 5 Mason, 95.

§ 914. *The peculiar probate system of a state, not allowing any other state court jurisdiction over matters of probate, will not oust the jurisdiction of the United States courts.*

The circuit court of the United States for the district of Missouri, therefore, had jurisdiction to hear and determine this controversy, notwithstanding the peculiar structure of the Missouri probate system, and was bound to exercise it, if the bill, according to the received principles of equity, states a case for equitable relief. The absence of a complete and adequate remedy at law is the only test of equity jurisdiction, and the application of this principle to a particular case must depend on the character of the case, as disclosed in the pleadings. *Watson v. Sutherland*, 5 Wall., 78 (§§ 1300, 1301, *infra*).

"It is not enough that there is a remedy at law. It must be plain and adequate; or, in other words, as practical and efficient to the ends of justice and its prompt administration as the remedy in equity." *Boyce v. Grundy*, 3 Pet., 210.

§ 915. *A case of fraud and misconduct of an administrator cannot be adequately reached at law.*

It is very evident that an action at common law, on the bond of the administrator, would not give to the complainant a practical and efficient remedy for the wrongs which, she says, she has suffered. A proceeding at law is not flexible enough to reach the fraudulent conduct of the administrator, which is the groundwork of this bill, nor to furnish proper relief against it. It is, however, well settled that a court of chancery, as an incident to its power to enforce trusts, and make those holding a fiduciary relation account, has jurisdiction to compel executors and administrators to account and distribute the

assets in their hands. The bill under review has this object, and nothing more. It seeks to compel the defendant, Hook, to account and pay over to Mrs. Payne her rightful share in the estate of her brother; and in case he should not do it, to fix the liability of the sureties on his bond.

§ 916. *When equity will not require all interested to be made parties.*

But it is said the proper parties for a decree are not before the court, as the bill shows there are other distributees besides the complainant. It is undoubtedly true that all persons materially interested in the subject-matter of the suit should be made parties to it; but this rule, like all general rules, being founded in convenience, will yield, whenever it is necessary that it should yield, in order to accomplish the ends of justice. It will yield if the court is able to proceed to a decree and do justice to the parties before it without injury to absent persons, equally interested in the litigation, but who cannot conveniently be made parties to the suit. Cooper's Eq. Pl., 35.

The necessity for the relaxation of the rule is more especially apparent in the courts of the United States, where, oftentimes, the enforcement of the rule would oust them of their jurisdiction, and deprive parties entitled to the interposition of a court of equity of any remedy whatever. *West v. Randall*, 2 Mason, 181; Story's Eq. Pl., § 89 and *sequentia*. The present case affords an ample illustration of this necessity. The complainant sues as one of the next of kin, and names the other distributees, who have the same common interest, without stating of what particular state they are citizens. It is fair to presume, in the absence of any averments to the contrary, that they are citizens of Missouri. If so, they could not be joined as plaintiffs, for that would take away the jurisdiction of the court; and why make them defendants, when the controversy is not with them, but the administrator and his sureties? It can never be indispensable to make defendants of those against whom nothing is alleged and from whom no relief is asked. A court of equity adapts its decrees to the necessities of each case, and should the present suit terminate in a decree against the defendants, it is easy to do substantial justice to all the parties in interest, and prevent a multiplicity of suits, by allowing the other distributees, either through a reference to a master, or by some other proper proceeding, to come in and share in the benefit of the litigation. *West v. Randall*, 2 Mason, 181; *Wood v. Dummer*, 3 Mason, 317 (Corp., §§ 378-88); Story's Eq. Pl., *supra*.

The next objection which we have to consider is, that the sureties of the administrator are not proper parties to this suit. Their liability on the bond in an action at law is not denied, but it is insisted they cannot be sued in equity. If this doctrine were to prevail, a court of chancery, in the exercise of its power to compel an administrator to account for the property of his intestate, would be unable to do complete justice, for if, on settlement of the accounts, a balance should be found due the estate, the parties in interest, in case the administrator should fail to pay, would be turned over to a court of law, to renew the litigation with his sureties. A court of equity does not act in this way. It disposes of a case so as to end litigation, not to foster it; to diminish suits, not to multiply them. Having power to determine the liability of the administrator for his misconduct, it necessarily has an equal power, in order to meet the possible exigency of the administrator's inability to satisfy the decree, to settle the amount which the sureties on the bond, in that event, would have to pay.

§ 917. *Sureties on an administrator's bond may be sued with their principal in equity.*

Besides, it is for the interest of the sureties that they should be joined in the suit with their principal, as it enables them to see that the accounts are correctly settled, and the administrator's liability fixed on a proper basis. If they were not made parties, considering the nature and extent of their obligation, they would have just cause of complaint.

§ 918. *Though a bill seeks to open settlements and cancel a receipt as fraudulent, if it involves but a single matter affecting all defendants alike it is not multifarious.*

It is said the bill is multifarious, but we cannot see any ground for such an objection. A bill cannot be said to be multifarious unless it embraces distinct matters, which do not affect all the defendants alike. This case involves but a single matter, and that is the true condition of the estate of Fielding Curtis, which, when ascertained, will determine the rights of the next of kin. In this investigation all the defendants are jointly interested. It is true the bill seeks to open the settlements with the probate court as fraudulent, and to cancel the receipt and transfer from the complainant to the administrator, because obtained by false representations; but the determination of these questions is necessary to arrive at the proper value of the estate, and in their determination the sureties are concerned, for the very object of the bond which they gave was to protect the estate against frauds which the administrator might commit to its prejudice.

The decree of the circuit court for the district of Missouri is reversed, and this cause is remanded to that court with instructions to proceed in conformity with this opinion.

VAN REIMSDYK v. KANE.

(Circuit Court for Rhode Island: 1 Gallison, 871-886. 1812.)

STATEMENT OF FACTS.—Bill in equity, filed to charge the estate of a deceased partner with the payment of a partnership debt, contracted by the agent of the firm, who drew a bill of exchange at Batavia on a firm in Amsterdam for the account of the owners of the ship Patterson, who were Clarke, the deceased, and the firm of Monroe, Snow & Monroe, of which firm Benjamin Monroe, who was the drawer of the bill, was a member. The bill charged that the firm of Monroe, Snow & Monroe was insolvent and had been discharged under the insolvent laws of Rhode Island; that Clarke was dead, leaving assets sufficient to pay the debt. The answer admitted that the proceeds of the bill passed to the use of the owners of the ship. It denied the agency of the drawer of the bill, and insisted that Monroe, Snow & Monroe were liable for the debt notwithstanding the discharge, and were now able to pay it. The deposition of the drawer of the bill, Benjamin Monroe, was ruled out as incompetent, and objection was taken to the bill for the want of proper parties.

Opinion by STORY, J.

The first question seems to be, whether the discharge of the firm of Monroe, Snow & Monroe under the insolvent act of Rhode Island is a complete discharge of them from this debt. The language of the insolvent act itself (1756) is, that a discharge under it shall be a perfect discharge "of and from all debts, duties, contracts and demands of every nature and kind whatsoever that shall be at that time outstanding against the *debtor*, debts due to the

crown itself only excepted." And section 6 provides that every creditor who shall not prove his debt before the commissioners within the time limited by the act shall not be entitled to have any action or suit therefor "at any court within this colony," "and that this act being pleaded in bar, shall be sufficient to bar the same." By an act of the legislature of Rhode Island, the full benefit of this act was allowed to the firm of Monroe, Snow & Monroe, and the only exception was of debts due to the state. It is admitted on all sides that Monroe, Snow & Monroe have been duly discharged under the act from all debts upon which it can operate as a bar.

§ 919. *The law of the place where a contract is made governs all questions as to its nature and validity.*

It will be recollected that the contract in controversy was made at Batavia with the complainant, a resident merchant there, and an alien to the United States. He never was a citizen of or resident within Rhode Island. The contract was to be executed at Amsterdam in Holland, and not in Rhode Island. The broad question then is, whether a discharge under the insolvent laws of a state is a complete discharge of all debts and contracts, with whomsoever and wheresoever contracted, so that no action lies therefor in a court of the United States sitting within that state.

The rule is well settled that the law of the place where a contract is made is to govern as to the nature, validity and construction of such contract; and that being valid in such state, it is to be considered as equally valid, and to be enforced everywhere, with the exception of cases in which the contract is immoral or unjust, or in which the enforcing it in a state will be injurious to the rights, the interest, or the convenience of such state or its citizens. This doctrine is explicitly avowed in *Huberus de conflictu legum* (2 Tom., lib. 1, tit. 3), and has become incorporated into the code of national law in all civilized countries. *Smith v. Smith*, 2 John., 235; *Thompson v. Ketcham*, 4 John., 285; *Van Raugh v. Van Arsdaln*, 3 Cain., 154; *Smith v. Buchanan*, 1 East, 6; *Potter v. Brown*, 5 East, 124; *Pedder v. McMaster*, 8 Term R., 609; *Quin v. Keafe*, 2 H. Bl., 553; 1 Emer. *Traite des Assur.*, ch. 4, s. 8; Dig., lib. 6, de *evictionibus*; *Casaregis Disc.*, 179, per tot., Id., s. 57; *Casaregis Disc.*, 43, s. 19; *Decis. Rot. Genuæ*, 38; *Straccha*, 147; *Casar. Disc.*, 130, s. 28, s. 33, 34.

It would seem to follow from this doctrine that if a contract be void by the law of the place where it is made, it is void everywhere (Hub., *ubi supra*), and that what is a discharge of a contract in the place where it is made shall be of equal avail in every other place. Hub., *ubi supra*; 5 East, 124; *Burrows v. Jemino*, 2 Str., 733; 2 H. Bl., 553; *Melan v. Fitz James*, 1 Bos. & Pull., 138. To the last position there is an exception, when the contract is to be executed in a place different from that where it is made, for the law of the place of the execution will in such cases apply. Hub., *ubi supra*; *Van Shaick v. Edward*, 2 John. C., 355; *Baker v. Wheaton*, 5 Mass., 509; *Thomson v. Ketcham*, 4 John., 285; *Smith v. Smith*, 2 John., 235; *Robinson v. Bland*, 1 Bl. Rep., 258; S. C., 2 Burr., 1077.

§ 920. *The remedy upon a contract is controlled by the law of the place where the suit is brought.*

But as to the form of the action or the remedy by which a contract is to be enforced, a different rule prevails, and it seems on all sides conceded that the recovery must be sought and the remedy pursued, not according to the *lex loci contractus*, but according to the *lex fori*. Hub., *ubi supra*; *Casaregis Disc.*, 179; id., *Disc.*, 130, s. 33; *Nash v. Tupper*, 1 Cain. Rep., 402; *Ruggles*

v. Keeler, 3 John., 268; *Pearsall v. Dwight*, 2 Mass., 84; *Smith v. Spinola*, 2 John., 198. The only question which seems to have arisen is, whether a bar, good by the law of the place where the suit is brought, and not where the contract originated, and conversely, a bar good by the law of the place where the contract was made, and not where the suit was brought, should fall within the rule as to the *validity* or as to the *remedy* of the contract. The current of authority is certainly in favor of the latter construction, where the bar has been a prescription or statute of limitations; and yet strong reasons have been urged, with what force I will not pretend to say, that every bar which goes to the merits of the action, and makes an end of it, should fall within the rule that declares a discharge good in the place of the contract, equally good in every other place; and a bar of the statute of limitations is as much a discharge of the contract as a bar of bankruptcy. Both are positive regulations, which prohibit a future action, and no more. In each the original cause of action may be revived by a new promise; and yet the authorities show that a discharge, under the statute of bankruptcy of the country, is a complete bar to the action on a contract made in that country in every other judicial forum. *Ballantine v. Golding* (cited 8 Term R., 609); *S. C.* (cited 1 East, 6); *Potter v. Brown*, 5 East, 124; 1 Dall., 188; *id.*, 229; 2 John., 235. However, it is not necessary to consider which of the opinions ought to prevail; and it will be time enough to meet this important question when it comes directly in judgment.

§ 921. *A general statute does not apply to extraterritorial contracts, unless expressly so declared.*

In order to clear the way for a more exact consideration of the question at bar, it may also be necessary to state that every state has within its own sovereignty an authority to bind its citizens everywhere, so long as they continue their allegiance. Unless, therefore, it be restrained by constitutional prohibitions, it may act upon the contracts made between its own citizens in every country, and consequently may discharge them by general laws. But such is not the operation of jurisdiction in contracts made by a citizen with a foreigner in a foreign country. If in such case the legislature by positive laws nullify such contracts, it is certain that they cannot be enforced within its own tribunals, but elsewhere they remain with the original validity which they had by the *lex loci contractus*. But if a statute be general, without a direct application to foreign contracts, the rule approved by Casaregis seems proper to be adopted, that its construction shall not be extended to such contracts. *Ratio est, quia statutum intelligit semper disponere de contractibus factis intra et non extra territorium suum.* Casar. Disc., 130, s. 14, 15, 16, 20, 22.

According to the principles, then, which have been stated, if this had been a contract between two citizens or residents of the state of Rhode Island, or a contract made or to be executed in Rhode Island, the discharge under the insolvent law of that state would be a good bar. *Ballantine v. Golding* (cited 8 Term R., 609; *Cook, Bank. L.*, 515; 1 East, 6; *Baker v. Wheaton*, 5 Mass., 509; *Potter v. Brown*, 5 East, 124; *Proctor v. Moore*, 1 Mass., 198. Ought it to be a bar when the contract was made in a foreign country, to be executed in a foreign country, and between parties, one of whom was not subjected to the jurisdiction of Rhode Island? The circumstance that the contract was made by an agent will not vary the case, for the law of the place of the contract still prevails, although it be made through an agent acting under author-

ity, or it acquires its validity only from a subsequent ratification. *Casar. Disc.*, 178, s. 63, 80.

§ 922. *When an action will be barred, and when not, the contract, discharge and suit being in different states.*

It has been decided that where the contract is in one state, the discharge in another, and the suit brought in a third state, the action is not barred. *Smith v. Smith*, 2 John., 235. So where the contract is made in the state where the suit is brought, a like discharge has been held no bar. *Pedder v. McMasters*, 8 Term R., 609; *Quin v. Keefe*, 2 H. Bl., 553; *Smith v. Buchanan*, 5 East, 6; *Van Raugh v. Van Arsdaln*, 3 Cain., 154. Sitting, therefore, in Massachusetts or New Hampshire, I should have no difficulty, upon these authorities, to hold the present discharge no bar to a suit at law.

§ 923. *The discharge of a contract by the lex loci contractus is good everywhere.*

But it is contended that a different rule must prevail in the state courts of Rhode Island, and if so, then also in the courts of the United States sitting within the same state. I will consider this question in both respects, and first, as to the state courts of Rhode Island. No authority has been shown that decides that no action upon a foreign contract could have been maintained in the state courts. It is a mere inference from the language of the act, which absolves the debtor from "all debts, etc., of every nature and kind whatsoever." But if the rule of *Casaregis* be correct, that by the true construction of a general statute it ought not to be extended to extraterritorial contracts, unless expressly so declared, the question recurs with all its force, because it will not be pretended that the legislature of Rhode Island have made such a positive provision. The general rule is that a discharge of a contract according to the *lex loci contractus* is good everywhere. The rule is founded upon public convenience and the comity of nations. It would seem to follow from the same principle that a discharge under the municipal laws of a foreign state should not affect the validity of such a contract. I have not been able to find any case exactly in point. The case of *Lynch v. McKenny*, before Mr. Justice Aston, cited in 2 H. B., 554, at first view would seem to have an important bearing, but it is very loosely stated, and the ground of the decision seems to have been, that the bankrupt laws of England were adopted in Ireland, and that the debt might have been proved under the commission in England. In *Van Raugh v. Van Arsdaln*, 3 Cain., 154, Livingston, J., declared that he was of opinion that a *cessio bonorum*, under the laws of a state where the debtor had his permanent domicile, ought to operate as a discharge from his creditors in every part of the world. I entertain the most entire respect for that opinion of the learned judge, the result, as he declares it to have been, of much reflection and research. I can only regret that he did not express the reasons of that opinion at large, which would have saved me much labor and investigation. In the case, however, in which it was delivered, he differed from the rest of the court, and the final decision of the case was against him.

The case of *Miller v. Hall*, 1 Dall., 229, must have proceeded upon the ground that the contract was executed in Maryland; in any other view it would be inconsistent with the other authorities which have been cited. In *Minturn v. Barber*, 1 Day, 136, the point seems to have been before the court, but it does not appear how far it affected the judgment of the court below; and in the appellate court the affirmance seems to have proceeded on other grounds.

These are all the cases which I have met with on the subject, and I may be

permitted to affirm, without the imputation of rashness, that the question does not seem to have been distinctly decided in any court in England or in the United States.

It remains, therefore, to be settled upon principle, and I cannot but presume that the judicial tribunals of Rhode Island, in all cases where a different rule were not prescribed by their own legislature, would adopt the *jus gentium* as to the construction and validity of foreign contracts sought to be enforced by their process.

If, therefore, the words of the act of insolvency do not necessarily extend (as I think they do not) to foreign contracts, I can entertain no doubt that they would adjudge therein according to that equity which the usage of nations had settled and applied. I hold it to be a legitimate inference from the doctrines already established, that a contract made in a foreign country, and to be governed and discharged by its laws, cannot be discharged by a mere positive regulation of another country, to which the parties have not bound themselves to submit. I hold with Emerigon, *Des Assurances*, 1 Tom., ch. 4, s. 8, “*pour tout ce qui concerne l'ordre judiciaire, on doit suivre l'usage du lieu ou l'on plaide. Pour ce qui est de la decision du fonds, on doit suivre en regle generale les loix du lieu ou le contrat a été passee. Ex consuetudine ejus regionis in qua negotium gestum est.*” A discharge under an insolvent act goes *au fonds*, to the merits, and not *a l'ordre judiciaire*, to the process or remedy.

How far, since the constitution of the United States, any state can have a right to pass an insolvent law, having the effect of a general statute of bankruptcy, inasmuch as no state can pass “a law impairing the obligation of contracts;” and the United States are authorized “to establish uniform laws on the subject of bankruptcies throughout the United States;” and if a state have such authority, how far it can constitutionally discharge the debts due to citizens of other states, are questions of great magnitude, on which learned men have differed, and I have formed no decided opinion.

§ 924. *The laws of the states are rules of decision for federal courts, sitting in such states respectively, but are not peremptory injunctions.*

But admitting the right to exist and to be exercised in the fullest extent, it will deserve further consideration whether the courts of the United States are bound to enforce against foreigners or citizens of other states, rightfully suing therein the full effect of a bar of this nature.

It is true that the judiciary act of 24th September, 1789, ch. 20, sec. 34, has provided that, except where the constitution, treaties or statutes of the United States shall otherwise provide, the laws of the several states shall be regarded as rules of decision in trials at common law in the courts of the United States, in cases where they apply. But the laws of the states are to be regarded only as rules of decision, and not as exclusive or peremptory injunctions. If a state were to declare that no action should lie upon a contract entered into by a citizen thereof with a foreigner or a citizen of another state, under any circumstances whatsoever; or if a state were to declare that interest reserved upon such a contract, if good according to the law of the place of that contract, should be void, it would, I think, be difficult to admit that such laws would be of paramount authority in the courts of the United States. A more striking case would be a policy of insurance, on which the right of recovery should be perfect by the law of the state where it was made, upon the merits, and yet which, by the law of the state where the suit was brought,

would be void, or receive a different construction from local ordinances. There must then be some limitation to the operation of this clause, and I apprehend such a limitation must arise whenever the subject-matter of the suit is extra-territorial. In controversies between citizens of a state, as to rights derived under that state, and in controversies respecting territorial interests, in which, by the law of nations, the *lex rei sitæ* governs, there can be little doubt that the regulations of the statute must apply. But in controversies affecting citizens of other states, and in no degree arising from local regulations, as for instance foreign contracts of a commercial nature, I think that it can hardly be maintained that the laws of a state to which they have no reference, however narrow, injudicious and inconvenient they may be, are to be the exclusive guides for judicial decision. Such a construction would defeat nearly all the objects for which the constitution has provided a national court.

§ 925. *A discharge under the insolvent laws of Rhode Island does not discharge a contract made in one and to be executed in another foreign country.*

Until I should be instructed by the higher court that I was bound to pronounce in such cases contrary to the acknowledged principles of national comity, and to acknowledge mere municipal rules as the law of the court, I should have little hesitation in affirming that a discharge under the insolvent law of Rhode Island was not a discharge of the contract in the present suit; and that it is not a case in which the law of the state is to be exclusively regarded as the rule of decision. I have not dwelt upon the inconveniences of a contrary construction, though I hardly know a case in which the argument *ab inconvenienti* could more pointedly apply. It would enable the state legislatures by local regulations to dry up the sources of the federal jurisdiction, and annihilate public as well as private credit; it would set the citizens of the different states in array against each other, and enable a fraudulent debtor to retreat into another state, and there by a formal surrender of his property and a settled residence to set at defiance the claims of all his absent and honest creditors. If the cause rested upon this single ground, I should be happy to give the parties an opportunity to settle this important question in the highest tribunal.

§ 926. *Who should be made parties to a bill in equity.*

But it is contended that whether the discharge of Monroe, Snow & Monroe be or be not a complete bar, they and their assignees ought to have been made parties to the present suit. Let us consider this point. It is a general rule, that every person interested in the subject-matter should be made a party to the bill. Mitf. Pl. Ch., 145; Coop. Pl. Ch., 33. Therefore, where there is a joint, or joint and several contract, it is laid down that the plaintiff must bring each of the debtors before the court. The reasons assigned for the rule are, that the debtors are entitled to the assistance of each other in taking the account, and to mutual contribution upon excess of payment beyond their respective shares. But where the reasons cease, the rule ceases also, and therefore, if the demand be admitted, and there can be no effectual contribution from the other parties, it is not allowed to prevail (*Madox v. Jackson*, 3 Atk., 406); and in cases of joint and several contracts, the rule itself has not stood without contradiction. *Collins v. Griffith*, 2 P. Will., 313; S. C., 2 Eq. Abr., 188, pl. 2. The rule has been relaxed where the parties before the court were the only solvent persons, and admitted the debt (3 Atk., 406; 2 Dick., 738); where the absent party was beyond the process of the court (*Pre. Ch.*, 83; *Darwent*

v. Walton, 2 Atk., 510); and where he stood in the situation of a mere surety (3 Atk., 406); though it might be otherwise, if he were a co-surety. *Angerstein v. Clark*, 2 Dickens, 738.

§ 927. *Generally one against whom no relief is possible need not be made a party.*

It is also a general rule, operating by way of exception on the former, that no one need be made a party, against whom, if brought to a hearing, the plaintiff can have no decree. Therefore, on a bill by creditors or purchasers against the assignees of a bankrupt, it seems now settled that the bankrupt himself need not be made a party, though it was formerly otherwise. 2 Vern., 32; 3 P. Will., 311, note I; *Collet v. Wollaston*, 2 Bro. Rep., 228.

Let us now apply these rules to the present case. The bill is brought to charge the executors of a deceased partner, having assets, with a joint debt, which at law survived against the firm of Monroe, Snow & Monroe. The ground of equitable interference is, that the surviving partners are certificated insolvents; and whatever may have been the doubts as to this branch of chancery jurisdiction in former times, it has been gradually settled, and is now placed beyond all controversy. *Lane v. Williams*, 2 Vern., 242; *Heath v. Perceval*, 1 P. W., 682; *Simpson v. Vaughan*, 2 Atk., 31; *Bishop v. Church*, 2 Ves., 101, 371; *Daniel v. Cross*, 3 Ves. Jr., 277; *Thomas v. Frazer*, 3 Ves. Jr., 399; *Burn v. Burn*, 3 Ves. Jr., 573; *Stephenson v. Chiswell*, 3 Ves. Jr., 566.

§ 928. *When in a bill to charge executor on testator's contracts, the co-obligors should be made parties.*

In cases where a suit is brought against executors *on other grounds*, it seems clear that the rule that all surviving co-obligors should be parties in general prevails. 2 Vent., 348; 3 Atk., 406. Shall it be permitted to prevail, where no relief can be given against the co-obligors? Shall a certificated bankrupt, who is a surviving partner, be joined with the executors, although no remedy can be effectually had in the suit against him? No authority has been adduced exactly in point. The case of *Ashurst v. Eyre*, in 2 Atk., 51, was supposed at first to support the affirmative; but it is very clear, upon a further examination of that case, as corrected in 3 Atk., 341, that no such question could have occurred, as the parties appear all to have been solvent. There is obviously a mistake in what is imputed to Lord Hardwicke in speaking of this case in 3 Atk., 406.

In no case where relief has been sought against the representatives of a deceased partner, on the ground of bankruptcy of the surviving partner, have I been able to discover that the bankrupt himself or his assignees have been made parties. On the contrary, if the reports can be relied on as evidence, the bill has been uniformly against the representatives alone. This very silence, in cases so strenuously and ably argued, affords a strong presumption of the practice and the law of the court. There seems, indeed, good reason why they should not be made parties, because the bankrupt may plead his certificate in bar without further answer, and the assignees are bound to apply the property in their hands, according to the course of distribution prescribed by the law and the court, among the creditors who prove their debts under the commission. They have, therefore, no interest in the case stated in the bill, and do not fall within the principle of the rule as to parties. If, indeed, it appeared that there was a surplus in the hands of the assignees beyond the sum necessary for payment of all other debts, perhaps equity would interpose, and in some shape require an application to that fund in aid of the executors.

As to the objection that the executors in this way would be deprived of all assistance in taking the account, and of contribution, it may be answered that they may file a cross-bill, and avail themselves of all legal evidence in their defense, and the right of contribution does not concern the plaintiff. It is *res inter alios acta*. I am therefore well satisfied, upon the reason of the thing and the practice, that if the certificate of Monroe, Snow & Monroe had been a valid discharge, neither they nor their assignees need have been made parties.

§ 929. *In a bill to charge the executors of a deceased partner, his copartners must be made parties, or their insolvency distinctly alleged.*

But it is not necessary absolutely to decide this point, because there is another view of the subject which is fatal to the bill in its present shape. In order to maintain the jurisdiction of this court, it is necessary that the bill should charge an absolute discharge or insolvency of Monroe, Snow & Monroe. I am of opinion that no such discharge is shown; and in the bill, there is no allegation that they were at the filing of the bill actually insolvent. Nothing can be more clear than that if they were liable at law, and able to pay, the present bill could not be sustained. It is perfectly well settled that equity will not lend its aid to reach assets in the hands of executors, when a complete, adequate and effectual remedy exists at law against surviving solvent partners. *Hoare v. Contencin*, 1 Bro. Rep., 27. The bill therefore does not contain an allegation which is now material, and the answer denies the present insolvency.

Whether, if the bill did charge such insolvency, and it were admitted or proved, it would become necessary and proper to make the insolvents or their assignees parties to the suit, I give no opinion. If the parties raise the question, it will deserve and receive the deliberate consideration of the court.

ST. LUKE'S HOSPITAL v. BARCLAY.

(Circuit Court for New York: 3 Blatchford, 259-265. 1855.)

STATEMENT OF FACTS.—Bill in equity by St. Luke's Hospital, a New York corporation, against Barclay and Bunch, aliens, consuls of Great Britain. The relief prayed, among other things, was an injunction to restrain the defendants from prosecuting a suit instituted by them in this court to recover a fund of \$10,000, held by the New York Life Insurance and Trust Company.

Opinion by BETTS, J.

All the equities set up by the bill are denied by the answer, and until the proofs come in, the court will not inquire in which party the legal or equitable right to the fund in question is vested. In disposing of the motion to enjoin the suit at law prosecuted by the defendants, the court will limit its decision to the point whether the action at law for the recovery of the fund in dispute shall be stayed, and if so, upon what terms or conditions.

In opposition to the motion, it is insisted by the defendants that the case is not within the cognizance of this court, either in respect to parties or subject-matter; and that, if otherwise, then all the equity shown by the bill, for the interposition of the court to stay the action at law, is removed by the answer. The jurisdiction of the court is resisted upon two grounds: *First*. That the defendants are both of them consuls of Great Britain, acknowledged by the United States, and are, in that capacity, exempt from suit in a circuit court of the United States. *Second*. That no remedy can be had in this court upon the facts alleged in the bill.

§ 930. *Where a bill in equity is filed in a circuit court to stay proceedings in a suit at law in the same court, the court has jurisdiction regardless of the citizenship of the parties.*

This proceeding is not by original bill solely, seeking relief upon the equities of the case; but in so far as regards the injunction asked to stay the proceedings at law, it is auxiliary to that action, and may be maintained here to that end, although the court may not have jurisdiction over the parties for other relief. The authority of a circuit court over this class of suits has been considered and settled by the supreme court in two instances. In *Simms v. Guthrie*, 9 Cranch, 19, it was decided that a bill to enjoin a judgment at law in a circuit court of the United States must be brought in that court, and that the court did not, in such case, regard a defect of jurisdiction in relation to some of the parties named. In *Dunn v. Clarke*, 8 Pet., 3, the court say that an injunction bill to stay proceedings at law is not considered as an original bill between the same parties; but that, if other parties are made in the bill, and different interests are involved, it must be considered, to that extent at least, an original bill, and the jurisdiction of the circuit court must depend upon the citizenship of the parties.

§ 931. *Rights of a cestui que trust to protect the trust fund.*

A *cestui que trust* may maintain a bill for an injunction against his trustee, to prevent his collecting, appropriating or disposing of the trust property 1 Eden on Inj., by Waterman, 172, note 1. In this case the allegations in the bill are sufficient to bring the parties within the jurisdiction of this court, if the bill be considered an original one in that point of view. The plaintiffs are averred to be citizens of the state of New York, and the defendants are aliens. The latter consideration is of no consequence in this case, except in so far as the proceeding may be regarded as an original suit; for, if the interest of the plaintiffs is of such a character that, under it, they would be entitled, in ordinary cases, to stay the suit prosecuted at law by the defendants for the recovery of the money in question, they are enabled to do this because the defendants are seeking, in that suit, to get possession of funds equitably belonging to the plaintiffs. And the capacity of the defendants, as suitors in the court prosecuting for the recovery of the fund claimed by the plaintiffs, also fixes upon them a liability to be controlled, in the management of that suit, at the discretion of the court as a court of equity. The court thus acquires jurisdiction over the present defendants, in their character of parties to the record, without regard to the fact of citizenship or alienage.

If the present plaintiffs had been parties to the action at law prosecuted in this court by the defendants against The New York Life Insurance and Trust Company, they might have had that action stayed, as in ordinary cases, by bill, or even motion, even though the official character of the defendants might exempt them from amenability to an original suit. The United States cannot be sued in any court of justice; but, if plaintiffs themselves, they stand subject to the authority of the court, in their capacity as suitors, in the same manner as private parties. *Cohens v. Virginia*, 6 Wheat., 406 (Courts, §§ 734-45). Without regard, then, to the circumstance that the party applying by bill to stay proceedings at law is not a party to those proceedings, or is incapable of maintaining an original action in his own name against the one he seeks to enjoin, equity will entertain a bill in his favor for that purpose when, on facts of which the court cannot take cognizance between the parties to the action at law, it is made to appear to be against conscience that the party prosecut-

ing at law should proceed in his cause. 2 Story's Eq. Juris., § 875. The case of a trustee attempting to pervert his trust, or employ it to the prejudice of his *cestui que trust*, by a proceeding at law in which the *cestui que trust* would be barred of an adequate protection, is particularly appropriate for the interference of equity to restrain the proceeding by injunction. 2 Story, Eq. Juris., § 882.

The defendants being, then, suitors at law, prosecuting for the possession of the fund which the bill avers to be a charity belonging to the plaintiffs to distribute, the effect of which suit, if successful, will be to transfer that trust fund from a public depository to the hands of individuals, the case is one proper for the interference of the court, to stay such change of possession, until the question of fiduciary right can be determined. That question belongs to equity, and necessarily in the present case, because no defense can be made at law to the action there, inasmuch as the defendants took a certificate of deposit in their individual names, and the Trust Company will not be permitted to question their legal title against that certificate. The protection of the present plaintiffs must be found in the aid of a court of equity to prevent the charitable fund from being transferred to parties who deny the trust and design to appropriate the money in a manner to place it out of the control of the plaintiffs.

§ 932. *Aliens are subject to the jurisdiction of the circuit court of the United States. Consuls have no privilege except exemption from suit in state courts.*

The defendants, being aliens, are amenable to the jurisdiction of the circuit court in a suit in favor of citizens, and their consular character exempts them only from the jurisdiction of state courts. The act of congress gives to the district courts of the United States jurisdiction in civil actions, in suits against consuls, exclusively only of the state courts. By the law of nations consuls are subject to the ordinary jurisdiction of the tribunals of the country to which they are accredited. 1 Kent's Comm., 43, 45; Wheat. Law of Nations, 293, § 22; 11 Wheat., 469, note. There seems, therefore, to be no legal impediment to the application of the eleventh section of the judiciary act of 1789 (1 U. S. Stat. at Large, 78), to actions by citizens against consuls in the circuit courts of the United States.

On both points, in my opinion, this court has cognizance of this case, and the injunction prayed for ought to issue and be enforced until the further order of the court.

UNITED STATES v. MYERS.

(Circuit Court for Virginia: 2 Marshall, 516-529. 1836.)

STATEMENT OF FACTS.—Moses and John Myers, being indebted to the United States on duty bonds, with Drummond as surety, made an assignment in trust for creditors to Lamb and Drummond, giving preference to debts due the United States. Prior to the assignment they had employed Myer Myers, resident in Europe, to collect a debt due them in Norway, the debt being specified in the deed of assignment. A judgment on the bonds remaining in part unsatisfied, the United States brought this suit in equity against Moses and John Myers, Myer Myers and the two trustees. A motion was made to dismiss as to Myer Myers for want of jurisdiction.

Opinion by DANIEL, J.

The objections to the jurisdiction of the court, urged by the counsel for this motion, are substantially these:

1. That this suit, although *in form* a suit in the name and on behalf of the United States, is, *in reality*, a controversy between citizens of Virginia, and, therefore, proper for a state court only.

2. That, admitting this suit to have been properly instituted as against Moses Myers & Son, and that the United States had a direct and substantive claim against them, still that there never was just ground for joining Myer Myers as a party defendant, and this suit ought, therefore, as to him, to be dismissed.

3. That admitting the regularity of this suit originally, as to all these defendants, yet the claim of the United States having been satisfied, the court should arrest its proceedings at this point and not go on to adjudge the controversy as between the defendants.

1. In support of the first of these objections it is pressed upon the court that there never was any interest or necessity operating upon the United States to compel them to the course they have adopted. That by means of their judgment against Moses Myers & Son and their surety, they had a perfect remedy at law which they were bound to carry out to its utmost extent; and that the sufficiency of that security (nowhere called in question) relieved them from all necessity for resorting to other sources. For these positions the case of *Linny v. Dare*, 2 Leigh, 588, is relied on.

§ 933. *The doctrine as to relief in equity where there is a remedy at law.*

The principle that wherever there exists a right or remedy exclusively *legal* and perfect in its character and operation a court of equity cannot take cognizance is fully recognized; and, it is likewise conceded, that a court of equity will never interfere merely to settle equities between a debtor and *his* debtor upon a bare possibility that resort may ultimately be had to the latter. This last principle, and nothing else, I conceive to have been settled in *Linny v. Dare*, for in that case there was no *trust* nor other foundation for equitable interposition. The surviving partner and his surety were both living, and recourse to them at law was perfectly unobstructed.

How is it with the case under examination? *Here is a trust expressly created by deed.* The United States, both by the terms of the conveyance and by operation of the statute, are made the *cestui que trust*. They have the right, I conceive, to enforce their legal security or to proceed under the trust *ad libitum*; and in the latter event, they have the consequent right to call for an account of the trust subject in the hands of whomsoever it may be. In the latter event, too, the *residence* of the parties is wholly immaterial, for it is in virtue, not of the residence, but of the *character* of the plaintiffs that the jurisdiction attaches. No importance is here yielded to the objection that the United States are said to have sued upon notice and demand from the defendant Drummond; they had the right, upon the above view of the case, to sue independently of such requirement, though perhaps they were bound to use their right so as not to visit injury upon others. I can perceive then, neither from the pleadings, the evidence nor the argument, that this first objection can be sustained.

§ 934. *An agent into whose hands a part of the avails of a trust have come is properly joined as a party in a proceeding against his principal to enforce the trust.*

2. With respect to the second objection, it would seem that if the plaintiffs are rightfully in court as *cestui que trust*, they have the right by regular consequence to call for and pursue the subject, wherever it may be. I should think that, putting aside the proof or the confession of agency for the trustees

or their grantors in the management of the subject, and simply upon the facts of possession and indebtedness, or either of them, on the part of Myer Myers (once admitting the right to the trust subject), it would be competent, on principles of justice, and advisable, on the score alike of prudence or celerity, to proceed against him conjointly with the original debtors and their trustees. But I do not think that, upon the pleadings in this cause, Myer Myers stands, *prima facie*, in a contingent attitude of creditor or debtor, wholly separated from the management of this fund. It seems, on the contrary, that he has had material agency in the management of the specific subject. Whatever, then, may be his ultimate responsibility upon a full adjustment between the parties, I must regard him as an agent, taking upon himself the management of this subject with full notice of its connection with the rights of the *cestui que trust*, and emphatically, therefore, liable to account whenever a settlement should be called for. This opinion is in conformity with the decisions of *Newland v. Champion*, 1 Ves. Sr., 105; *Utterson v. Mair*, 2 Ves. Jr., 95; *Alsager v. Rowley*, 6 Ves., 748, and *Burroughs v. Elton*, 11 Ves., 29.

§ 935. *A federal court having acquired jurisdiction of a proceeding in equity will not stop short of complete justice, but will do equity between the defendants notwithstanding they are citizens of the same state.*

3. The third and last point, at first view, seems encompassed with rather more of difficulty than surrounds the two former; yet this difficulty will, it is thought, upon nearer inspection, be found to be rather in appearance than reality. It may here, too, be remarked that the question now presented is, at this time, somewhat premature, the facts assumed for its basis not being *formally* before the court. There is no proof direct and certain that the United States have received, or will receive, satisfaction of their claim against *Moses Myers & Son*, from any source other than the trust subject.

The objection now considered concedes the jurisdiction of the court at the time when this suit was instituted, but insists upon the assumption of a subsequent satisfaction as having destroyed that jurisdiction admitted to have been once perfect. The authority of the court to adjudge the rights of the parties once admitted, it may naturally be asked how that authority can have been impaired by a recognition of the rights of, or by a satisfaction made to, either party? Such recognition or satisfaction does not change one legal feature or principle of the case, nor the positions in which the parties stand to each other or to the court, but is, on the contrary, rather an admission or confirmation of all these. In the case at bar, there is not the slightest change either of *parties, contracts or duties*; all these remain as at the institution of the suit; what possible ground, then, can there be for changing the rules which were applicable to them at that period? I can perceive none whatever, in any supposed necessity, for restricting the courts of the United States within their proper orbit, for that they cannot transcend, while they honestly limit their action to cases in which the United States are fairly and necessarily parties; and to such they are imperiously bound to extend their action, whoever may be directly or incidentally embraced with it. If there be no paramount constitutional necessity for a change of forum, none surely can doubt the advantages as to economy, either of time or expense, of a system which terminates in a single proceeding matters that otherwise would be drawn out in multiplied and costly litigation. A course like this is, moreover, sanctioned by the inveterate practice of courts of equity, which, when once properly invested with jurisdiction, will never parcel out the subject of controversy to different

tribunals. Should a practice like that proposed by the present motion prevail in this court, the mischiefs incident to its establishment are easily anticipated. Few instances will ever occur, where the priority of the United States will be asserted, which will not involve an examination of various and conflicting interests, because such cases will almost uniformly be those of absolute insolvency, or of different creditors claiming under specific liens upon the same subject, or by substitution in the place of those who may have been preferred. Again, where the United States may have no concern, suppose there should be several incumbrancers upon the same subject, the last of whom should be a citizen of another state. In either of these cases it would, probably, be indispensable to examine into the foundation and to settle the rank of the respective claims; to ascertain, by accounts to be stated, their precise extent, and to convert the subject pledged into funds applicable to some or all of the demands upon it. The representatives of all the different interests are convened, their rights adjusted, the subject converted into money and actually brought into court. What shall be done? Shall the court, dispensing justice to *some* of the parties only, turn from its door the residue, whom it had not only power to call, but whom it was compelled to call, before it; and with their expulsion cast from it as a waif the remainder of the fund, to be struggled for in a different forum? The evils of such a proceeding would, indeed, be grievous, and its absurdity most glaring, from a contrast with the admission that, over persons and subject, the court *once* had complete jurisdiction, but that such jurisdiction has been taken away, the character of both parties and subject remaining wholly unchanged! But the question here discussed appears to me not one of the first impression, or to be dependent solely upon reasonings from principle. It seems to have been considered by the supreme court, and by that tribunal, in effect, if not in terms, decided. Thus, in the case of *Conolly v. Taylor*, 2 Pet., 556 (COURTS, § 899), it is ruled that, “where there is no change of parties to a suit during its progress, a jurisdiction depending upon the condition of the parties is governed by that condition, *as it was at the commencement of the suit.*” So, too, the case of *Dunn v. Clarke*, 8 Pet., 2, cited and relied on by the counsel for this motion, appears to me to coincide with the authority just quoted, and to operate strongly, if not conclusively, against the present application. In the latter case from *Peters* a judgment in ejectment had been obtained in the state of Ohio by a citizen of Virginia against citizens of Ohio, and an injunction to this judgment at law granted. The plaintiff at law, the defendant in equity, then dying, the suit was revived in the name of his representative, *a citizen of Ohio*. Upon this case the question of jurisdiction was raised, *the parties being then all citizens of Ohio*. The court say that, although the defendant in equity is a citizen of Ohio, yet he was the representative of the plaintiff at law, who was a citizen of Virginia, and “this fact” (that is, his citizenship in Ohio) “will not deprive the court of an equitable control over the judgment.” And again: “Of the action at law the circuit court had jurisdiction, and no change in the residence or condition of the parties can take away a jurisdiction which has once attached.” Finally, regarding this motion as neither enforced by any overruling authority by which the judgment of this court must be controlled, nor as consistent with justice to all the parties, I am constrained to refuse it.

Opinion by BARBOUR, J.

Various points have been made in support of this motion, which I will briefly examine in the order in which they were presented.

§ 936. *What constitutes a nominal party.*

1. It is contended that this is substantially a contest between Drummond, the surety in the custom-house bonds, one of the trustees, and also one of the defendants, and Myer Myers, his co-defendant, and that the United States are only *nominal parties*; and that consequently the court has not jurisdiction, because they are both citizens of Virginia. If this were so, then the consequence contended for would follow. But are the United States only *nominal parties*? It is not denied that a debt is due to them, that it was originally due from Moses Myers & Son, and that it is charged upon the fund conveyed by them in trust, and that independently of that charge created by the parties, the law, in case of an assignment of the debtor's whole estate, as in this case, gives them a priority of payment; and this is a bill brought to enforce that charge and that priority in behalf of a real creditor competent to sue in this court. I understand the term nominal party to import one to whom nothing is due, but who is suing in his name for the benefit of another. Now here there *is* something due to the United States, and this bill is brought to enforce the recovery, and the decree must be in favor of the United States. The counsel for the defendant relied upon the case of *Brown v. Strode*, 5 Cranch, 303. That was a suit brought by the justices of a county court, to whom, as obligees, the defendant, an executor, executed an official bond for the faithful discharge of the duties of his office. The nominal plaintiffs and defendants were all citizens of Virginia, and yet the supreme court held that this court had jurisdiction; but why? Because it appeared upon the record that they sued, not for themselves, but for an alien creditor, having claim against the estate; they were, in truth, but *nominal parties*; to themselves nothing was due; for themselves they claimed nothing; but the suit was brought in their names, as by law it was obliged to be, for the benefit and at the relation of another, who was an *alien* creditor; the fact of his being an alien creditor, appearing, as it was necessary it should appear, upon the record, this case is in direct contrast with the one at bar, in the important particulars that here the United States are suing, not for another, but for themselves; not at the instance of a relator appearing upon the record, and who, under a decree in their name, would receive the amount; but prosecuting *their own claim* at the request, indeed, as appears from Drummond's answer, of one of the defendants, in the spirit of a liberal justice, to make the burden fall where it ought to rest. If this would make the person at whose instance this course is pursued the substantial party, as well might it be said that if a principal and surety were to execute a joint and several bond, and the creditor were, at the instance of the surety, to prosecute his action against the principal only, that the surety was the substantial party plaintiff.

§ 937. *Where jurisdiction depends upon the party it is the party to the record.*

We consider the principle settled, nay it is said in 4 Cond. Rep., 128, that it may be laid down as a rule without exception, that in all cases where the jurisdiction depends on the party it is the party on the record. Now the party plaintiff here is the United States, who are undoubtedly competent to sue here as plaintiffs; and all the defendants, as far as the jurisdiction depends on citizenship, are citizens of Virginia, and considered in that respect only are clearly suable here as defendants.

§ 938. *The fact that a plaintiff has concurrent remedies at law and in equity will not oust the court's equitable jurisdiction.*

2. It is argued that the court cannot take jurisdiction of this case, because

the United States having obtained judgment for their claim against Drummond, the surety, who is solvent, they have complete remedy at law.

Let us examine the application of this principle to this case. It is, indeed, enacted by the sixteenth section of the judiciary act that suits in equity shall not be sustained in either of the courts of the United States where plain, adequate and complete remedy may be had at law. 1 Story's Laws U. S., 59. It has been decided, again and again, that this is nothing but an affirmation of the well known principle of equity; and it is said in *Boyce's Executors v. Grundy*, 3 Pet., 210, that, to prevent resort to equity, the remedy at law must be as practical and efficient to the ends of justice, and its prompt administration, as the remedy in equity.

The principle which we are now considering applies to those cases in which, ordinarily, the only remedy is at law; but the party comes into equity on the ground that by reason of some impediment in the way, or some unfair legal advantage acquired by his adversary, justice cannot be done him at law. The court inquires whether such impediment or legal advantage exists; and, accordingly, as it *does* or *does not*, grants or withholds relief. But it does not apply to those cases in which the courts of equity and law have a concurrent jurisdiction. In those cases, although the concurrent jurisdiction of the court of equity most probably originated from the consideration that there *was not* or *might not be* an adequate remedy at law, yet where that concurrent jurisdiction has been established, if a party elect to come into a court of equity, it is no objection to its jurisdiction in the given case that the party might have remedy at law, even although, in that particular case, the remedy might be adequate. Thus, if one man appoint another his bailiff or receiver, I suppose there is no doubt that if money be received and not accounted for, the party may bring a suit in equity for an account, or an action of account or *assumpsit* at law; and the equity jurisdiction will not be ousted, because these concurrent remedies lie at law. Again, a party may now have remedy at law upon a lost bond; but that does not oust the ancient equity jurisdiction. But what is more in point is, the case put by Mr. Johnson, which is admitted in all the books, that if a party have a mortgage and a bond for the same debt, he may even pursue both simultaneously, until he gets satisfaction. That is, in effect, the case here; for here, there is a specific lien, which places this case upon the same footing with the mortgage. If it were true that where the United States had remedy at law they could not be entertained in equity, then they never could come into equity, in cases of custom-house bonds, where the sureties are solvent, for they always have remedy on them at law; and yet, not to mention other cases, in *The United States v. Howland*, 4 Wheat., 108, and *Hunter v. The United States*, 5 Pet., 173 (Bonds, §§ 527-31), they were plaintiffs, as here, seeking to charge a trust fund, in cases of custom-house bonds, and in the first of these cases, as here, a judgment, as appeared by the bill, had been obtained against the surety; and it does not appear in the case that he was unable to pay.

§ 989. *An agent who has received a portion of a trust fund is a proper party defendant to a proceeding to enforce the trust.*

3. It is contended that the court cannot take jurisdiction against Myer Myers, who, it is said, stands in the relation of debtor to the plaintiffs' debtors, and, as such, cannot by them be called to account; and the case has been likened to one of a debtor to a decedent's estate, against whom, it is said, and we think correctly, the creditor of the decedent can have no remedy, except

under special circumstances, such, for example, as collusion with the executor, etc. We do not consider the cases alike. We look upon Myer Myers as standing in the relation, not of a mere debtor, and the plaintiffs as mere common creditors at large; but if Myer Myers has received and not accounted for any portion of the trust subject, then we consider him as the actual holder of part of a fund, as to which the plaintiffs are entitled to priority of payment, by operation of law, and to a specific lien, by the deed of the parties.

Considered in this aspect, we think it can be shown on principle, that he is liable to account to the plaintiffs. But we forbear to pursue the reasoning on the subject, because we think the question is closed by authority. In the *United States v. Howland, etc.*, before cited, Shoemaker and Travers were indebted to the United States on duty bonds; the principals became insolvent, and assigned all their estate, particularly the cargo on board a particular ship, to pay their debts, and that to the United States first. The United States obtained a judgment against the sureties, which was unsatisfied. The sureties filed their bill to subject the proceeds of that cargo to their claim, and made Howland and Allen, the owners of the ship, and who had received the proceeds of the cargo, defendants. It was objected, as here, that they were improperly made defendants, but the supreme court held otherwise. That we consider as a case directly in point, to prove that Myer Myers was properly made defendant. We give no opinion upon the state of his indebtedness; at present, the inquiry is, whether we can rightfully take jurisdiction, at the instance of these plaintiffs, as against him? Whether he holds anything liable to their claim, and if so, how much, will be the subject of future inquiry?

§ 940. *Satisfaction of a debt may be claimed by the United States although they hold funds of the debtor derived through a treaty award. Set-off.*

4. It is insisted that, under the treaty with France, sums of money have been awarded to Moses and John Myers, more than the claim of the United States, which they can retain in satisfaction of their debt, and, therefore, they ought not to prosecute their claim here.

The United States may, if they elect so to do, apply so much of the money thus awarded as will satisfy their claim. This they actually did in the case of the Spanish indemnity by an act of congress providing that no part of the sums awarded to any of their debtors should be paid to them without retaining the amount of their debts, respectively, to the United States. Whensoever, in relation to this case, they shall elect to pursue this course, it will be then proper to consider what bearing that will have upon the subject. That, however, is not the present posture of this case; and, we think, that the power to retain, until exercised, constitutes no impediment to the prosecution of this suit.

§ 941. *A federal court having acquired jurisdiction of a proceeding in equity will not stop short of complete justice, but will do equity between the defendants, notwithstanding they are citizens of the same state.*

5. The fifth and last point is this: Whether it is competent for this court to decree, as between co-defendants, in a case where plaintiffs and defendants are rightfully convened before the court, though, on account of the citizenship of these defendants, one of them could not have maintained an original suit in this court against the other? Upon this point, I acknowledge, I have felt a serious difficulty.

On the one hand, such a course seems, in some sense, to be obnoxious to the objection that the court was thus taking jurisdiction between parties *indirectly*,

which they could not take *directly*. On the other, the inconveniences of a contrary course are so great, that the argument, *ab inconvenienti*, presses with great weight. Thus, take the case of a citizen of Virginia, dying intestate, leaving all his distributees, but one, also citizens of Virginia, and also administration taken out by a citizen of Virginia. The foreign distributee brings his bill in this court against the administrator and co-distributees. This suit is rightly instituted, both in respect to plaintiff and defendants. Must a decree be made, assigning the plaintiff only his share, making no disposition of the remainder?

Let us put another case. A citizen of Virginia mortgages real estate in Virginia to two or three citizens successively, and then makes a further mortgage to a citizen of another state; the last mortgagee brings his bill in this court against the mortgagor, and all the prior mortgagees, praying a sale of the subject, and asking that what may remain, after satisfying the previous liens, shall be applied in discharge of his debt. The subject is sold; what shall be done with the proceeds?

We incline to think that the true principle is this: that all inquiries as to the character of parties in this court are, in their nature, preliminary; and, that when the court is once satisfied that all the plaintiffs are such as may properly come into this court, and all the defendants are such as may properly be brought into this court, it is then competent to make any decree which a state court might make; in a word, that, although this court is limited as to the persons for whom, and against whom, it may take jurisdiction, yet, when the suit is rightly constituted, as between plaintiffs and defendants, it is not limited in its action on the whole case. And our impression is, that the cases may be explained on this principle. Thus, without going into them in detail, take the strongest one in 8 Pet., 1. There all the complainants and all the defendants were citizens of Ohio; but as it was an injunction to the circuit court of Ohio, the court sustained jurisdiction as against one defendant who was the representative of the plaintiff at law, but declined jurisdiction as to all the other defendants, who had not been parties to the suit at law. Even taking jurisdiction against the one seems to be, in some degree, a departure from the strict rule, as all the parties were citizens of the same state; but it being necessary so to do, to stay the execution of their own judgment, they did so, whilst, as to the other defendants, this principle not applying, they disclaimed jurisdiction.

No case has been found deciding this very point, but there being no case the other way, considering the great inconvenience, nay, mischief, which might result from a contrary course; that it seems rather to be a question of jurisdiction between the parties than a question of power over them after jurisdiction vests; that here all the parties are rightly constituted; that in any state court a decree might be made under the circumstances stated between co-defendants; that the supreme court has said, in 6 Pet., 761, that the cases on the question, even of jurisdiction as to the parties, have gone as far as it would be proper to go, we incline to think that a decree between co-defendants, though both citizens of Virginia, may be made in this court. The result of these views is that the motion is overruled.

UNITED STATES *v.* GILLESPIE.

(Circuit Court for New Jersey: 9 Federal Reporter, 74-77. 1881.)

Opinion by NIXON, J.

STATEMENT OF FACTS.—The bill of complaint is filed in this cause against the executors of Joseph L. Lewis, late of Hoboken, in the county of Hudson and state of New Jersey, deceased, and it alleges that the said Lewis departed this life on or about the 4th day of March, 1877, having first duly made and executed his last will and testament, bearing date October 1, 1873, and a codicil thereto, dated June 5, 1875, by which will and codicil, after certain specific bequests, he devised and bequeathed all the residue of his estate as follows:

"I give, devise and bequeath all the rest, residue and remainder of my estate, real and personal, and of every kind whatsoever, of which I may die seized and possessed, and to which I may be at my death entitled, unto my executors, in trust, to expend and apply in reducing the national debt of the United States of America, contracted in the course of the rebellion of 1861. In the execution of this trust my executors, as trustees, may use their discretion as to the manner of applying the said residue and remainder of my estate to the reduction of the said debt; but I strictly enjoin them that they personally superintend the application of the said residue and remainder to the purpose aforesaid, that there may be as little waste of it as possible, and that it may not be diverted to other uses by dishonest officials."

It further alleges: That the executors propounded the will for probate in the prerogative court of New Jersey about the 15th of May, 1877; that the same was admitted to probate, and letters testamentary granted thereon to the said executors on the 29th of May, 1878; and that they thereupon took on themselves the administration of the estate, and have thereby obtained the possession of and now hold United States bonds and securities, and other property of great value, belonging to the said Lewis at the time of his death.

The bill states various other matters, to which it is not deemed necessary to refer in this connection; and, after alleging that the will has created a trust in favor of the United States which the defendants are legally bound to execute, and that the United States has full right and power to enforce its performance in this court, it prays: That an account of the estate of the testator, and of the receipts and disbursements of the executors, shall be taken and audited, and that the debts, legacies and expenses remaining unpaid shall be duly paid, under the direction of the court, in due course of administration; that the amount of the net residue, applicable to the reduction of the national debt, shall be ascertained and settled; and that the executors shall bring the funds in their hands into the court to abide the administration thereof, and the decree to be rendered therein; and that it may be adjudged and decreed that the said bequest in favor of the United States is valid and operative; and that the defendants be decreed to execute the trust in regard to the residue of the estate; and that the defendants shall answer, state and set forth how they propose to perform and fulfil the trust, after the residue of the estate has been ascertained; and that, if such proposal be satisfactory to the court, the defendants shall be authorized and directed, by the decree of the court, to execute the said trust in the manner so proposed; and that the complainant may have such other and further relief in the premises as the nature of the case may require.

§ 942. *A court of equity has jurisdiction to construe a will, to declare its trusts, and to cause them to be executed.*

To the bill the defendants have interposed six pleas, supporting the same by an answer. They substantially allege:

(1) That the complainant has made no reasonable demand for the legacy or relief prayed for.

(2) That no suit can be maintained against an executor, in a court of equity, for a legacy, or other such relief as is prayed by the bill, on such allegations as are made in the bill, until a reasonable demand has been made for such legacy or relief, and that no reasonable demand has been made.

(3) That by the statute law of New Jersey no suit at law can be maintained for a legacy or bequest until after reasonable demand made upon the executor who ought to pay the same; and that no such demand has been made for any part of the relief prayed for, or for any action on the part of the executors, in relation to the discharge of their duties under the will.

(4) That no persons interested in the estate of a testator as legatee or *cestui que trust* can lawfully cite executors to account, alleging only the facts alleged in the bill of complaint, until after a year from the probate; and in case of a suspension of their authority by an appeal from the probate, until one year after the affirmance of the probate; that in the present case the probate was granted May 29, 1880; that it was appealed from by John S. Cathcart and others on the 1st of June, 1880, and was affirmed by the court of errors and appeals March 1, 1881; that said appeal suspended all rights and powers of the executors, except such rights and powers as they had before the probate; and that they were unable to sue, or be sued for or in respect of any matter stated in the bill, until they had an unsuspended authority for one year after probate, and that when the bill was filed, to wit, June 7, 1881, they had had an unsuspended authority for only one hundred and two days.

(5) That by the laws of New Jersey an order may be made by the ordinary, or other authority granting probate, that the executors of an estate give notice to creditors of the decedent to bring in their demands against the estate within nine months, on the expiration of which time the court may decree that all creditors who have not brought in their claims shall be barred; that such order was taken in this case March 12, 1881, which was the earliest time that an effectual and undoubted order could be obtained in consequence of the suspension of their authority by the appeal; that until the date of the expiration of said order, to wit, December 12, 1881, it cannot appear that there is any residue of the estate after paying creditors; that many persons have made claim to all, or a large portion, of the testator's assets, under deeds of trust and secret trusts created by testator before his death, not disclosed; and that these claimants to the *corpus* of the estate should be barred before any decree against the executors.

(6) That by statute no action can be brought, either at law or in equity, against executors within six months after probate granted, unless upon suggestion of fraud; and that six months has not elapsed from and after probate was granted to them of said will, within the meaning of said statute.

These pleas have been set down for argument under the thirty-third equity rule, and the respective parties have been fully heard. After a careful consideration we are of the opinion that they must be overruled. They seem to have been founded upon a mistaken apprehension of the nature, character and object of the bill of complaint. It is not a suit for a legacy or bequest, and

hence the several statutes quoted, and the reasons for a stay of proceedings against executors in suits of that sort, have no application. The theory of the bill is that there is an estate in the course of administration in one of the courts of the state of New Jersey which the complainant desires to have administered here; that the defendants are the executors and trustees of the estate, and have the trust fund in their hands, to be disposed of according to the provisions of the will; that the complainant, as *cestui que trust*, is entitled to have the will construed by this court, and to have the directions of the court to the executors and trustees, in regard to the proper method of executing the trust; and, as auxiliary to this, may require an account in order to ascertain what is the residue of the estate available for the purposes of the trust. The general jurisdiction of courts of chancery over questions of this kind, in the administration of estates, is undoubted, and such jurisdiction must be exercised by this court, sitting in equity, when the proper parties appear to invoke it. Entertaining this view it is not necessary to follow the counsel in their learned discussion of questions which are not involved in the subject-matter of the bill of complaint. But, perhaps, we ought to advert to the apprehensions expressed on the argument that the mere allowance of the suit might be construed into a reflection upon the conduct of the defendants. We do not so regard it. We find nothing in the bill suggesting unfaithfulness on their part, and look upon the proceeding as a request by the complainant that the court should aid the trustees in the discharge of their delicate and responsible duties, and should require only the exercise of such reasonable diligence as the condition of the estate and the circumstances of the case demand. With what speed they should be ordered to proceed is under the control of the court, to be determined on the answer, and not on the pleas; and it ought not to be assumed in advance that the court will make any order which will unreasonably subject the defendants to either hazard, loss or practical inconvenience.

The pleas should be overruled, and it is ordered accordingly.

BENJAMIN v. CAVAROC.

(Circuit Court for Louisiana: 2 Woods, 168-173. 1875.)

STATEMENT OF FACTS.—Complainant held certain bonds issued by a corporation which, with other bonds, were secured by mortgage. Other holders of bonds caused the mortgage to be foreclosed and the property sold, and it was bought by Cavaroc. He paid some of the purchase money to the sheriff, and held the remainder to be applied according to the stipulations of the sheriff's deed.

Complainant filed this bill stating the foregoing facts and charging that Cavaroc and other defendants for whom he had made the purchase had become personally liable, and that the property itself was in the hands of the purchaser liable for the payment of the mortgage debts. The bill prayed for a sale of the property and for a personal decree against the defendants. There was a demurrer to the bill by two of the defendants. Further facts appear in the opinion of the court.

Opinion by Woods, J.

A very learned and elaborate brief has been filed by counsel for defendants who demur, to show that a mortgage like the one referred to in the bill, executed according to the law of Louisiana, is not such a mortgage as is recog-

nized by equity jurisprudence, but is a public act before a notary which imports confession of judgment, and that the remedy upon it is statutory and at law by writ of seizure and sale.

§ 943. *A mortgage by public act, although it imports confession of judgment, may be enforced by suit in equity.*

There is no question that the mortgage mentioned in the bill was executed to secure a debt evidenced in part by the bonds held by complainant. It was a security for a debt. A suit upon the bonds at law would not give adequate relief, because the plaintiff could not in such a suit assert his prior lien over other ordinary judgment creditors. One of the main purposes of the suit is to enforce a lien upon property. This cannot be done by a court of law, which simply renders judgment for the amount due plaintiff and leaves him to make his money out of the property of defendant by writ of *fieri facias*.

It is said, however, that the plaintiff has a statutory remedy by seizure and sale, to which he might have resorted. But the court could not have granted an order of seizure and sale in this case, because the writ can only issue where the evidence submitted to the court is authentic and makes full proof of every allegation of the petition. *De Brueys v. Freret*, 18 La. An., 80; *Landry v. Landry*, 12 id., 167; Code of Practice, art. 732. Complainant holds no such evidence against any of the defendants except Cavaroc. The proof against the others is an agreement under private signature.

§ 944. *Although in Louisiana there may be a statutory remedy on a mortgage, the jurisdiction of a court of equity to enforce it is not ousted.*

But the fact that a state legislature has conferred upon the state courts the jurisdiction to enforce equitable rights by a statutory proceeding does not oust the equitable jurisdiction of the United States courts. That cannot be interfered with in any degree by state legislation. *Bennett v. Butterworth*, 11 How., 674, 675; *Thompson v. The Railroad Companies*, 6 Wall., 137 (§§ 1115-19, *infra*); *Case of Broderick's Will*, 21 Wall., 520; *Noyes v. Willard*, 1 Woods, 187.

But it seems that the very question raised by the first ground of demurrer is settled adversely in the case of *Walker v. Dreville*, 12 Wall., 440. That case went up from this court. It was a petition in which complainant set out that defendant was indebted to her in the sum of \$5,492, which sum was secured by mortgage, and the prayer was that defendant be condemned to pay the amount so alleged to be due, and that the mortgaged premises be adjudged and decreed to be subject to the payment of said debt, interest and costs. The judgment or decree of the court was in accordance with the prayer of the petition. The case was taken to the supreme court of the United States by writ of error, and the writ of error was there dismissed on the ground that the case belonged to the equity side of the court and should have been brought up by appeal.

§ 945. *Where, under the laws of a state, want of privity is no obstacle to the enforcement of a contract made by one person, for the benefit of another, with a third, equity will enforce such contract at the suit of the beneficiary.*

2. The second ground of demurrer is want of privity between complainant and defendants who demur. Under the jurisprudence of this state this want of privity would not be an obstacle to a suit in a court of the state to require the defendants to perform a contract made by them for the benefit of a third person, not a party to the contract. Art. 35, Code of Practice.

By this article the liability to suit of the person thus contracting is expressly

created, and the right to sue is also given to the person for whose benefit the contract is made. In other words, there is an obligation created in favor of the beneficiary of the contract against the person making the contract, although the beneficiary is not a party to the contract. Can this court enforce this liability? The question seems to be distinctly answered by the supreme court of the United States, in the Case of Broderick's Will, 21 Wall., 520, where the court says: "Whilst it is true that alterations in the jurisdiction of the state courts cannot affect the equitable jurisdiction of the circuit courts of the United States, so long as the equitable rights themselves remain, yet an enlargement of equitable rights may be administered by the circuit courts as well as by the courts of the state. . . . Indeed, much of equitable jurisdiction consists of better and more effective remedies for attaining the rights of parties."

This court has jurisdiction of this case to enforce a lien upon property, to which the defendants claim title. They are, therefore, proper and necessary parties. The court, having the defendants properly before it, will proceed to do complete justice by enforcing directly against them the liability which they incurred by entering into the contract with Cavaroc or with the sheriff, for the benefit of the complainant and others. Demurrer overruled.

GREEN v. CREIGHTON.

(23 Howard, 90-108. 1859.)

APPEAL from U. S. Circuit Court, Southern District of Mississippi.

Opinion by MR. JUSTICE CAMPBELL.

STATEMENT OF FACTS.—The intestate of the plaintiff, as an heir of Wheeler Green, deceased, and claiming by assignment of the remaining heirs, the entire estate, filed this bill against the defendant, in his capacity of administrator of Amos Whiting, deceased, and of executor of the will of Jonathan McCaleb. He states that Albert Tunstall became the administrator of the estate of Wheeler Green by the appointment of the court of probate of Claiborne county, Mississippi, in 1836; that he gave bond for the faithful performance of his duties, with Amos Whiting as his surety; that Tunstall received a large amount of property belonging to the estate, and committed a *devastavit*; that, in the year 1841, his intestate summoned Tunstall before the probate court to make an account, and upon that accounting he was found to be indebted to him, as heir, \$61,194.76; which sum he was required to pay by the decree of the court, and authority was given to prosecute a suit on the administration bond. The bill avers that Tunstall and Whiting, his surety, are both dead, and that all of his other sureties are insolvent. It charges that the defendant Creighton, as administrator of Whiting, has assets in his hands for administration, and that a portion of the assets is in the hands of McCaleb, who is the surety of Creighton on his bond to the probate court, as administrator of Whiting.

The object of the bill is to establish the claim of the intestate and his representative, arising from the judgment against Tunstall and the breach of his administration bond, on which Whiting is a surety, against the administrator of Whiting and his surety, and to obtain satisfaction from them to the extent of the assets in their hands belonging to that estate, and for this purpose they seek a discovery of the assets, and account and payment.

The defendants appeared to the bill, and allege that the estate of Whiting has been regularly administered, and that returns have been made to the probate court of Claiborne county, Mississippi, of whatever property came to

the hands of the administrator, Creighton, whose character as administrator is admitted, and that he was then engaged in administering the estate under the laws of Mississippi; that the estate had been reported to the probate court as insolvent several years before this suit was instituted, and that commissioners had been appointed by that court to receive and audit the claims; which commission was still open for the proof of claims. They contest the validity of the judgment recovered against Tunstall, and the truth of the account preferred against them, and deny the jurisdiction of the circuit court to entertain this bill. The connection of McCaleb with the bond of Creighton is admitted, and also that a portion of the money of the estate of Whiting had been deposited with or lent to him. Upon the hearing of the cause on the pleadings and proofs, the bill was dismissed for want of jurisdiction, and by the agreement of the parties the record has been made up so as to present that question only. None other will, therefore, be considered.

§ 946. *Practice of United States courts in equity is not affected by the practice in the state courts.*

In the organization of the courts of the United States, the remedies at common law and in equity have been distinguished, and the jurisdiction in equity is confided to the circuit courts, to be exercised uniformly through the United States, and does not receive any modification from the legislation of the states, or the practice of their courts having similar powers. *Livingston v. Story*, 9 Pet., 632 (§§ 897-901, *supra*).

The judiciary act of 1789 conferred upon the circuit courts authority "to take cognizance, concurrent with the courts of the several states, of all suits of a civil nature, at common law or in equity, where the matter in dispute exceeds, exclusive of costs, the sum or value of \$500, and . . . the suit is between a citizen of the state where the suit is brought, and a citizen of another state."

§ 947. *Courts of equity have jurisdiction over executors and administrators, who are treated as trustees.*

The questions presented for inquiry in this suit are, whether the subject of the suit is properly cognizable in a court of equity, and whether any other court has previously acquired exclusive control of it. The court has jurisdiction of the parties. In the court of chancery, executors and administrators are considered as trustees, and that court exercises original jurisdiction over them, in favor of creditors, legatees and heirs, in reference to the proper execution of their trust. A single creditor has been allowed to sue for his demand in equity, and obtain a decree for payment out of the personal estate without taking a general account of the testator's debts. *Attorney-General v. Cornthwaite*, 2 Cox, 43; *Adams, Eq.*, 257. And the existence of this jurisdiction has been acknowledged in this court, and in several of the courts of chancery in the states. *Hagan v. Walker*, 14 How., 29 (§§ 1876-78, *infra*); *Pharis v. Leachman*, 20 Ala., 663; *Spottswood v. Dandridge*, 4 Munf., 289. The answer of the defendant contains an assertion that, prior to the filing of the bill, the estate of Whiting was reported to the probate court of Claiborne county as insolvent, and thereupon that court had appointed commissioners to audit the claims that might be presented and proved, as preparatory to a final settlement, and that the commission was still open for the exhibition of claims.

But of this statement there is no sufficient proof. Neither the report nor any decretal order founded on it is contained in the record, and the proceedings referring to one are of a date subsequent to the filing of the bill.

§ 948. *Jurisdiction of the United States courts in equity over suit pending against administrator is not ousted by pendency of proceedings in insolvency in probate court of state.*

The question arises, then, whether the fact of the pendency of proceedings in insolvency in the probate court will oust the jurisdiction of the circuit court of the United States. In *Suydam v. Brodnax*, 14 Pet., 67, a similar question was presented. A plea in abatement was interposed in the circuit court in Alabama, in an action at law against administrators, to the effect that the decedent's estate had been reported as insolvent to a court of probate, and that jurisdiction over the persons interested, and the estate, had been taken in that court. This court declared that the eleventh section of the act to establish the judicial courts of the United States carries out the constitutional right of a citizen of one state to sue a citizen of another state in the circuit court of the United States. "It was certainly intended," say the court, "to give to suitors having a right to sue in the circuit court remedies co-extensive with those rights. These remedies would not be so, if any proceedings under an act of a state legislature, to which a plaintiff was not a party, exempting a person of such state from suit, could be pleaded to abate a suit in the circuit court."

In *Williams v. Benedict*, 8 How., 107, this court decided that a judgment creditor in a court of the United States could not obtain an execution and levy upon the property of an estate legally reported as insolvent, in the state of Mississippi, to the probate court, and which was in the course of administration in that court. The court expressly reserve the question as to the right of a state to compel foreign creditors, in all cases, to seek their remedies against the estates of decedents in the state courts alone, to the exclusion of the jurisdiction of the courts of the United States.

The cases of *Peall v. Phipps*, 14 How., 368, and *Bank of Tennessee v. Horn*, 17 How., 157, are to the same effect. The case of *The Union Bank v. Jolly*, 18 How., 503, was that of a judgment creditor, who recovered a judgment against administrators, who subsequently reported the estate of their decedent insolvent. After administering the estate in the probate court, it was ascertained that there was a surplus in their hands. The creditor had not made himself a party to the settlement in the probate court; and the administrators contended that his claim was barred. This was a suit in Mississippi. This court determined that the creditor had a lien upon the assets thus situated.

Thus it will be seen, that, under the decisions of this court, a foreign creditor may establish his debt in the courts of the United States against the representatives of a decedent, notwithstanding the local laws relative to the administration and settlement of insolvent estates, and that the court will interpose to arrest the distribution of any surplus among the heirs. What measures the courts of the United States may take to secure the equality of such creditors in the distribution of the assets, as provided in the state laws (if any) independently of the administration in the probate courts, cannot be considered until a case shall be presented to this court.

§ 949. *A creditor may proceed in equity against the surety on an administrator's bond, before obtaining judgment against the administrator, where the surety is possessed of assets of the administrator which should be applied to the creditor's claim.*

The remaining question to be considered is, whether the debt described in the bill entitles a plaintiff to come into a court of equity, under the circum-

stances. It is well settled that no one can proceed against the sureties on an administration bond at law, who has not recovered a judgment against the administrator. 5 How. (Miss.), 638; 6 Port., 393. But this rule is not founded upon the supposition that there is no breach of the bond until a judgment is actually obtained. The duty of the administrator arises to pay the debts when their existence is discovered; and the bond is forfeited when that duty is disregarded. The jurisdiction of a court of equity to enforce the bond arises from its jurisdiction over administrators, its disposition to prevent multiplicity of suits, and its power to adapt its decrees to the substantial justice of the case. *Moore v. Walter's Heirs*, 1 Marsh., 488; *Moore v. Armstrong*, 9 Port., 697; *Carew v. Mowatt*, 2 Ed. Ch. R., 57.

In this case the original debtor, Tunstall, has died insolvent. Whiting, his surety, has died insolvent. A portion of the assets belonging to the estate of the latter is in the hands of the surety of this administrator. A discovery of the amount and nature of the assets in hand, and their application to the payment of the debt, are required, if they are subject to the application.

We conclude that the circuit court was authorized to entertain this suit, and that the decree dismissing the bill is erroneous. Decree reversed.

HAYWARD v. ANDREWS.

(16 Otto, 672-679. 1882.)

APPEAL from U. S. Circuit Court, Northern District of Illinois.

Opinion by MR. JUSTICE MATTHEWS.

STATEMENT OF FACTS.—This appeal brings into review the decree dismissing, on a general demurrer, the amended bill of Hayward, the complainant, for want of equity.

The case made by the amended bill and exhibits is this: Aaron H. Allen was the owner of re-issued patent No. 1126, granted to him upon the surrender of original patent No. 12,017, dated December 5, 1854, for a new and useful improvement in seats for public buildings. It was extended for seven years from December 5, 1868, and consequently expired by limitation December 4, 1875. By virtue of certain written instruments, set out as exhibits to the bill, the complainants claimed to be the sole and exclusive owner in equity of all claims for damages arising out of, or occasioned by, infringements of the re-issued patent, committed after September 18, 1869, and of all claims for gains and profits derived by others by reason of such infringement.

The first of these instruments is dated September 18, 1869. Allen thereby grants to J. W. Schermerhorn & Co. "the sole right and privilege of manufacturing and selling school furniture, made according to" the re-issued patent, "for a tilting seat on the lever principle," subject to the terms and conditions of an indenture between the parties, which, however, is not set out. On April 22, 1881, John H. Platt, as assignee of James W. Schermerhorn, George M. Kendall and George Munger, bankrupts, transfers to the complainant all the interest of the bankrupts in the Allen patent, and all causes of action arising to him, as assignee of the bankrupts, by reason of his interest in the said patent, and especially his claim in a certain suit then pending, brought by Allen in the circuit court of the United States for the southern district of New York against the city of New York.

The second and only other instrument of title exhibited is an assignment from Allen, the patentee, to the complainant, dated March 8, 1880, whereby

Allen transfers to him and to his assigns all his right and interest in the suit mentioned in the assignment from Platt, against the city of New York, "together with all claims for damages arising since the 18th day of September, 1869, against any persons, firms or corporations by reason of infringements of letters patent of the United States for a tilting seat supported on the lever principle," being the re-issued patent specified in the bill. And the complainant is thereby further constituted the attorney in fact of Allen, irrevocably, in his name, to demand and recover all such damages, for his own use, paying all expenses, but accounting for thirty per cent. of all sums recovered, to Allen, until the latter shall have received \$6,600, and no longer.

It is alleged in the amended bill that in the suit against the city of New York a decision was reached sustaining the validity of the patent, but no final decree therein has been entered; and that, owing to the delays incident to that litigation, while waiting for a decision upon the validity of the patent, neither Allen nor the complainant has been in a situation to prosecute other infringers or sooner to file this bill.

It is also alleged in the amended bill that the defendants have infringed the said letters patent since September 18, 1869, and until the expiration thereof, and in violation thereof "have manufactured, sold and used the said invention for improvements in seats for public buildings, patented as aforesaid, whereby great injury resulted to your orator and great gains and profits accrued to the said defendants," for which, accordingly, an account is prayed and a decree for the amount thereof and for damages.

The original bill was filed December 1, 1881, Allen being a co-complainant, and the amended bill May 25, 1882, the original bill having been dismissed as to him.

It is manifest that the right claimed by the complainant receives no support from any title derived from Allen through J. W. Schermerhorn & Co. for the right of the latter under the instrument of September 18, 1869, was that of mere licensees. They could maintain no action for damages or profits against infringers, for they had no interest in the patent, nor was there any assignment to them of any right of action accrued or to accrue to Allen. In addition to this the license itself only extended to the manufacture and sale of school furniture, and there is no allegation in the amended bill that the defendants had infringed the patent in that respect. That branch, therefore, of the complainant's bill is removed from the case, and he is relieved from the embarrassment which, it is alleged in argument, is occasioned by the uncertainty produced by alternative and inconsistent titles, and which is made one of the grounds for claiming the right to resort to equity.

§ 950. *The assignee of a chose in action cannot enforce in equity the right of his assignor, merely because he cannot maintain an action at law in his own name.*

The case, then, is left to stand upon the right derived under the contract between Allen and the complainant of March 8, 1880, and the single question remains, whether the assignee of a chose in action may proceed by bill in equity to enforce for his own use the legal right of his assignor, merely because he cannot sue at law in his own name.

§ 951. — *case cited and approved.*

It is admitted that, according to the rule declared and established in *Root v. Railway Co.*, 105 U. S., 189, the patentee could not, in his own name and right, maintain the present suit, and the original bill was accordingly dismissed as to

him. To permit the appellant to proceed in equity, upon the mere ground of the assignment to him, would be substantially to abrogate that rule. The principle was stated to be that the relief granted to a patentee in equity, by the recovery of profits and damages against an infringer, was "incidental to some other equity, the right to enforce which secures to the patentee his standing in court;" that "the most general ground for equitable interposition is to insure to the patentee the enjoyment of his specific right by injunction against a continuance of the infringement; but that grounds of equitable relief may arise other than by way of injunction;" and among these, by way of illustration, was mentioned that "where the title of the complainant is equitable merely;" but it is the obvious meaning of the passage to limit the exception to cases where the purpose and necessity of the resort to a court of chancery are to enforce the peculiar equity personal to the complainant, and not merely the legal right of which he is the beneficial owner. If the assignee of the chose in action is unable to assert in a court of law the legal right of the assignor, which in equity is vested in him, then the jurisdiction of a court of chancery may be invoked, because it is the proper forum for the enforcement of equitable interests, and because there is no adequate remedy at law; but when, on the other hand, the equitable title is not involved in the litigation, and the remedy is sought merely for the purpose of enforcing the legal right of his assignor, there is no ground for an appeal to equity, because by an action at law in the name of the assignor the disputed right may be perfectly vindicated, and the wrong done by the denial of it fully redressed. To hold otherwise would be to enlarge the jurisdiction of courts of equity to an extent the limits of which could not be recognized, and that in cases where the only matters in controversy would be purely legal rights.

In opposition to this view, a passage from Story, Eq. Jur., sec. 1057*a*, is cited and relied on in argument, in which that learned author, after stating that it had been "recently held that the assignee of a debt, not in itself negotiable, is not entitled to sue the debtor for it in equity, unless some circumstances intervened which show that his remedy at law is, or may be, obstructed by the assignor," adds, that "this doctrine is apparently new, at least in the broad extent in which it is laid down, and does not seem to have been generally adopted in America. On the contrary the more general principle established in this country seems to be, that wherever an assignee has an equitable right or interest in a debt or other property (as the assignee of a debt certainly has), then a court of equity is the proper forum to enforce it; and he is not to be driven to any circuitry by instituting a suit at law in the name of the person who is possessed of the legal title." In the next paragraph, however, it is admitted that "if the assignment be of a contract involving the consideration and ascertainment of unliquidated damages, as in case of the assignment of a policy of insurance, then, unless some obstruction exists to the remedy at law, it would seem that a court of equity ought not, or might not, interfere to grant relief; for the facts and the damages are properly matters for a jury to ascertain and decide. But the same objection would not lie to an assignment of a bond or other security for a fixed sum."

The doctrine referred to in this passage, as "apparently new," is that stated by Vice-Chancellor Shadwell, in *Hammond v. Messenger*, 9 Sim., 327, 332, where he said: "If this case were stripped of all special circumstances, it would be simply a bill filed by a plaintiff, who had obtained from certain persons to whom a debt was due, a right to sue in their name for the debt. It is

quite new to me, that, in such a simple case as that, this court allows, in the first instance, a bill to be filed against the debtor by the person who has become the assignee of the debt. I admit that if special circumstances are stated, and it is represented that notwithstanding the right which the party has obtained to sue in the name of the creditor, the creditor will interfere and prevent the exercise of that right, this court will interpose for the purpose of preventing that species of wrong being done; and if the creditor will not allow the matter to be tried at law in his name, this court has a jurisdiction in the first instance to compel the debtor to pay the debt to the plaintiff, especially in a case where the act done by the creditor is done in collusion with the debtor. If bills of this kind were allowable, it is obvious they would be pretty frequent; but I never remember any instance of such a bill as this being filed, unaccompanied by special circumstances."

And, accordingly, the supreme judicial court of Massachusetts in *Walker v. Brooks*, 125 Mass., 241, held that "a court of equity will not entertain a bill by the assignee of a strictly legal right merely upon the ground that he cannot bring an action at law in his own name, nor unless it appears that the assignor prohibits and prevents such an action from being brought in his name, or that an action so brought would not afford the assignee an adequate remedy." And Gray, C. J., delivering its opinion in that case, referring to the passage from Story to the contrary, said: "But the adjudged cases, including those cited by the learned commentator, upon being examined, fail to support his position, and show that the doctrine of *Hammond v. Messenger* is amply sustained by earlier authorities in England and in this country." This conclusion he then verifies by a review of the cases from the time of Lord Chancellor King, whose decision in *Dhegetoft v. London Assurance Co.*, Mos., 83, was affirmed in the house of lords (4 Bro. P. C. (2d ed.), 436); followed by Lord Hardwicke in *Motteux v. London Assurance Co.*, 1 Atk., 545, and Lord Loughborough in *Cator v. Burke*, 1 Bro. Ch., 434, to Vice-Chancellor Knight Bruce in *Rose v. Clarke*, 1 You. & Col. C. C., 534; and in this country from *Carter v. United Insurance Co.*, 1 Johns. Ch., 463, by Chancellor Kent, and *Ontario Bank v. Mumford*, 2 Barb. Ch., 596, 615, by Chancellor Walworth; including several others in various states. He then points out that in *Riddle v. Mandeville*, 5 Cranch, 322, the principal case cited by Mr. Justice Story in support of his statement, a bill in equity by an indorsee of a promissory note against a remote indorser, was sustained by this court upon the ground that in Virginia, the law of which governed the case, no remedy at law could be had against him, except by the circuitous course of successive actions by each indorsee against his immediate indorser, and that, in that particular case, the intermediate party was insolvent; and that Mr. Chief Justice Marshall, who delivered the opinion in that case, did not consider it as establishing the general proposition for which it was cited, was manifest from his opinion in the later case of *Lenox v. Roberts*, 2 Wheat., 373, in which the assignee of all the property of a banking corporation was allowed to maintain a bill in equity in his own name upon a promissory note which had not been formally indorsed to him, for the reason that, "as the act of incorporation had expired, no action could be maintained at law by the bank itself."

The same doctrine had received a pointed application by this court in the case of *Thompson v. Railroad Companies*, 6 Wall., 134 (§§ 1115-19, *infra*). That case was commenced in the state court in Ohio, by the parties in interest, in their own name, although only beneficially entitled, in accordance with the

code of the state. It was removed into the circuit court, where the plaintiffs filed a bill in equity, because their title was equitable merely. A decree in their favor, on appeal, was reversed by this court; Mr. Justice Davis remarking in the opinion that "this case does not present a single element for equitable jurisdiction and relief," and added: "The absence of a plain and adequate remedy at law is the only test of equity jurisdiction, and it is manifest that a resort to a court of chancery was not necessary in order to enable the railroad companies to collect their debt." That decision has been cited with approval in the subsequent cases of *Walker v. Dreville*, 12 Wall., 440; *Van Norden v. Morton*, 99 U. S., 378 (§§ 1155-57, *infra*), and *Hurt v. Hollingsworth*, 100 id., 100.

In the present case, the complainant had a plain and adequate remedy at law by an action in the name of Allen, whose willingness to permit his name to be so used in accordance with his agreement to that effect is manifest from the fact that in the original bill he was named as one of the complainants. There was, therefore, no error committed by the circuit court in dismissing the amended bill for want of jurisdiction in equity. Decree affirmed.

§ 952. In general.—Equity has jurisdiction to furnish relief in cases of fraud, mistake or an implied trust. *Dunlap v. Stetson*, 4 Mason, 849 (§§ 2049-58).

§ 953. A court of equity will not disown its jurisdiction nor send a party properly before it to seek his remedy in another forum. *Mercantile Trust Co. v. Lamoille Valley R. Co.*, 16 Blatch., 324 (§§ 94-97).

§ 954. The jurisdiction of a court of equity, although it may attach on the ground of actual or constructive fraud, or accident, or mistake, is not necessarily dependent on them; but may be exercised on other distinct grounds in which the subject-matter is *per se* within the equitable jurisdiction. Among these are matters of account; and, as incident thereto, matters of partnership. *Johnson v. Straus*, 4 Hughes, 621 (§§ 1849-62).

§ 955. Equity sometimes takes jurisdiction on account of the parties and sometimes on account of the relief proper to be administered. *May v. Le Claire*,* 11 Wall., 217.

§ 956. The same considerations which invoke the jurisdiction of a court of equity may control the remedy. *Ibid.*

§ 957. In all cases in which a court of equity takes jurisdiction, it will exercise that jurisdiction on its own principles. *Bodly v. Taylor*, 5 Cr., 191.

§ 958. It is said that jurisdiction in chancery is of three kinds: (1) inherent and original, comprehending cases where there is no adequate remedy at law; (2) statutory, being a new power granted by the legislature to the court to act upon particular subjects of a like kind, as occasions for doing so may occur; and (3) extraordinary, as when a statute permits persons to present petitions to the chancellor for relief in private affairs, when the petitioner cannot get relief by the ordinary course of law, or from the inherent power of a court of chancery. In these last cases the chancellor acts summarily, *ex parte*, upon the petition of the party seeking relief. *Williamson v. Berry*, 8 How., 495.

§ 959. The sixteenth section of the judiciary act of 1789 is merely declaratory, making no alteration whatever in the rules of equity on the subject of legal remedy. *Boyce v. Grundy*, 3 Pet., 210.

§ 960. A court of equity, having obtained jurisdiction of the parties and the subject-matter of the action for one purpose, may retain it for all purposes within the equities to be enforced. *Ober v. Gallagher*, 3 Otto, 199 (Courts, §§ 887-91).

§ 961. The jurisdiction of courts of equity does not depend upon the existence of a case in which the particular exercise of it asked for can be shown; but upon general principles and analogies, applicable to the structure of the court. *Wood v. Mann*, 3 Sumn., 318.

§ 962. In case of a transaction which is held in equity to be a mortgage, with power to sell the property and account for the proceeds, equity takes jurisdiction, not on the ground of fraud, but rather as a case of specific performance of a contract to pay certain balances back or make reconveyances after payment of the debt. And if specific performance is not practicable, the court gives damages as an indemnity. In another view it is exercising jurisdiction over a trust growing out of a mortgage; and it may also be considered as a case of accounting between persons having a community of interest. *Jewett v. Cunard*,* 3 Woodb. & M., 277.

§ 963. The mere fact that a case is in conformity with the principles of natural equity and justice is not sufficient to bring the case within the jurisdiction of equity for relief. *Howe v. Sheppard*, 2 Sumn., 409.

§ 964. Where all the defendants in a suit in equity appear and answer the bill, and the case stated in the bill is a proper one for equitable relief, the court of equity has complete jurisdiction over the suit both as to parties and subject-matter. *Insurance Co. v. Harris*, 7 Otto, 834.

§ 965. Not affected by state laws.—The equity jurisdiction of the circuit court of the United States is wholly independent of the local laws of any state, and that the plaintiff has an adequate remedy under the local law is no objection to this jurisdiction. *Gordon v. Hobart*, 2 Sumn., 401; *Neves v. Scott*, 13 How., 270; *Gaines v. Relf*, 15 Pet., 14; *Orendorf v. Budlong*, 12 Fed. R., 24 (§§ 1866-72).

§ 966. Equity proceedings in the United States courts are not modified by state modes of practice. If the rights of the party are cognizable alone in equity he must proceed accordingly. *Walker v. Seigel*,* 2 Cent. L. J., 508.

§ 967. In cases in equity the courts of the United States are governed by those rules and principles which prevail in a court of equity, and not by the law of the state in which they are sitting. *McFarlane v. Griffith*, 4 Wash., 585.

§ 968. Neither the jurisdiction nor practice in chancery in the courts of the United States is derived from or governed by state laws. A state law providing that a bill filed to foreclose a mortgage given to secure a judgment is demurrable, unless it appears in the bill that an execution has been issued on the judgment, which has been returned unsatisfied, and that the defendant has no property, except the mortgaged property, to satisfy the judgment, does not apply to a suit in the circuit court of the United States. *Dow v. Chamberlin*, 5 McL., 281 (Conv., §§ 453-54).

§ 969. The equity powers of the courts of the United States cannot be abridged by state legislation. Though the jurisdiction of all matters properly cognizable by a court of chancery were to be confined by the laws of the state to the court of probate, the equity jurisdiction of the federal courts would remain untouched in all cases where proper parties and a sufficient sum in dispute give jurisdiction. *Parsons v. Lyman*, 5 Blatch., 170 (Courts, §§ 322-23).

§ 970. The equitable jurisdiction of the courts of the United States does not depend altogether upon the remedies given by the state courts. This jurisdiction is the same throughout the country, and exists in those cases in which the chancery courts in England have concurrent jurisdiction with the courts of common law. These courts therefore have jurisdiction of a suit in equity by an assignee in bankruptcy to avoid a conveyance made in fraud of creditors, notwithstanding that in the courts of the state an assignee in insolvency must proceed at law in such a case, unless the rights of more than two parties are involved, or some peculiar equitable relief is required. *Pratt v. Curtis*, 2 Low., 87.

§ 971. The equity jurisdiction of the federal courts to decree an account in favor of a legatee against an executor cannot be restricted by a statute of the state declaring that a settlement made by an executor in the county court shall be *prima facie* evidence in favor of the accounting party. Although the effect of this statute in the state courts is that the plaintiff must successfully attack the account as settled in the county court by showing errors in it, and only to the extent that he surcharges and falsifies it by such errors can the executor be compelled to account again, it has no such effect in the federal courts. But irrespective of the statute, the account may be treated before the master, so far as the court by the decree of reference shall adjudge, as evidence against the executor to the extent that it contains admissions by him, and in his favor to the extent that it is not shown to be incorrect. *Pulliam v. Pulliam*, 10 Fed. R., 23.

§ 972. On a bill to redeem, *held*, that a state statute requiring a tender to be made in certain cases of the money due on the mortgage, does not apply to the general equity jurisprudence of the federal courts. *Gordon v. Hobart*,* 2 Sumn., 403.

§ 973. The jurisdiction of the circuit court of the United States as a court of equity is uniform throughout the United States and is unaffected by state laws. Under section 913 of the Revised Statutes, declaring that the forms and modes of proceeding in suits in equity shall be according to the principles, rules and usages which belong to courts of equity, as contradistinguished from courts of law, which section is taken from the act of 1792, it has always been held that the jurisdiction and practice of the circuit courts in equity was uniform throughout the United States and not subject to limitation or restriction by local statutes. It is a corollary of this proposition, that the court is not bound by the decisions of the state courts upon questions of equity jurisprudence. It is, therefore, not bound by a state statute limiting the time within which a creditor's bill may be brought. *Orendorf v. Budlong*, 12 Fed. R., 24 (§§ 1866-72).

§ 974. The thirty-fourth section of the judiciary act of 1789 does not make a state law

rendering interested witnesses competent a rule of decision for the United States circuit court sitting in equity. *Segee v. Thomas*, 8 Blatch., 11 (§§ 1427-38).

§ 975. Although a state statute cannot affect the equity jurisdiction of the federal courts, yet where such a statute creates a right and prescribes a remedy to enforce it, the federal courts will pursue it if consistent with the ordinary proceedings on the chancery side. *Lawrence v. Bowman*, 1 McAl., 419 (§§ 1809-18).

§ 976. The federal courts of equity administer the same general principles in all cases and in every state, irrespective of local law and state practice. If the court has jurisdiction to try and determine a case in equity, it must determine it according to those general principles which are the same in every state. *Northern Pacific R. Co. v. St. Paul, etc., R. Co.*, 2 McC., 260 (§§ 1676-78).

§ 977. Although "alterations in the jurisdiction of the state courts cannot affect the equitable jurisdiction of the circuit courts of the United States so long as the equitable rights themselves remain, yet an enlargement of equitable rights may be administered by the circuit courts as well as by the courts of the state." *Case of Broderick's Will*, 21 Wall., 503.

§ 978. The act of Maine of February 5, 1821, requiring a tender of the money due upon mortgages in certain cases, is no objection to a bill to redeem in a federal court. It is wholly inapplicable to the general equity jurisdiction of the courts of the United States, which can in no manner be limited or controlled by state legislation. *Gordon v. Hobart*, 2 Sumn., 401.

§ 979. State laws respecting rights are to be considered by the courts of the United States as rules of decision. But in suits in equity, state laws in respect to remedies, whether prior or subsequent to the act of 1792, can have no effect whatever on the jurisdiction of the federal courts, that act having prescribed a rule by which the line of partition between the law and equity jurisdiction of those courts is distinctly marked. *Mayer v. Foulkrod*, 4 Wash., 349 (§§ 1120-26).

§ 980. The equity jurisdiction of the federal courts is derived from the constitution and laws of the United States, and is in no manner limited or enlarged by equity rule 90. These rules are rules of practice for regulating the mode of proceeding in the courts. *Lewis v. Shainwald*, 7 Saw., 408 (§§ 1820-26).

§ 981. The equity jurisdiction conferred on the federal courts is the same as that of the high court of chancery in England, and is subject to neither limitation nor restriction by state legislation, and is uniform throughout the different states of the Union. *Pulliam v. Pulliam*, 10 Fed. R., 23; *Boyle v. Zacharie*, 6 Pet., 657; *Harvey v. Richards*, 1 Mason, 380.

§ 982. In regard to equitable rights, the power of the courts of chancery of the United States is, under the constitution, to be regulated by the law of the English chancery; that is, the distinction between law and equity is to be observed in administering the remedy for an existing right. The rule applies to the remedy and not to the right. It is the form of the remedy which the constitution provides; and if the complainant has no right under the law of the state or the United States, the federal court, as a court of chancery, has nothing to remedy. Thus upon a bill filed to enforce a bequest to a voluntary association in Maryland, upon the doctrine of charitable uses, it was held that the bequest could not be enforced, it not being a valid one by the laws of Maryland, although such a bequest would be maintained in England. *Meade v. Beale*, Taney, 339.

§ 983. The circuit courts of the United States have the same equity jurisdiction in all the states, unaffected by the abolition of forms of action and the distinctions between legal and equitable remedies by state legislation. *Smith v. Railroad Co.*, 9 Otto, 398; *United States v. Howland*, 4 Wheat., 115; *Boyle v. Zacharie*, 6 Pet., 657; *Pulliam v. Pulliam*, 10 Fed. R., 23; *Blanchard v. Sprague*, 1 Cliff., 288; *Fletcher v. Morey*, 2 Story, 555. The rules of decision are the same in all the states. *United States v. Howland*, 4 Wheat., 115; *Boyle v. Zacharie*, 6 Pet., 657; *Blanchard v. Sprague*, 1 Cliff., 288.

§ 984. By the words "cases in equity," as used in the clause of the constitution extending the judicial power to all cases in law and equity arising under the constitution and laws of the United States, those cases are meant which are so called in the jurisprudence of England as contradistinguished from cases at common law. So that in the courts of the United States equity jurisdiction embraces the same matters of jurisdiction and modes of remedy as exist in England. This jurisdiction is the same in all the states. *Lorman v. Clarke*, 2 McL., 568 (Courts, §§ 596-603).

§ 985. The forms and modes of proceeding in equity in the courts of the United States are required to be according to the course of the civil law, and this requirement of the statute was intended to regulate the whole course of proceeding. *Wayman v. Southard*, 10 Wheat., 1.

§ 986. The equity jurisdiction of the federal courts is governed by the established rules of equity in England. The supreme court of the United States has jurisdiction of a suit in equity by a state against the citizens of another state. It will award costs as it sees fit. *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 18 How., 461.

§ 987. The phrase "rules of equity," as used in a statute requiring proceedings to be conducted according to the rules of equity, means the well-settled and established rules and principles of the court of chancery, as adopted and recognized in their decisions, which have been acted upon here under the provisions of the constitution and the acts of congress. *United States v. Arredondo*, 6 Pet., 709.

§ 988. Distinctions between law and equity.—Proceedings at law and in equity are kept distinct in the courts of the United States, even in states where the two systems are blended. And, therefore, in suits at law in the courts of the United States, the hearing and determination of all questions that belong exclusively and appropriately to the jurisdiction of a court of equity must be excluded. In a suit at law in a federal court to recover possession of land in dispute, no inquiry can be made into the *bona fides* or the regularity of a survey and location made by the government in pursuance of a patent, there being no pretense for saying that they were made without authority. *Jones v. McMasters*, 20 How., 8.

§ 989. Although the equity and common law jurisdiction is distinct in the federal courts, there are cases in which the courts of law will notice and enforce equitable interests. *Campbell v. Hamilton*, 4 Wash., 92.

§ 990. The provision of the act of congress of March 3, 1853, which enacts that a patent issued under it "shall not affect the interests of third parties," does not abolish the distinction between law and equity proceedings in the United States courts. *Mezes v. Greer*, McAL., 401.

§ 991. The commingling of law and equity in the courts of Georgia is unknown in the national courts, where law and equity are distinct and separate. *Shuford v. Cain*, 1 Abb., 302.

§ 992. The organic act of the territory of Montana recognizes the distinction between the jurisdictions of law and equity, but requires that proceedings in both be in the same court. The statute regulating the proceedings in the courts of the territory allows only one form of civil action, and enacts that issues of fact shall be tried by a jury, unless a jury is waived or reference ordered. It is held that, although the formal distinctions in the pleadings and forms of procedure are thus abolished, the essential distinction between law and equity is not changed: that the relief which the law affords must still be administered through the intervention of a jury, unless a jury be waived, and relief which equity affords must still be applied by the court itself, and all information presented to guide its action, whether obtained through masters' reports or findings of a jury, is merely advisory, and the decree must proceed from the judgment of the court, and not from the judgment of the master or jury; and that the court in an equity case may disregard the findings of the jury. *Basey v. Gallagher*, 20 Wall., 670; *Gallagher v. Basey*,* 1 Mont. T'y, 457.

§ 993. The proceedings supplementary to execution, prescribed by the practice act of California, are a substitute for a creditor's bill, and constitute in substance an equitable proceeding. The distinction between legal and equitable remedies in the United States courts prevents, therefore, the use of these proceedings on their common law side. The state statute cannot annul the distinction between legal and equitable rights and remedies preserved in the federal courts, and enable a party to pursue in those courts an equitable right on the common law side. *Byrd v. Badger*, McAL., 443.

§ 994. When the code of a state, abolishing the distinction between actions at law and in equity, and providing for a mingling of the two in the same proceeding, provides for a particular action, the question whether the action is to be regarded in the circuit court of the United States as equitable or legal depends upon the facts stated and the nature of the relief sought. If the suit appears in its nature to be a suit in equity, it must go upon the equity calendar, and be proceeded with according to equity rules. *Duncan v. Greenwalt*, 3 McC., 378.

§ 995. In the federal courts the jurisdiction at law and in chancery, in Louisiana and in all other states, is separate and distinct. A proceeding which belongs to the chancery jurisdiction cannot be brought before the supreme court by writ of error. *McCollum v. Eager*, 2 How., 61 (APPEALS, §§ 103, 104).

§ 996. Under the civil law and the code of Louisiana there is no distinction between the proceedings at law and in equity. (Per BALDWIN, J.) *Livingston v. Story*, 11 Pet., 393.

§ 997. — no state courts of equity.—Chancery jurisdiction having been conferred on the courts of the United States, and the rules of the high court of chancery of England having been adopted, the exercise of this jurisdiction is not limited by the chancery system adopted by any state, and the courts exercise this jurisdiction in states where no court of chancery has been adopted. *State of Pennsylvania v. Wheeling Bridge Co.*, 18 How., 518.

§ 998. Although a federal court adopts the modes of procedure at law of the state in which it sits, yet if that state has abolished the distinction between legal and equitable remedies, the federal court will reject this mode, and compel a suitor seeking to enforce equitable rights to proceed according to the established equity practice. *Bennett v. Butterworth*, 11 How., 674.

§ 999. Although the state in which a circuit court of the United States is sitting may not have any equitable jurisdiction, still the equitable jurisdiction of the United States court re-

mains as at common law. A creditor's bill, therefore, will be entertained by the circuit court, but only after judgment at law. *Smith v. Railroad Co.*,⁹ Otto, 400.

§ 1000. In Pennsylvania the jury may find a special or conditional verdict when the plaintiff's claim proves to be an equitable one. This is because there are no courts of equity there. The United States circuit court sitting in that state has an equity side, and therefore the custom does not apply to it. *Conn v. Penn*, Pet. C. C., 502.

§ 1001. Where a wife divorced *a mensa et thoro*, being a resident of a state other than that of her husband's residence, brings a suit on the equity side of the circuit court of the United States to enforce a decree for alimony rendered in the divorce suit, it is no objection to the equity jurisdiction of the court that there is a remedy under the local law, for the equity jurisdiction of the federal courts is the same in all of the states, and is not affected by the existence or non-existence of an equity jurisdiction in the state tribunals. *Barber v. Barber*, 31 How., 582 (COURTS, §§ 903-12).

§ 1002. Whenever a new right is granted by statute or a new remedy for violation of an old right, or whenever such rights or remedies are dependent on state statutes or acts of congress, the jurisdiction of such cases, as between the law and equity sides of the federal courts, is determined by the nature of the case, and unless it comes within some well-settled head of equitable jurisdiction, it must be held to be an action at law. *Van Norden v. Morton*, 9 Otto, 380 (§§ 1155-57).

§ 1003. If a right exists within a state which cannot be enforced at law, and which properly belongs to chancery jurisdiction, relief may be given in a federal court. It is immaterial whether a similar right has come under the action of a court of chancery in this country or in England. The right may be new. It may exist under a statute or usage and nowhere else. Thus where a statute declares that all equitable rights, however held by a judgment debtor, may be reached by bill in chancery, by the judgment creditor, to satisfy the judgment, the right so given, not being enforceable at law, may be enforced in the United States circuit court in equity. Such a right is also enforceable in this court upon general principles of equity, independently of the state statute. *Lorman v. Clarke*, 2 McL., 568 (COURTS, §§ 596-608).

§ 1004. Auxiliary proceedings.—A bill in equity lies to enjoin a judgment at law rendered in the same court, though the original plaintiff resides in another state. Such a bill is not an original suit within the meaning of the eleventh section of the judiciary act, but is a proceeding auxiliary to the original action. *Dunlap v. Stetson*, 4 Mason, 349 (§§ 2049-58).

§ 1005. The circuit court has jurisdiction of a suit in equity to stay proceedings upon a judgment at law between the same parties in the same court, although the subpoena is served upon the defendant out of the district in which the court sits. *Logan v. Patrick*,^{*} 5 Cr., 288.

§ 1006. The defendant, in a judgment at law, in the circuit court of the United States, may file a bill in chancery in the same court to enjoin the plaintiff from proceeding on the judgment, and such a bill is to be regarded not as an original bill, but only as auxiliary to the suit at law. But if the bill is filed by one who is neither party nor privy to the judgment, seeking to restrain its enforcement, and praying a decree for the amount recovered, it is an original bill, and the jurisdiction of the court must be sustained by the citizenship of the parties. *Williams v. Byrne*, Hemp., 472.

§ 1007. Defendants are prosecuting a suit against plaintiff in the United States district court, claiming title to certain mines. Plaintiff, by a proceeding in the circuit court, seeks to enjoin the working of said mines by defendants till the title is ascertained. Defendants object to the jurisdiction of the circuit court on the ground that its jurisdiction is limited, and does not extend to an auxiliary proceeding depending upon that exercised by the district court, which is not a common law tribunal. *Held*, that when the court has jurisdiction of the parties, and the subject-matter equals in value the jurisdictional amount prescribed by law, it matters not that the jurisdiction is auxiliary, and that the objection was not well taken. *United States v. Parrott*,^{*} 1 McAL., 271.

§ 1008. Citizenship.—The claimant of land under a tax sale filed his bill against S., the original owner, to quiet title, and against B., who claimed a part under the tax sale, for partition. S. and B. were both citizens of Arkansas. *Held*, that S. might file a cross-bill of a defensive character against both the claimant and B., though the latter was a citizen of the same state as himself. *Peay v. Schenck*, 1 Woolw., 175 (§§ 2192-95). See COURTS.

§ 1009. Where a bill to enjoin a judgment at law, rendered for the defendant in equity against the complainant, must be brought in a court of the United States because the judgment was rendered in that court, and its limited jurisdiction creates some doubt of the propriety of making citizens of the same state with the plaintiff parties defendant, the court may dispense with parties who would otherwise be required, and decree between those before the court, since its decree cannot affect those who are not parties to the suit. *Simms v. Guthrie*, 9 Cr., 19.

§ 1010. Motion for an injunction against the infringement of a patent refused, it appearing

that the defendants live and carry on business in another state. *Goodyear v. Chaffee*,* 8 Blatch., 270.

§ 1011. A bill in equity brought to construe a prior decree of court is not a new bill in such a sense that the jurisdiction of the court is dependent upon the citizenship of the parties thereto, but it is rather a continuation of the former litigation, and it will consequently be entertained independent of the question of citizenship. *Minnesota Co. v. St. Paul Co.*, 2 Wall., 632 (Conv., §§ 1815-19).

§ 1012. There being no act of congress conferring on the federal courts a right to take cognizance of a suit in equity between citizens of the same state, no such jurisdiction exists. Authority given by congress to entertain suits at law between citizens of the same state in certain cases does not include authority to entertain jurisdiction in equity in such cases, where such jurisdiction does not become necessary in an action at law regularly before the court. *Livingston v. Van Ingen*, 1 Paine, 45.

§ 1013. A decree in equity was rendered for plaintiffs, non-residents, against the defendants, residents of the state, and sustaining the relation of principal and surety, in the circuit court of the United States. The surety was compelled to pay the decree on account of the insolvency of the principal debtor, and, on the subsequent solvency of the principal, he filed a petition in the same court for contribution. It was held, on objection that the court had no jurisdiction on account of the residence of the parties, that the circuit court, possessing all the powers of a court of equity, having acquired jurisdiction of the cause and the parties, it still had jurisdiction to compel contribution, notwithstanding the fact that both the parties lived within the state. *Howards v. Selden*, 4 Hughes, 300.

§ 1014. Where the complainant and defendant in a patent suit in the circuit court of the United States are citizens of different states, the jurisdiction of the court extending here to any case which may fall within its general jurisdiction as a court of equity, its power is not a mere statutory jurisdiction confined to cases arising under patent laws, but is the general power of a court of equity. *Sayles v. Richmond, etc., R. Co.*, 3 Hughes, 172.

§ 1015. A court of equity will not suffer its jurisdiction to be ousted by the mere joinder or non-joinder of formal parties, whose citizenship furnishes the objection to the jurisdiction. *Wormley v. Wormley*, 8 Wheat., 421.

§ 1016. To a bill to enjoin the working of a gold mine, there was a plea to the jurisdiction on account of the citizenship of the parties. There being a proper averment of citizenship to give jurisdiction, the court directed an immediate argument upon the plea, and held that the *prima facie* jurisdiction derived from the record authorized, in case of irreparable mischief, a temporary injunction to preserve the rights of the parties *in statu quo* until the plea should be disposed of. *Fremont v. The Merced Mining Co., McAL.*, 267.

§ 1017. Parties.—A court of equity has no jurisdiction of a bill in equity where it has not all the parties necessary to a final decree before it. *Shields v. Barrow*, 17 How., 130.

§ 1018. A court of equity will not proceed to make an account as between several *cestuis que trust*, some of whom have not been made parties defendant, even if they are out of the jurisdiction. *Greene v. Sisson*, 2 Curt., 177. See PRACTICE.

§ 1019. If, in a suit in equity in a federal court, certain parties are materially interested in the subject-matter of the suit, and are without the jurisdiction of the court, it will not take jurisdiction of the case. *Tobin v. Walkinshaw, McAL.*, 28; *Coiron v. Millaudon*, 19 How., 115.

§ 1020. If a court of equity can make a decree according to justice and equity between the parties before it, that decree will not be withheld because a party out of its jurisdiction is not made a defendant, although he must have been united in the suit had he been within the process of the court. *Breedlove v. Nicolet*, 7 Pet., 431.

§ 1021. Defendants in an injunction suit cannot object that the court has no jurisdiction over the parties on the ground that some of their associates are resident in foreign countries when the mine (the use of which it is sought to enjoin) is in possession of the agents of the company, of which the non-residents are parties, and when the parties are prosecuting a claim against the complainants in this suit for the title to the said mine. *United States v. Parrott*,* 1 McAL., 271.

§ 1022. In a creditor's bill in a federal court to subject to the payment of the complainant's judgment unpaid subscriptions to the capital stock of the defendant corporation, where all of the defendants are citizens of the same state, the court has no jurisdiction of the cross-bill by one of the defendants against the others, which does not make the complainant a party, to compel payment first by those who have paid nothing at all on their subscriptions. *Putnam v. New Albany*,* 4 Biss., 365. See BONDS, §§ 1134-36; CORP., §§ 182-86.

§ 1023. In a suit by a father as next friend, representing himself as guardian of two minors, it appeared that under the laws of the state where the suit was brought, he had ceased to be such for more than two years prior to bringing the suit. It also appeared that one of the minors came of age four days after action begun, the other before the decree was made, and that

neither ever became a formal party. *Held*, that under these circumstances a court of equity had no jurisdiction to decree a sale of their real estate. *Livingston v. Jordan*,* 10 Am. L. Reg. (N. S.), 58.

§ 1024. *Land lying in another state.*—A decree of a court of equity cannot transfer the title to lands in another state, although a deed of the land is made by a commissioner in conformity with the decree. *Watts v. Waddle*, 1 McL., 308; *Carrington v. Brents*, id., 175.

§ 1025. A court of equity can only affect the title to land lying outside of its territorial jurisdiction by means of its jurisdiction over the persons of those who are interested in it. *Tardy v. Morgan*,* 8 McL., 358.

§ 1026. The circuit court sitting in equity, though it cannot cause land lying outside its jurisdiction to be sold to pay debts or legacies, yet when it has jurisdiction by reason of the citizenship of the parties it will cause the defendant to pay a legacy chargeable upon the land. *Lewis v. Darling*, 16 How., 13.

§ 1027. The effect of a decree of a court of equity transferring the title to land lying outside of its jurisdiction is not to effect a change of title which is valid out of such jurisdiction. The court may decree that the defendant execute a conveyance, and, if it has jurisdiction of his person, may compel him to execute such a conveyance; but unless a conveyance is made the title remains unaffected by the decree. *Corbett v. Nutt*, 10 Wall., 475.

§ 1028. Where corporations of several different states are consolidated, and a mortgage is given covering the consolidated property lying in different states, if a suit in equity to foreclose the mortgage is brought in the circuit court in one circuit, and that court takes jurisdiction of the case, it may sell all the property in all the states, and no other court can take jurisdiction of suits founded on claims against the same property. *Blackburn v. Selma, M. & Memphis R. Co.*, 2 Flap., 544 (CORP., §§ 1179-86).

§ 1029. A court of chancery acting *in personam* may decree the conveyance of lands in any other state, and enforce the decree by process. But neither a decree itself, nor any conveyance under it, except by the person in whom the title is vested, can operate beyond the jurisdiction of the court. *Watkins v. Holman*, 16 Pet., 57.

§ 1030. A federal court of equity, acting upon the parties before it, may order the sale of land outside of its own jurisdiction. *Lyman v. Lyman*, 2 Paine, 11.

§ 1031. Where the defendant is liable to the plaintiff, either in consequence of contract, or as trustee, or as the holder of a legal title acquired by any species of *mala fides* practiced on the plaintiff, the jurisdiction of a court of chancery is sustainable wherever the person may be found, although the title to lands not within the jurisdiction of the court may be involved in the inquiry, and may even constitute the essential point on which the case depends. Thus lands lying in another state may be decreed to be conveyed to a principal, where his agent to locate a warrant for the lands takes the title in his own name. *Massie v. Watts*, 6 Cr., 148.

§ 1032. *Foreclosure of mortgage*—United States owner of equity of redemption.—A mortgagee may foreclose his mortgage in equity, although the United States has become the owner of the equity of redemption by purchase as security for a debt. The court having jurisdiction over the land, although it cannot compel the United States to appear and submit itself to the judgment, may prescribe that notice shall be given to the attorney for the United States in the district. *Elliot v. Van Voorst*, 3 Wall. Jr., 299.

§ 1033. *Land claims*—Bill of review.—The act of May 26, 1824, conferred upon the superior court of the territory of Arkansas full power of a court of chancery to try the validity of claims to land derived from the French and Spanish governments, and therefore authorized a bill of review in that court. *United States v. Samperyac*, Hemp., 118.

§ 1034. *Account*—Estate of decedent.—The circuit court of the United States has jurisdiction of a bill in equity for an account against the estate of a deceased person, where the testator left real and personal estate in the state where the court is sitting, and administration was also granted in such state, although the testator resided, at the time of his death, in another state, and his will was duly proved there, the plaintiff being a resident of another state. *Walker v. Beal*, 3 Cliff., 155.

§ 1035. *Non-residents.*—The circuit court of the United States has jurisdiction in equity to stay proceedings in a suit at law upon a judgment rendered in favor of the defendant against the complainant, although the defendant is a resident of another state and was served in the latter state with the subpoena. *Logan v. Patrick*, 5 Cr., 288.

§ 1036. A statute of limitations of a state relating to the time of bringing suits in equity has no application in the federal courts of equity. *Hall v. Russell*, 3 Saw., 506.

§ 1037. *Ejectment.*—Though there is no chancery court under the laws of the state, and an action of ejectment may be sustained in the courts of the state upon an equitable title, such is not the practice of the courts of the United States where the jurisdictions of law and equity are distinct. *Swayze v. Burke*, 12 Pet., 11.

§ 1038. In the circuit court of the United States a merely equitable title cannot be set up as

a defense in an action of ejectment. It is a matter proper for the cognizance of a court of equity, and is not admissible in the suit at law. *Robinson v. Campbell*, 3 Wheat., 212.

§ 1039. **Suit on note—Defect of title.**—To a suit at law on a promissory note given for the purchase of land, a partial defect in the title cannot be set up in defense. The defendant must seek relief in equity. *Greenleaf v. Cook*, 2 Wheat., 13.

§ 1040. **On a bill in equity to enjoin the erection of buildings on ground in dispute** between the parties, the court is competent to determine the question of title. Having once got possession of the matters in controversy, it will proceed to adjust them upon principles of equity and good conscience. *Parrish v. Stephens*,* 1 Or., 73.

§ 1041. **Where a resulting trust is attached and sold under the attachment, and the trustee conveys to the purchaser, a court of equity has jurisdiction to determine whether the property was liable to attachment, and whether the purchaser took anything.** *Piatt v. Oliver*, 2 McL., 267.

§ 1042. **Vendor and vendee.**—As between parties, where there is a contract to sell and buy, chancery may, by considering that done which ought to be done, regard the buyer as owner. But this is only as between the parties, and not third persons; and equity cannot consider a deed as executed unless the consideration has been paid or secured. *Smith v. Babcock*, 3 Woodb. & M., 246.

§ 1043. **A bill in equity lies to compel the holder of mortgaged property to redeem, or surrender the possession and account for profits.** *Almy v. Wilbur*, 2 Woodb. & M., 371.

§ 1044. **Validity of will.**—Where the validity of a will is brought in question incidentally in a court of chancery, the court has jurisdiction to determine the question. *Fuentes v. Gaines*, 1 Woods, 112.

§ 1045. **Patent cases.**—Independently of the jurisdiction of the courts of the United States, derived from the patent laws, equity has no jurisdiction of a suit to recover from an infringer the profits derived from his use of the patented invention, on the ground of constructive trusteeship solely. *Sayles v. Richmond, etc., R. Co.*, 3 Hughes, 172.

§ 1046. **The circuit courts of the United States have jurisdiction in equity of controversies arising under the patent laws by direct grant from congress.** They do not act merely as ancillary to a court of law, and therefore do not require the patentee to establish his legal right in a court of law and by the verdict of a jury. *Sanders v. Logan*,* 9 Am. L. Reg., 475.

§ 1047. **The circuit court of the District of Columbia, as a court of equity, has no jurisdiction of a cause, unless there is some party within the District against whom an effectual decree can be made.** *Vasse v. Comegys*, 2 Cr. C. C., 564.

§ 1048. **General average.**—There is a jurisdiction in equity to enforce a claim for contribution in general average. *Sturgess v. Cary*, 2 Curt., 59.

§ 1049. **Enjoining erection of bridge.**—The circuit court of the United States, as a court of equity, has jurisdiction of a bill to restrain the erection of a proposed railroad bridge over the Connecticut river at Saybrook, on the ground that it will seriously obstruct the navigation of the river, the plaintiff being engaged in such navigation. The injury complained of is of that peculiar character for which a remedy at law is inadequate, and a resort to equity necessary. The free navigation of the river being secured by the constitution and laws of the United States, the jurisdiction is not impaired by a state law authorizing the bridge. In this case, a temporary injunction was granted until the final hearing. *Baird v. Shore Line R'y Co.*,* 6 Blatch., 276.

§ 1050. **Enforcing liens.**—Where a bill in equity is filed to enforce a particular lien given by statute, the jurisdiction of the court rests upon the statute, and goes no further. *Canal Company v. Gordon*, 6 Wall., 561.

§ 1051. **Sale of real estate of a decedent.**—The act of the legislature of Maryland of 1785, "enlarging the power of the high court of chancery," authorizing the chancellor to order a sale of the real estate of a decedent where his personal estate shall be insufficient for the payment of debts, is an enlargement of the jurisdiction of the chancery court, and does not confer a personal power on the chancellor. *Bank of the United States v. Ritchie*, 8 Pet., 128.

§ 1052. **Relief against usury.**—An application to a court of equity for relief from usury, praying for an injunction to prevent a sale of property conveyed in trust to secure the repayment of the money loaned until the question of usury shall be decided at law, is not within the jurisdiction of equity unless the complainant avers in the bill his willingness to pay the principal and lawful interest. *Stanley v. Gadsby*, 10 Pet., 521.

§ 1053. **Distribution of estates.**—A court of equity has competent authority to decree distribution of intestate property collected under an administration granted here, the intestate having died domiciled abroad, and the distribution to be made according to the law of his foreign domicile. But whether it will do so will depend upon the circumstances of the case. *Harvey v. Richards*, 1 Mason, 380.

§ 1054. **The court of chancery has an ancient and settled jurisdiction to decree an account**

and distribution of a testator's and an intestate's estate on the application of the legatees or next of kin. *Ibid.*

§ 1055. In cases of the administration of assets of the estate of a deceased person, courts of equity have concurrent jurisdiction with courts of law. And the courts of the United States have equity jurisdiction of suits by persons entitled to portions of the estate of a decedent to recover their portions, notwithstanding the local law gives them a legal remedy against the administrator. Especially is the jurisdiction sustainable for a discovery of the assets. *Pratt v. Northam*, 5 Mason, 95.

§ 1056. Charities.—The supreme court of the District of Columbia has jurisdiction of charitable trusts, as a court of equity. *Ould v. Washington Hospital*,* 1 MacArth., 547.

§ 1057. Where a legacy was bequeathed to a voluntary association in trust for charities, with no vested interest in the *cestuis que trust*, the association not being capable of taking the trust because not incorporated, it was held that the power of a court of equity to protect the legacy as a charity depended on the statute of 43d Elizabeth; and that, as that statute was not in force in the state, and as the courts of the United States had no equity jurisdiction outside of the ordinary powers of courts of equity, these courts could not interfere to sustain the charity. *Trustees of Philadelphia Baptist Ass'n v. Hart*, 4 Wheat., 1.

§ 1058. Award—Specific performance.—Courts of equity have jurisdiction to enforce specific performance of awards, the ground being that it is but an execution of the agreement of the parties, ascertained and fixed by the arbitrators. *McNeil v. Magee*, 5 Mason, 244 (ARBITRATION, §§ 171-84).

§ 1059. Founded on statute.—Under the extraordinary jurisdiction of chancery, as when a statute permits persons to present petitions to the chancellor for relief which they could not get in a court of law or from the ordinary chancery jurisdiction, the court will follow the statute strictly and will not give a decree founded partly on this statutory jurisdiction and partly on the ordinary jurisdiction. *Williamson v. Berry*, 8 How., 536.

§ 1060. Setting up spoliated will before probate.—The probate courts having exclusive jurisdiction in the probate of wills under the Louisiana law, and the local law requiring the will to be probated before any title can be set up under it, a court of the United States as a court of equity has no power to set up a spoliated will which has never been admitted to probate and give it effect as revoking a former one which has been probated, and uphold a title claimed thereunder. But where the executors in the first will have answered to a suit in equity to give effect to the second will, the jurisdiction of the court may be sustained to entitle the complainants to use the answers as evidence in an application to the probate court for proof of the last will and revocation of the first. It seems that a court of chancery might have power to establish the last will in a clear case, where all remedy in the law courts has failed. *Gaines v. Chew*, 2 How., 619.

§ 1061. County bonds—Bill against tax payers to compel payment of tax.—Where county bonds have been issued under authority of a law requiring the assessment and collection of a tax for their payment, and in a suit for recovery on such bonds an assessment has been made in obedience to a mandate of the court, but all remedy at law against the county has failed on account of the refusal of the county officers to collect the tax, or any one else to undertake the collection, and the failure of a receiver of the court to perform the duty on account of threats and violence; and there is no such privity between the bondholders and the tax payers as is necessary to the maintenance of a suit against them at law, equity has jurisdiction of a bill by the bondholders against the tax payers to enforce a payment of their tax to the county, to the end that the county may pay the complainants. And the court having obtained jurisdiction is bound to do full justice, and will direct payment of the tax so assessed into the registry of the court, to be applied in payment of the complainant's decree. *Post v. Taylor County*, 2 Flip., 518 (BONDS, §§ 1623-28).

§ 1062. The rules of practice of the high court of chancery in England have been adopted by the supreme court, and are obligatory upon the circuit courts. The latter have power, however, to adopt other rules not inconsistent with the general rules. *Lorman v. Clarke*, 2 McL., 508 (COURTS, §§ 596-608).

§ 1063. A claim by a part owner of a vessel for compensation for the use or destruction of his share of the outfit, on a voyage from which he dissented, is within the jurisdiction of a court of equity and not a court of admiralty. *The Marengo*, 1 Low., 52.

§ 1064. Copyright cases.—There is nothing in the act of February 15, 1819, conferring equity powers on the courts of the United States in cases of copyrights, which extends the equity powers to the adjudication of forfeitures, it being manifestly intended that the jurisdiction therein conferred should be the usual and known jurisdiction exercised by courts of equity for the protection of analogous rights. *Stevens v. Gladding*, 17 How., 447.

§ 1065. Both a copyright and its infringement may be set up and adjudicated in a court of

equity without first having been determined at law. *Farmer v. Calvert Lithographing, etc., Co.*, 1 Flip., 228.

§ 1066. **Bill by assignee in bankruptcy to set aside fraudulent conveyance.**—Equity has jurisdiction of a suit by an assignee in bankruptcy to set aside a conveyance of real estate made by the bankrupt to his wife, which is alleged to have been fraudulent and void. *Lee v. Hollister*, 5 Fed. R., 752.

§ 1067. **Bill to compel collection of tax.**—The maintenance of the distinction between equity and common law jurisdiction in the federal courts forbids that a bill in equity to compel the collection of a tax should be treated as a petition for a writ of *mandamus*, on its failure to be sustained on principles of equity. *Heine v. Levee Commissioners*, 19 Wall., 655.

§ 1068. **Setting aside fraudulent distribution.**—The circuit court of the United States, as a court of equity, has jurisdiction to set aside a fraudulent distribution of a decedent's estate in the probate court of another state. *Sullivan v. Andoe*, 4 Hughes, 290.

§ 1069. **District courts.**—Independent of the bankruptcy act of 1841, the district courts of the United States have no equity jurisdiction whatsoever. *Ex parte Christy*, 3 How., 292; *Morgan v. Thornhill*, 11 Wall., 80.

§ 1070. **Enjoining wrongful use of corporate name.**—A corporate name is entitled to the same consideration and protection in equity as a trade-mark. And equity has jurisdiction to enjoin the wrongful use of a corporate name at the suit of the injured party. This jurisdiction does not depend on the insolvency of the defendant. *Newby v. Oregon Central R. Co.*, Dedy, 609.

§ 1071. **Enforcing decree of state court—Trial by jury.**—Proceedings in equity may be instituted in one state to enforce a decree in equity rendered in another state. The seventh amendment securing the right of trial by jury constitutes no objection to this. This provision cannot be made to embrace the established, exclusive jurisdiction of courts of equity, nor that which they exercise as concurrent with courts of law, but is limited to rights and remedies purely legal in their nature. *Shields v. Thomas*, 18 How., 268.

§ 1072. **State boundaries.**—The supreme court of the United States has jurisdiction, by bill in equity, over questions of disputed boundary. *State of Rhode Island v. State of Massachusetts*, 12 Pet., 720.

§ 1073. **Errors in the settlement of accounts between principal and agent, especially if induced by misrepresentation, are cognizable in equity.** Thus where an agent who had agreed to procure for his principal a cargo of goods as freight for a certain vessel, procured such cargo, and after completing the shipment forwarded bills of lading prepared as if the whole cargo had been procured and shipped at specified rates, when in fact a part thereof had been shipped upon terms of one-half the net profits; and the principal, relying on the misrepresentation, paid to the agent his commissions on the basis of the bills of lading, it was decided that the principal was entitled to have the amount corrected in equity. *Delano v. Winsor*, *1 Cliff., 501.

§ 1074. **Bill by stockholder, where the question has been settled in a state court.**—A circuit court of the United States has no jurisdiction of a bill in equity brought by a non-resident stockholder of a domestic corporation, where the precise question involved has been settled in an action against the corporation in a state court, which was defended by the directors on the merits and without fraud or collusion. *Chaffin v. St. Louis*, *4 Dill., 24.

§ 1075. **Suit by non-resident enjoined.**—The circuit court has power to inhibit a non-resident plaintiff from prosecuting an action against a defendant residing within the state. A party entitled to sue by reason of a constitutional qualification acquires no right to any standing in a federal court different from what he would have in any other tribunal competent to take cognizance of his case. *The City Bank of New York v. Skelton*, *2 Blatch., 27.

§ 1076. **Consent of parties—Agreed statement—No pleadings.**—The filing of a stipulation, signed by the parties, setting forth an agreed statement of facts and consenting that the court may take jurisdiction, hear, try and determine the cause, and render a decree without pleadings, cannot give a federal court of equity jurisdiction. *Nickerson v. Atchison, Topeka & Santa Fe R. Co.*, *1 McC., 383.

§ 1077. **The jurisdiction and practice of the circuit court of the United States as a court of equity is not affected by a state statute authorizing the court to take jurisdiction of a cause, without pleadings, on the filing of an agreed statement of facts consenting to the jurisdiction.** *Ibid.*

§ 1078. **How questioned.**—When the jurisdiction of the circuit court appears, by proper averments, on the record, the defendant can only impugn it in a special plea. *Wickliffe v. Owings*, *17 How., 47.

§ 1079. **Account.**—The fact that it may be necessary, should defendant answer, to take an account gives the court of equity jurisdiction; and defendant cannot defeat the jurisdiction by admitting the allegations of the bill by demurrer. *Cropper v. Coburn*, *2 Curt., 465.

§ 1080. *Over contracts.*—It seems that the jurisdiction of equity over contracts depends on the nature of the contract. *Philadelphia, Wilmington, etc., R'y Co. v. Philadelphia, etc., Tow-boat Co.*, 28 How., 215.

§ 1081. *Process authorized by state laws.*—A process by petition and order restraining a sheriff from making an illegal levy, such process being given by the laws of Louisiana, would, if brought in the federal courts, be a process in the common law, not the equity side of the court. *Van Norden v. Morton*, 9 Otto, 381 (§§ 1155-57).

§ 1082. *Bill to reach unpaid subscriptions.*—A judgment creditor of a Pennsylvania corporation brought a suit against it in a New York state court, alleging what is ordinarily required in a creditor's bill to reach equitable assets; and further that he had made diligent efforts to prosecute an action on his judgment in Pennsylvania, but could not find any officers of the company in that state upon whom to serve process, or any property belonging to it to attach. The bill did not make any of the stockholders parties, but alleged that the plaintiff's only resource was to reach unpaid subscriptions to the capital stock (which he averred were more than sufficient to satisfy his judgment), and to that end prayed for a sequestration of the property, rights and franchises of the defendant, and for the appointment of a receiver with the usual powers to receive these and collect the unpaid subscriptions from the stockholders. The defendant procured the suit to be removed to the circuit court of the United States in New York. It was held that the fact the defendant had no real or personal property, choses in action or equitable interests within the district was not an objection to the jurisdiction or a defense to the bill, the appearance of the defendant having given the court power to make a proper decree upon the case; and that, as the receiver appointed in the case would have power to sue for and collect the unpaid stock subscriptions, it could not be objected to the jurisdiction of the court that the result of the suit would be fruitless. *Winans v. McKean Railroad and Navigation Co.*, 6 Blatch., 215 (§§ 1896-1903).

2. *Remedy at Law.*

[See §§ 871, 878, 1269, 1270.]

SUMMARY—*Remedies not governed by state laws*, § 1083.—*Section 16 of the judiciary act is declaratory*, § 1084.—*The remedy at law must be complete and adequate*, §§ 1085, 1104.—*Adequate remedy at law in state court*, §§ 1086, 1098.—*Remedy at law in any form of action sufficient*, § 1087.—*Remedy at law as perfect as that in equity*, §§ 1088, 1089.—*Legal titles*, §§ 1090, 1104.—*Case will be dismissed*, §§ 1090-1093.—*Remedy at law must be practical and efficient*, §§ 1094, 1095.—*New rights and remedies under statutes*, § 1096.—*State practice; real party in interest; removal to federal court*, § 1097.—*Suit to recover a legacy*, § 1098.—*Bill to avoid judicial sale of land*, § 1099.—*Enjoining levy on mortgaged property*, § 1100.—*Bill to establish title to property adversely held*, § 1101.—*Suit for damages, based upon fraud*, § 1102.—*Numerous ejectment suits; bill to enjoin and to consolidate*, § 1103.—*Bill by holder of legal title to quiet title*, § 1104.—*Remedy for seizure of property on execution against another*, §§ 1105, 1106.—*Controversy as to right to withhold property from complainant*, § 1107.—*Bill by assignee of note against assignor, charging fraud*, § 1108.—*When jurisdiction attaches it will be retained*, § 1108.—*Bill to cancel a policy after a loss*, § 1109.—*Bill to enforce a trust under a will*, §§ 1110, 1112.—*Judgment at law not a bar, when*, §§ 1111, 1112.—*Levy by sheriff on property in hands of marshal*, § 1113.—*Bill for discovery and damages*, § 1114.

§ 1083. The remedies in the courts of the United States are at common law or in equity according to the principles of common law and equity as distinguished and defined in England, and not according to the practice of the state courts. And the adoption of the state practice in the courts of the United States does not authorize the blending of legal and equitable proceedings. *Thompson v. Railroad Companies*, §§ 1115-19.

§ 1084. The provision of the sixteenth section of the judiciary act of 1789, that suits in equity shall not be sustained when there is a plain, adequate and complete remedy at the common law, is merely declaratory, and made no change in equitable remedies. To bar the remedy in equity on this ground, the remedy at law must be as efficient to secure all the equitable rights of the complainant as the remedy in equity. *Hunt v. Danforth*, §§ 1166-69; *Lewis v. Cocks*, §§ 1137-38.

§ 1085. It is not sufficient to show that a plaintiff in equity has a remedy at law in order to turn him out of that court, unless the defendant can also prove that that remedy is complete and fully adequate to the object of the suit. *Mayer v. Foulkrod*, §§ 1120-26.

§ 1086. It is no objection to the jurisdiction of the equity side of the circuit court of the

United States that there is an adequate remedy at law in the state court; there must be an adequate remedy on the law side of the same court. *Ibid.*

§ 1087. Plain and adequate remedy at law, as an objection to equity jurisdiction, does not mean an ability to resort to every remedy which the forms of legal procedure give. If any form of action at law will give a complete and adequate remedy, there can be no resort to equity. *La Mothe v. Fink*, §§ 1127-29.

§ 1088. A court of equity will not interfere to aid a defendant who has a good defense at law, when the legal remedy is as perfect and complete as the remedy in equity. So a life insurance company, in case of alleged fraudulent representations in the application for the policy, will not be allowed to proceed directly against the holder of the policy in equity, but will be left to its remedy at law. *Insurance Co. v. Bailey*, §§ 1130-33.

§ 1089. Whenever a court of law is competent to take cognizance of a right, and has power to proceed to judgment which affords a plain, adequate and complete remedy, without the aid of a court of equity, the plaintiff must proceed at law. *Hipp v. Babin*, §§ 1134-36.

§ 1090. Where a bill in equity is founded on a purely legal title, the practice of the courts is to dismiss, whether objection is made by the defendant or not. *Ibid.*

§ 1091. Usually where a case is not cognizable in a court of equity, the objection is interposed in the first instance; but if a plain defect of jurisdiction appears at the hearing, or on appeal, a court of equity will not make a decree. *Thompson v. Railroad Companies*, §§ 1115-19.

§ 1092. Where a plain and adequate remedy at law clearly exists, it is the duty of a court of equity *sua sponte*, to take notice of it and give it effect, although the objection is not taken by demurrer, plea, or answer, or suggested by counsel at the trial. *Lewis v. Cocks*, §§ 1137-38.

§ 1093. The objection that there is an adequate remedy at law raises a jurisdictional question, and will be enforced by the court *sua sponte*, although not raised by the pleadings or suggested by counsel. Even where it is not apparent on the face of the bill, but the bill is so framed as to avoid the point, if in looking at the proofs it appears that the case is one where there is a plain and adequate remedy at law, it is the duty of the court to decline jurisdiction and dismiss the bill. And the objection may be taken after answer, and at the hearing, where the objection appears on the face of the bill. *Dumont v. Fry*, §§ 1158-59.

§ 1094. To bar equitable relief on the ground that there is a remedy at law, such remedy at law must be equally effectual with the equitable remedy as to all the rights of the complainant. The remedy at law must be as practical and efficient to the ends of justice and its prompt administration. *Lewis v. Cocks*, §§ 1137, 1138.

§ 1095. The existence of a remedy at law will not bar relief in equity unless it is adequate and complete and as effectual as the remedy in equity; and the equity jurisdiction will be retained, if the peculiar machinery of a court of equity, as a discovery or an injunction, be necessary to do complete justice between the parties. The complainant, as agent for an insurance company, and as surviving partner of a firm which had acted as agent for the company (such firm having changed several times by the death of members), brought a suit in equity against the company, setting up a claim for the value of percentages in money upon all future accruing premiums on policies procured through the instrumentality of the complainant or any of the firms which had acted as agent for the company, as the commuted value of such prospective percentages at the time of the dissolution of the agency by death, or the act of the company, could be ascertained under the recognized rules of such computation as administered and applied in the business of life insurance companies. This remedy could be enforced at law only through a multiplicity of suits by the complainant in his several capacities. The bill prayed for an account, and also an injunction against two suits, one against the complainant for moneys alleged to have been collected by the complainant, and the other against the surety on a bond given by one of the firms, conditioned to pay over all sums collected for the company. In view of these things and the computations required as to the various classes of percentages, the jurisdiction was sustained. *Plummer v. Connecticut Mut. Life Ins. Co.*, §§ 1139, 1140.

§ 1096. Whenever a new right is created by statute, or a new remedy for a violation of an old right, or whenever such rights and remedies are dependent on state statutes or acts of congress, the jurisdiction of such cases, as between the law and equity sides of the federal courts, must be determined by the essential character of the case, and unless it comes within some of the recognized heads of equitable jurisdiction it must be held to belong to the law side. *Van Norden v. Morton*, §§ 1155-57.

§ 1097. Two railroad companies transported some stock for T., payment to be made on the presentation of drafts drawn on him. The drafts were for convenience drawn in favor of a third person who had no interest in them. The drafts not being paid by T., the companies sued him for the debt, stating the original indebtedness and averring that the plaintiffs had been compelled to take up the drafts. The civil code of the state under which the action was

brought required it to be brought in the name of the real party in interest, and abolished the distinctions between actions at law and those in equity. The defendant caused the suit to be removed to the United States circuit court, and a bill in equity substituted for the original petition. The reason given for the change in the nature of the action was that the nominal legal title to the drafts was in the payee, the third person, and the state law required the real party in interest to bring the suit. It was held that the action could be maintained in the name of the real party in interest in a federal court of law, and that equity had no jurisdiction of the suit. *Thompson v. Railroad Companies*, §§ 1115-19.

§ 1098. A testator devised all of his real estate to his wife during her life, and directed that, after her death, it should be rented for the benefit of his daughter during her life; and that, after the latter's decease, the said estate should be sold at public auction by the executors and the proceeds divided among his grandchildren. After the death of the widow and daughter, the surviving executor sold a certain part of the estate for \$12,000. Before the death of the widow, the plaintiff purchased from four of the grandchildren five-eighths of the real estate of the testator, or the proceeds thereof, which was duly transferred and set over to him. The prayer of the plaintiff's bill was that the defendants, who were administrators of the surviving executor of the testator, might discover what real estate of the testator had been sold, and to what amount, and pay to the plaintiff five-eighths of the proceeds of said sales. It was held that equity had jurisdiction, and that there was no adequate remedy at law, especially as there had been no promise to pay the legacy to the plaintiff, but the reverse; and that the jurisdiction was not affected by a state law authorizing a suit at law for the recovery of legacies. *Mayer v. Foulkrod*, §§ 1120-26.

§ 1099. A person whose land has been sold under a judgment rendered against him at law, cannot maintain a bill in equity to have the sale declared void and possession of the property delivered to him, upon the ground that the judgment is a nullity by reason of the non-service of the original process in the suit, wherefore the defendant (now complainant) had no day in court. There is a plain and adequate remedy at law by action of ejectment. *Lewis v. Cocks*, §§ 1187-83.

§ 1100. A marshal will not be enjoined from levying an execution against a mortgagor on chattels in possession of the mortgagee under the mortgage. There is an adequate remedy at law. *La Mothe v. Fink*, §§ 1127-29.

§ 1101. A bill in equity is not maintainable to establish a title to real property adversely held, even though an account of the rents and profits is asked. *Hipp v. Babin*, §§ 1184-86.

§ 1102. A court of equity will not take jurisdiction of a suit for damages, based upon a fraud, where that is the sole object of the bill, and when no other relief can be granted. The remedy is as complete and perfect at law as it is in equity. But when other relief is sought by the bill, which a court of equity is alone competent to grant, and damages are claimed as incidental to relief which cannot be obtained at law, then the court, being properly in possession of the cause for the purpose of relief purely equitable, will, to prevent a multiplicity of suits, proceed to determine the whole cause. Whether a case for damages for fraud may be maintained in equity on the ground that a discovery is sought and is necessary is not determined, but it is clear that the jurisdiction does not attach when the discovery is not obtained, and the fraud is distinctly and unequivocally denied. Thus where the defendants held a bond for the conveyance of a piece of land to them, which merely gave them a right of pre-emption to be exercised within a certain time, and the plaintiff, having bought this contract from the defendants, sought to charge them by suit in equity for fraudulent representations as to the land, the court being unable to rescind the contract and replace the parties in their original positions because the time for performing the condition had expired, it was held that the suit could not be maintained. *Ferson v. Sanger*, §§ 1141-46.

§ 1103. About ninety ejectment suits having been brought, in which the parties, the title of the plaintiffs and defendants and the testimony were the same in each, the defendants sought to enjoin the proceedings in some of them, permitting the plaintiffs to go on with so many as might be necessary to fairly try the title, and making the suits enjoined abide the event of those directed to be tried. The bill was merely a prayer to consolidate actions, on the ground of multiplicity of suits and the expense attending them. It was held that the relief sought, if proper at all, could be afforded as well at law as in equity, and that the parties were too early in making the application. *Peters v. Prevost*, § 1147.

§ 1104. Equity will not take jurisdiction where there is an adequate remedy at law, or where the title, which the complainant seeks to enforce, is merely a legal one and presents no special ground for equitable relief. The complainants, holding the legal title to a piece of land, filed a bill to quiet their title, alleging that the defendants had forcibly taken possession of the land, and wrongfully and unlawfully withheld it under false and fictitious claim of title from the complainants' grantor. The bill did not describe the defendants' title, nor even show that it was in writing. According to the facts stated in the bill the defendants were mere trespassers;

and there was nothing stated from which it could be concluded that the defendants' pretended title would be any obstruction whatever to the assertion of the complainants' rights by an action at law. It was decided that the bill could not be sustained, either as a bill to quiet title or to remove a cloud from the title, no facts sufficient to raise a cloud being stated. *Speigle v. Meridith*, §§ 1148-54.

§ 1105. The remedy for seizing one's property on an execution against another is by replevin or action for damages, and not in equity. It was so held where one's dredge-boat was so taken, and there was no allegation or reason to believe that the value of the boat would not be adequate compensation. *Van Norden v. Morton*, §§ 1155-57.

§ 1106. In Louisiana, where a person's property is seized on an execution against another, relief is given by a short, summary proceeding before the court under whose authority the officer is acting. It is held that, though the word injunction is used in the code, this is not a remedy in chancery which may be enforced on the equity side of the circuit court of the United States. *Ibid.*

§ 1107. A controversy between complainant and defendant as to the defendant's right to withhold from the complainant bonds to which the latter has the legal title, and the defendant no title whatever, is not one of equitable cognizance. An action at law for conversion or in replevin is the plain and adequate remedy. Nor is the cause of action changed into an equitable one because there are other parties who may assail the title of the complainant after it has been established against the wrong-doer, unless there are present some of the peculiar incidents which authorize the intervention of a court of equity. *Dumont v. Fry*, §§ 1158-59.

§ 1108. The holder of a note filed a bill against one from whom he received the note, charging fraudulent representations on the part of the latter as to the value of the note, etc., and alleging that the maker and indorser were both insolvent, and that the defendant knew it at the time the note was transferred by him. *Held*, that in averring fraud, and asking for a discovery as to certain facts to support the charge, there was sufficient, *prima facie*, to give jurisdiction; and jurisdiction once having attached it will be retained, although on the discovery there does not appear to be much in the relief asked from the supposed fraud which could not be given at law. *Foster v. Swasey*, §§ 1160-62.

§ 1109. After a loss has occurred under a policy of fire insurance, equity, though it has the jurisdiction, ought not to entertain a bill to cancel the policy and enjoin a suit on it on the ground of fraud in procuring it, where such defense may be set up in a suit on the policy; and especially where the policy limits the time of suing to twelve months from the loss. In such a case the right to an injunction is dependent upon the right to a cancellation. *Home Insurance Co. v. Stanchfield*, §§ 1163-65.

§ 1110. A bill by a married woman, by her next friend, her husband also joining, against an executor, to enforce the execution of a trust expressly declared by the testator in his lifetime for her sole and separate use, is not demurrable upon the ground that, as the bill shows that a liquidated sum is due her from the estate of the testator, the remedy is exclusively at law by action for money had and received in the joint names of the husband and wife. Since such a suit at law would reduce the chose in action to the husband's possession, her interests would not be sufficiently protected thereby. Such a case is also one of an express trust; and although the bill may allege that a particular sum was obtained by the trustee from the sale of the trust property, yet an account must be taken of the proceeds and of any allowances claimed for the trustee by his executor. *Hunt v. Danforth*, § 1166-69.

§ 1111. The judgment of a court of common law upon a claim which is exclusively of equitable cognizance does not bar a resort to a court of equity for an adjudication of the same claim. *Ibid.*

§ 1112. The law of Rhode Island providing for the appointment of commissioners to receive and report upon claims against the estate of a deceased, which is represented by the executor or administrator to be insolvent, does not give such commissioners jurisdiction of merely equitable claims. A bill by a married woman, by her next friend, to enforce the execution of a trust, expressly declared by the testator in his lifetime to be in her favor for her sole and separate use, is not subject, therefore, to demurrer, because she has presented her claim to such commissioners and it has been disallowed by them. *Ibid.*

§ 1113. Seizure by a sheriff under order of a state court, of property levied upon, by and in the hands of a United States marshal, is no ground for interference by a court of equity, there being a plain remedy at law and no fraud being charged. *Knox v. Smith*, § 1170.

§ 1114. Where a bill is brought for discovery and for other equitable relief within the appropriate jurisdiction of a court of equity, and the ultimate object of the plaintiff is to obtain damages, in such case the court, having granted a discovery, will proceed and give the proper relief in damages, and not compel the plaintiff to undergo the delays and expenses of a suit at law. But where no other equitable relief is or could be sought, and the only relief that can be given is in damages, the jurisdiction for discovery alone will not authorize the granting of

relief in damages, except where, from the complication of the case or other circumstances, the remedy at law will not give adequate relief. The complainant brought a bill for discovery, account and the recovery of damages, based on the violation of a patent right and an agreement of license. The patent had expired, and while the averments of the bill were sufficient, if necessary, to constitute it a bill for an injury to a patent right, yet it was manifest that the pleader intended to make the alleged breach of the agreement the foundation of the action and the ground of recovery of damages. It being objected that a bill in equity based upon a contract could not be sustained because the remedy was at law, the court held that it properly had jurisdiction of the case, inasmuch as the proper averments of the bill made it a bill for discovery, and as the ascertainment of the facts from which the damages are to be ascertained in cases of injury to property in letters patent is within the jurisdiction of a court of equity; and that it would proceed to give proper relief in damages. *Magic Ruffle Company v. Elm City Company*, §§ 1171-75.

[NOTES.— See §§ 1176-1268.]

THOMPSON v. RAILROAD COMPANIES.

(6 Wallace, 184-189. 1867.)

APPEAL from U. S. Circuit Court, Southern District of Ohio.

STATEMENT OF FACTS.— The railroad companies having a claim against Thompson for services rendered, drew drafts on him, which he neglected to pay. The drafts were made payable to one Robinson, cashier, but this was done only for convenience of collection. The companies brought an action at law against Thompson in a state court of Ohio, which was removed by Thompson to the federal court, he being a citizen of Kentucky. A bill in equity was substituted in the federal court, and from a decree in favor of the complainants Thompson appealed, assigning as a ground of error that there was a complete remedy at law.

§ 1115. *Where a want of jurisdiction appears at the hearing or on appeal, equity will not make a decree.*

Opinion by MR. JUSTICE DAVIS.

Has a court of equity jurisdiction over such a case as is presented by this record? If it has not, the decree of the court below must be reversed, the bill dismissed and the parties remitted to the court below to litigate their controversies in a court of law. Usually, where a case is not cognizable in a court of equity, the objection is interposed in the first instance, but if a plain defect of jurisdiction appears at the hearing or on appeal, a court of equity will not make a decree. *Penn v. Lord Baltimore*, 1 Ves., 446.

§ 1116. *The remedies in the United States courts are at law or in equity, according to the principles which distinguish them in England.*

The constitution of the United States and the acts of congress recognize and establish the distinction between law and equity. The remedies in the courts of the United States are, at common law or in equity, not according to the practice of state courts, but according to the principles of common law and equity as distinguished and defined in that country from which we derive our knowledge of these principles. *Robinson v. Campbell*, 3 Wheat., 212. "And although the forms of proceedings and practice in the state courts shall have been adopted in the circuit courts of the United States, yet the adoption of the state practice must not be understood as confounding the principles of law and equity, nor as authorizing legal and equitable claims to be blended together in one suit." *Bennett v. Butterworth*, 11 How., 674.

§ 1117. *Suit on a breach of contract to pay a draft should be brought at law and not in equity.*

This case does not present a single element for equitable jurisdiction and

relief. The suit brought in the state court was nothing but an ordinary action at law. When it was removed to the federal court a bill in equity (alleging the same cause of complaint) was substituted, by leave of the court, for the petition originally filed in the state court, and the suit progressed as a cause in chancery. Thus an action at law which sought solely to recover damages for a breach of contract was transmuted into a suit in equity, and the defendant deprived of the constitutional privilege of trial by jury.

§ 1118. *Test of equity jurisdiction.*

The absence of a plain and adequate remedy at law is the only test of equity jurisdiction, and it is manifest that a resort to a court of chancery was not necessary in order to enable the railroad companies to collect their debt.

Whether their proper course was to sue upon the contract or upon the drafts, or upon both together, the remedy at law was complete. If the remedy at law was adequate in the state court, why the necessity of going into a court of equity when the jurisdiction was transferred to a federal tribunal? The reason given is because in Ohio the real parties in interest must bring the suit, and as the nominal legal title in the drafts was in the payee, Robinson, the railroad companies (after the transfer) could not proceed at law and continue plaintiffs on the record, and were, therefore, obliged to change the case from an action at law into a suit in equity. If this position were sound, it would allow a federal court of equity to entertain a purely legal action, transferred from the state court, on the mere ground, if it were not done, the plaintiff would have to commence a new proceeding. It surely does not need argument or authority to show that the jurisdiction of a federal court is not to be determined by any such consideration.

§ 1119. *In actions at law in the United States courts the rules of evidence are administered as in the state courts.*

But there was no necessity for a change from law to equity after the suit was transferred. The railroad companies mistook the course of proceeding in courts of the United States in actions at law in suits brought up from state courts. In this case, as the action was a purely legal one, if they could have maintained it in their names in the state court they had an equal right to maintain it in their names when it arrived in the federal court.

In actions at law the courts of the United States may proceed according to the forms of practice in the state courts, and in such actions they administer the rules of evidence as they find them administered in the state courts. There was, therefore, no difficulty whatever in the plaintiffs in the state court remaining plaintiffs on the record, and prosecuting their suit in the same manner they were authorized to prosecute it by the laws of the state. If, in Ohio, the drafts could have been received in evidence in a state court in a suit brought by the railroad companies against Thompson, then on the transfer of the suit to the federal court, and trial had there, they would have been equally receivable in evidence. The law of Ohio directs that all suits be brought in the name of the real party in interest. This constitutes a title to sue when the suit is brought in the state court in conformity with it; and in all cases transferred from the state to the federal court under the twelfth section of the judiciary act, this title will be recognized and preserved; and when a declaration is required by the rules of the circuit court, it may be filed in the name of the party who was the plaintiff in the state court.

Decree reversed and the cause remanded, with directions to dismiss the bill without prejudice and to proceed in conformity with this opinion.

MAYER v. FOULKROD.

(Circuit Court for Pennsylvania: 4 Washington, 349-356. 1833.)

STATEMENT OF FACTS.—John A. Holt devised to his wife all his real estate for life, after her death the land to be rented out for the benefit of his daughter for her life, and at her death to be sold and the proceeds equally divided among his grandchildren; except that one grandchild, M. Cooper, should have two shares. The executor, Foulkrod, sold a tract of land, part of the estate, for \$12,000. Benner (plaintiff's intestate), before the death of the widow and daughter, purchased five-eighths of the estate from four of the grandchildren, of whom M. Cooper was one. The plaintiff, who, as well as his intestate, was a citizen of Maryland, filed this bill praying that the defendants, who are the administrators of Foulkrod, the executor of Holt, may discover what lands of Holt's estate have been sold, and pay over five-eighths of the proceeds to the plaintiff. The bill does not state that the legatees from whom Benner bought were citizens of a state other than Pennsylvania. Defendants demurred for want of equity in the bill, and because all the matters therein stated were triable in a court of law.

Opinion by WASHINGTON, J.

The objections to the jurisdiction are: 1. To the general jurisdiction of the circuit courts of the United States in cases like the present, on the ground that the plaintiff, claiming as assignee of the legacies in dispute, the jurisdiction of the courts of the United States is excluded by the eleventh section of the judiciary law, unless it appear upon the face of the proceedings that the court could have taken cognizance of the cause in case no assignment had been made and the assignor had brought the suit. 2. To the jurisdiction of the equity side of this court, upon the ground that the plaintiff has an adequate and complete remedy at law in respect to the matter in dispute.

§ 1120. *An executor or administrator is not an assignee within the meaning of section 11 of the judiciary act of 1789.*

1. The objection to the general jurisdiction of the court was considered so clearly untenable by the supreme court in *Chappelaine v. Dechenaux*, 4 Cranch, 306 (ACCOUNTS, § 21), that the counsel, when proceeding to discuss it, were stopped by the court. This decision came afterwards under the notice of the court in *Sere v. Pitot*, 6 Cranch, 332 (COURTS, §§ 1188-89), and was then more deliberately considered. The opinion there given was, that the eleventh section of the judiciary law, which was relied upon, does not apply to the case of an executor or administrator who is an alien, or citizen of another state than that in which the suit is brought, because "they are not usually designated by the term *assignees*, and are therefore not within the words of the act." These cases so entirely refute the objection under consideration, that a further examination of it is rendered altogether unnecessary.

2. The grounds of the objection to the jurisdiction of the equity side of the court are: 1. That, upon general principles, a court of law can afford to a legatee a remedy for the recovery of his legacy; but if not, still, under the act of assembly of this state, which was referred to, a legislative remedy is expressly provided, full, adequate and complete.

§ 1121. *A remedy at law, to oust a court of equity of its jurisdiction, must be adequate and complete.*

1. In support of the first ground upon which this objection is rested, the learned counsel cited no case upon which he ventured to rely. Could it even

be made to appear that courts of law have afforded a remedy in cases of this kind, it would not follow that the jurisdiction of the equity side of this court is excluded, either by the general principles which regulate the jurisdiction of a court of chancery, or by the positive provision contained in the sixteenth section of the judiciary law, which does no more than affirm the general principle. It is not sufficient to show that the plaintiff in equity has a remedy at law, in order to turn him out of that court, unless the defendant can go further, and prove that that remedy is complete, and fully adequate to the object of the suit. Upon what other ground is it that the jurisdiction of the chancery court stands undisputed by all other courts, in cases of account, dower, partition, rents and profits, lost deeds, and a variety of others, in which the courts of law afford a remedy, but that the remedy falls short of that which a court of equity can grant? Amongst the numerous cases which might be cited in affirmance of the jurisdiction of courts of equity over the particular subject of this suit, it may be sufficient to refer to that of *Atkins v. Hill*, Cowp., 284, for the purpose of seeing the opinion of Lord Mansfield, who, it is well known, was disposed to go to the very verge of the common law jurisdiction, if not beyond the mark which separated it from the ancient and well established jurisdiction of the courts of equity. He observes that "the *discovery and account* given in a court of equity is so preferable a remedy that it has drawn all such suitors [legatees] thither; and therefore, in fact, there is scarce an instance of a legatee attempting to sue at law." "The relief given by a court of equity is easier and better." See, also, 2 Mad. Chan., 2; 2 Fonb., 321; *Herbert v. Wren*, 7 Cranch, 370, 376 (DOM. REL., §§ 493-95).

§ 1122. *Courts of law do not usually afford a complete remedy for the recovery of a legacy from an executor.*

But it is not true that courts of law do afford a remedy for the recovery of a legacy, unless in a case where the executor, under certain circumstances, assumes to pay it. In the case above referred to of *Atkins v. Hill*, the declaration set forth a promise by the executor to pay the legacy, in consideration of assets having come to his hands, more than sufficient to pay all the just debts and legacies of the testator; and the opinion of the court in support of the action proceeded upon the ground of this promise, made, as the court decided, upon a sufficient consideration. The case of *Hawkes and Wife v. Saunders*, which followed immediately after the above, page 289, is precisely like it, as are indeed the more ancient cases referred to by Mr. J. Butler. But it will be observed that in all these cases the nature of the demand was changed, on account of the promise, from what it would have been had the action been founded merely upon the bequest in the will; the judgment in the former being *de bonis propriis*; whereas in the latter it must have been *de bonis testatoris*, in case such an action could be supported. The general question whether an action at law will lie for a legacy came to be afterwards considered when Lord Kenyon was chief justice, in the case of *Deeks v. Strutt*, 5 Term R., 690, in which the court decided that the action would not lie; and the superiority of the remedy in equity was much relied upon by the judges as a reason for not sustaining an action, which they considered to be without a precedent, except one which was decided in the time of the commonwealth, and which could only be justified by the circumstance that, at that time, no remedy existed in any other court. Although the declaration in *Deeks v. Strutt* stated a promise by the executor, yet none was proved at the trial, and the court was of opinion that, from the mere circumstance of the executor

having a sufficiency of assets, a promise to pay the legacy could not be implied by law. In the case now before the court it is not stated in the bill that the executor had, at any time, promised to pay to the plaintiff the legacies demanded, but the reverse; nor even that the defendant has assets sufficient to pay all the debts and legacies of the testator. In respect to the amount to which the plaintiff may be entitled, the bill seeks a discovery and prays for an account, those incidents (as Lord Mansfield observes in the case of *Atkins v. Hill*) to the equity jurisprudence upon which the court of chancery claimed to hold plea of legacies. But even if a promise in consideration of assets were stated to have been made, still the equity jurisdiction of this court would not be excluded, as we believe has been abundantly shown by what has already been said. See, also, *Blount v. Restland*, 5 Ves., 516.

§ 1123. *If by state law a legatee has a complete remedy in state courts, the circuit courts of the United States are not ousted of their equity jurisdiction unless the law side of those courts can give a complete remedy.*

2. The next reason relied upon for excluding this case from the equity jurisdiction of the court is the act of assembly of this state before referred to. Let it be admitted, for the present, that, under this act, an action at law may be maintained in this court for the recovery of a legacy; still it would not follow that the equity jurisdiction of the court would be excluded, since the remedy provided by the act is not complete or adequate.

For where, let us ask, could this court, in such an action, find the power to compel the executor to discover the amount of the assets which came to his hands? the disposition which he had made of them? the title papers of the real estate of the testator which he was empowered to sell? the particular tracts of land sold by him under the power and the amount for which they were sold? Where would we find the authority to impose upon the parties such equitable terms as the court might deem proper for the safety of the parties and for the due administration of justice? It is obvious, in short, that the legal remedy contemplated by this act, although as complete, perhaps, as could well be exercised by a court of law, falls far short of that full, complete and adequate remedy which the legislature of the Union intended should oust the equity jurisdiction of the courts of the United States. As to the refunding bond for the security of the executor, equity always decrees it to be given.

If the counsel for the defendant meant to argue that, because the plaintiff might have maintained an action in *the state court* for the recovery of this legacy, therefore the equity jurisdiction of this court is ousted, we must protest against the doctrine. This case is clearly within the jurisdiction of this court. No objection can be made to the jurisdiction of the equity side of it, but that there is complete and adequate remedy on the other side of *this court*. It is no argument to say that the plaintiff may have such a remedy (could it even be truly said) in the state court. The conclusive answer is, that the plaintiff is under no obligation to resort to that jurisdiction.

§ 1124. *Remedies and modes of procedure in federal courts are fixed by the act of March 8, 1792, chapter 37.*

But we cannot admit (which has been conceded merely for the purpose of the argument just disposed of) that the common law and equity jurisdiction of the courts of the United States may be affected by state laws, which provide *remedies* for the state courts; or which prescribe their practice. The thirty-fourth section of the judiciary law of 1789, is very correctly stated by the court in the case of *The United States v. Wonson*, 1 Gall., 18 (*APPEALS*, §§ 105–

108), to apply only to the rights of persons and of property. In relation to these subjects the courts of the United States are bound to consider them as rules for their decision, in cases where they apply; except where the constitution, treaties or statutes of the United States may otherwise require or provide. As to the modes of process in suits at common law the act of the 29th of September, 1789, declared that they should be the same in each state respectively, as were then used, or allowed in the supreme court of the same. And by the act of the 8th of March, 1792, ch. 137, it is provided that the forms and modes of proceeding in suits, in those of common law, shall be the same as were then used in the courts of the United States respectively, in pursuance of the above act; in those of equity, according to the principles, rules and usages which belong to courts of equity, as distinguished from courts of common law, subject to such alterations and additions as the said courts should deem expedient, or to such regulations as the supreme court might prescribe.

§ 1125. *Equity practice in federal courts cannot be altered by state laws.*

From these acts it results that state laws, respecting *rights*, are to be considered by the courts of the United States as rules of decision; and that the modes and forms of proceeding at common law, as used by those courts in 1792, could not be altered, or in any manner affected, by state laws regulating the course of proceedings and practice of the state courts, unless they should be adopted by the courts of the United States. But as to suits in equity, state laws, in respect to remedies, whether prior or subsequent to the act of 1792, could have no effect whatever on the jurisdiction of the court, the act having prescribed a rule by which the line of partition between the law and the equity jurisdiction of those courts is distinctly marked. It follows, therefore, that if a state law should declare that to be a *legal title* which, upon general principles recognized by courts of equity, would be considered as an equitable one, the courts of the United States would afford a legal remedy, suited to the case, to enforce it, without excluding at the same time the concurrent jurisdiction of the equity side of the court; if such a jurisdiction could be asserted as belonging to that side of the court. It was upon this ground that the supreme court sustained the legal remedy by ejectment in the case of *Simms v. Irvine*; the common law of this state being that a warrant, survey and purchase money paid, constitutes a legal right of entry. Upon the same ground it is that this court entertains actions by assignees of choses in action, which the laws of the state permit to be assigned.

§ 1126. *If state laws obliterate distinctions between law and equity practice, federal courts will nevertheless observe them.*

But because the state courts from a necessity, which the want of a court of chancery induces, entertain actions at law upon equitable rights; or because a statute of the state shall authorize such suits, it does not follow that such practice or such laws can affect the marked distinction between legal and equitable remedies in the courts of the United States. The only inquiry here must be what are the principles, usages and rules of courts of equity, as distinguished from courts of common law, and (to borrow the expressions of the supreme court in the case of *Robinson v. Campbell*, 3 Wheat., 212) "defined in that country, from which we derive our knowledge of those principles." The case just referred to is indeed an authority which so completely covers the present subject of inquiry, as to render the further investigation of it superfluous, and we shall merely add to that authority, the decision of the supreme court in the case of the *United States v. Howland*, 4 Wheat., 108; which

is conclusive, not only of this particular point, but of the question respecting the general jurisdiction of a court of equity in a case where there is a remedy at law, though not as complete as that which a court of equity can offer.

We think it unnecessary to prolong this opinion by noticing the alleged defects in the bill, being clearly of opinion that they do not deserve to be so called. The demurrer must be overruled, and the defendant ordered to answer.

LA MOTHE v. FINK.

(Circuit Court for Wisconsin: 8 Bissell, 498-502. 1879.)

Opinion by DYER, J.

STATEMENT OF FACTS.—This is an application for a preliminary injunction based upon a bill filed to restrain the defendant from selling certain personal property seized by him as marshal of this district, as the property of John McDonald, upon an execution issued on a judgment at law recovered in this court by one Cook against McDonald, of which property complainant claims to have been a mortgagee in possession at the time of the seizure, and to be vested with the legal title.

The material averments of the bill are these: On the 9th day of December, 1878, McDonald executed to complainant a chattel mortgage on the property in question, to secure the payment of an alleged indebtedness amounting to about \$10,000, which mortgage was on the same day filed in the office of the town clerk of the town where the property was situated, as required by the statute of the state. It is alleged that on the 13th day of January, 1879, deeming herself insecure, and in pursuance of authority given in the mortgage, she took possession of the property, with a view to selling and converting the same into money for the satisfaction of her debt, and that she has ever since held possession of the same.

It is alleged that on the 16th day of January, a suit at law was commenced in this court by one Isaac Cook against John McDonald, to recover an alleged indebtedness of about \$3,100; that the property in question was seized upon a writ of attachment issued in said action, and that the marshal forcibly and unlawfully took possession of the property; that on the 6th day of February, 1879, judgment was obtained in that action by Cook against McDonald, and that on the same day an execution was issued thereon, which was levied upon the same property which, it is alleged, was at the time in the lawful possession of complainant. It is alleged that upon making the execution levy, the defendant forcibly and unlawfully dispossessed complainant of the property, and that both the defendant and Cook knew of complainant's claim to and possession of the property, and that their proceedings were taken in defiance of her alleged rights. It is further averred that the defendant has advertised a sale of the property upon the execution held by him, and is about to sell the same, and the prayer of the bill is that he may be enjoined from selling, disposing of, or further holding possession of the property under the execution levy, and from any interference with the possession and rights of the complainant. Affidavits and exhibits accompany the bill sustaining the allegations, and from a statement annexed to the bill, it appears that the property consists of live stock, wagons, carriages, sleighs, harnesses, and a miscellaneous assortment of farming machinery and utensils, described in the mortgage as situated on the farm of McDonald.

There is no doubt that this court has jurisdiction to entertain this bill, and

may grant an injunction as prayed, if the bill makes a case for equity relief, and whether it does or not was the question argued at the bar. If it does, then the court ought to grant an injunction *pendente lite*, in order to secure to complainant the final relief which she may ultimately be entitled to. If it does not, then no preliminary injunction ought to be granted. The present application, therefore, goes to the merits of the bill.

In determining the question involved, we have to consider the character of the property, the fact that complainant's interest therein originated in a chattel mortgage to secure indebtedness alleged to have been owing by McDonald to her, and the further fact that she took possession of the property for the purpose of selling and converting the same into money for the satisfaction of her debt. Accepting the allegations of the bill as true, and admitting that complainant was in possession and held the legal title to the property when it was seized, the question is whether there is such want of adequate remedy at law as entitles complainant to come into a court of equity for relief by injunction to restrain the threatened disposition of the property at execution sale.

§ 1127. *Circumstances under which equity will intervene to prevent the sale of personal property under execution at law.*

There is a familiar class of cases cited in the elementary works, in which, on account of antiquity or historical character or other peculiar value, jurisdiction in equity was entertained to prevent the transfer or injury of articles of personal property, or to compel their specific delivery. But it is stated that these were cases where the articles were of peculiar value and importance, and the loss of which could not be fully compensated in damages. Such was the case of the silver altar-piece bearing a Greek inscription, and of curious antiquity, and which could not be replaced in value (*Somerset v. Cookson*, 3 P. Will., 390); and of the horn which constituted the tenure by which an estate was held (*Pusey v. Pusey*, 1 Vern., 273); and of the silver tobacco box (*Fells v. Read*, 3 Ves., 70); and of the masonic dresses and decorations (*Lloyd v. Loaring*, 6 Ves., 774); and other similar cases involving articles of property which were family relics or heirlooms. *Arundell v. Phipps*, 10 Ves., 139; *Nuthrown v. Thornton*, id., 159; *Lowther v. Lowther*, 13 id., 95; *Macclesfield v. Davis*, 3 Ves. & B., 16.

All these were cases where the chattels were articles of antiquity or curiosity, or were memorials of affection, or constituted insignia of office, and equitable interposition to preserve them to the owner *in specie* was sustained on the ground that the recovery of their intrinsic value in money would not be adequate satisfaction to the owner. There is another class of cases in which courts of equity have interposed to protect the owner of specific chattels in the beneficial enjoyment and use of them in specie. As where certain articles of property are placed in the hands of an agent to be held for the owner, and the agent has threatened to dispose of them to a third party in violation of his trust. The ground upon which equitable relief in such cases has been afforded is found to lie in the fiduciary relation which existed between the parties, together with the threatened mischief. *Wood v. Rowcliffe*, 3 Hare, 304.

§ 1128. *A mortgagee of ordinary chattels in possession under his mortgage is not entitled to an injunction to prevent their sale under an execution at law against the mortgagor.*

The principle upon which jurisdiction may be invoked to grant relief by injunction or decree for specific delivery of personal property in the classes

of cases mentioned is plainly not applicable to the case at bar, for here the case is simply that of seizure and threatened sale upon execution of ordinary personal property, the entire and actual value of which, for all purposes, is ascertainable, and is wholly measurable by money, and which the alleged owner holds only for purposes of sale and conversion into money, to satisfy a debt.

On the argument such reliance was placed upon several cases decided by the supreme court to sustain the present application that they should be particularly noticed.

In the case of *The State of Georgia v. Brailsford*, 2 Dall., 402, an obligee having recovered a judgment on a bond which was claimed by the state of Georgia under a certain act of confiscation, and execution having issued, the state filed a bill in the supreme court setting out its title, and a temporary injunction was granted to stay the money in the hands of the marshal until the title of the state could be tried. The obligees in the bond were British merchants. They had brought suit against the obligor in the court below. The state claimed that the bond was confiscated, and applied to the court in which the suit was tried for leave to defend, which was refused. Judgment was rendered, execution issued, and the money was in the hands of the marshal. The state desired to establish its title before the money was paid over to the obligees. Two of the judges thought that there was no ground for relief in equity. The other judges, with hesitation, concluded otherwise, and the basis of their judgment was, that as the money was in the hands of the marshal it was in the custody of the law, and that it was better that it should remain there until the law should adjudge to whom it belonged; in other words, that it was equitable to stay the money while it was yet in the custody of the law till the right to it could be tried at law. This is the scope of the decision.

Osborn v. United States Bank, 9 Wheat., 738 (Constr., §§ 2363-87), involved a franchise. The state of Ohio proposed to expel a branch of the United States Bank from the state by process of taxation. By an unconstitutional law of the state the auditor was directed, in collection of the tax, to levy his warrant on the money and property of the bank. It was held that this was not the case of an ordinary trespass; that it was the destruction of a franchise, and amounted to expulsion of the bank from the state; that the tax would be annually levied and so that it would become a continuing wrong; that the injury done by denying to the bank the exercise of its franchise could not be accurately calculated; that there was no remedy whatever against the principal — the state — for the injury; that the remedy would be only against the agent of the state; that no agent could make compensation for such an injury, and so the remedy at law would be one in name merely, and that the injury would be absolutely irreparable. For these reasons, to preserve a great franchise for the future, and to prevent its essential destruction, it was held that equity should interpose by injunction.

Upon examination of *Ford v. Douglas*, 5 How., 143, I do not think the case involves any question or principle such as we have here. *Pennock v. Coe*, 23 How., 117 (Conv., §§ 1305-9), holds that one bondholder of a class covered by a mortgage given to secure that class of bonds, cannot, by getting judgment at law, be permitted to sell, and will be restrained from selling, a portion of the property devoted to the common security, because it would give him an inequitable preference over other bondholders of the same class, and would disturb the *pro rata* distribution in case of a deficiency; and moreover, would

have the effect to prejudice a superior equity of bondholders under a prior mortgage. This is but the enforcement of a familiar principle in equity, such as is recognized in *Freeman v. Howe*, 24 How., 450 (COURTS, §§ 255-60).

In *Oelrichs v. Spain*, 15 Wall., 211 (§§ 1602-7, *infra*), there was involved an element of trust, which always confers jurisdiction in equity, and also the consideration of a multiplicity of suits.

Watson v. Sutherland, 5 Wall., 74, is much relied on to support the present application. In that case a creditor of A. levied on goods consisting of a stock in retail trade which was in the possession of B., and which it was alleged A. had, in fraud of his creditors, conveyed to B. B. was a young man recently established in trade, and was doing a profitable business; the stock was suitable for the current season and intended to be paid for out of the sales, and in fact his purchase from A. was in good faith on his part. The court held that the execution sale should be enjoined. Here were several elements of fact which furnished ground for equitable relief. B. had purchased the goods to establish himself in business. He expected to pay for them out of the sales. He had commenced business and had established a profitable trade. To take from him the property was to break up his business, destroy his credit and render him insolvent. As the court say, "commercial ruin might be the effect of closing his store and selling his goods," which had been purchased as the foundation for a business and as his beginning in business life. Here it was evident that the value of the goods alone would not compensate him for the injury, because other consequential damages must result, which could not be recovered in an action at law; so the remedy at law was not complete and adequate. Mr. Justice Davis in the opinion says: "It is well settled that the measure of damages, if the property were not sold, could not extend beyond the injury done to it, or if sold, to the value of it, when taken, with interest from the time of the taking down to the trial. . . . Loss of trade, destruction of credit, and failure of business prospects are collateral damages, which it is claimed would result from the trespass, but for which compensation cannot be awarded in a trial at law. . . . The absence of a plain and adequate remedy at law affords the only test of equity jurisdiction, and the application of this principle to a particular case must depend altogether upon the character of the case as disclosed in the pleadings." In this case it would seem very clear that the remedy in equity could alone furnish efficient relief. (See §§ 1300, 1301, *infra*.)

§ 1129. *A remedy at law, if plain and adequate, will exclude equity jurisdiction. If any one form of action at law will give such a remedy equity will not interfere. What is a plain and adequate remedy.*

Of course as ground for the refusal of an injunction, it is not enough to say that there is a remedy at law. It must be plain and adequate, or in other words as practical and efficient to the ends of justice, and its prompt administration, as the remedy in equity. *Watson v. Sutherland*, 5 Wall., 74. And "where the remedy at law is of this character, the party seeking redress must pursue it. In such cases the adverse party has a constitutional right to a trial of the issue of fact by a jury." *Oelrichs v. Spain*, 15 Wall., 211, 228 (§§ 1602-7, *infra*).

The general rule in relation to the application of the remedial powers of courts of equity to compel the specific delivery of personal property to which another person has a right is stated by Mr. Story, as follows: "Ordinarily, in cases of chattels, courts of equity will not interfere to decree a specific deliv-

ery, because, by a suit at law, a full compensation may be obtained in damages, although the thing itself cannot be specifically obtained; and where such a remedy at law is perfectly adequate and effectual to redress the injury, there is no reason why courts of equity should afford any aid to the party." 2 Story's Eq. Juris., § 708. And Willard, in his Equity Jurisprudence, pp. 364, 365, says: "If there be nothing in the case but title to the chattel in the plaintiff on the one side, an unlawful withholding of possession by the defendant, and the chattel be one capable of being estimated in money and compensated in damages, there will be no occasion to depart from the ordinary remedies at law."

Now, bearing in mind what is the test of equity jurisdiction, it must be said of the case at bar that it presents no peculiar or extraordinary features, and that it is plainly distinguishable from the cases that have been noticed in which relief by injunction was successfully invoked. Why is not complainant's remedy at law, taking the facts as averred in the bill, plain and adequate? She alleges that she took possession of the property in question under her mortgage. She in effect claims legal title. She took possession and held the property for one purpose only, namely, to sell and convert it into money for satisfaction of her debt. The property is not of peculiar character or value. A recovery of its value affords complete compensation. Whatever damages she may sustain by execution sale of the property can be completely repaired at law. There was some discussion on the argument as to whether she could maintain trover or replevin in this court. Upon that question I forbear to express an opinion. But undoubtedly she could maintain trespass or trover against the marshal, if her claim be well founded, in the state court. It is said that she cannot maintain replevin in the state court. And so it was argued that her remedy at law was not adequate unless she could have the benefit of all possible legal remedies. But it does not follow that, because she may not be able to maintain replevin, an action to recover compensation in damages does not afford adequate remedy. Plain and adequate remedy at law does not mean an ability to resort to every remedy which the forms of legal procedure give. If any form of action at law will give a complete and adequate remedy, then she is within the principle which tests the right to resort to equity.

In an action at law for the alleged trespass, or for conversion of the property, the measure of damages would be the value of the property when taken, with interest from the time of the taking to the time of the trial, and this would, under the facts as averred in the bill, cover all damages sustained. Moreover, in determining the value, complainant would not be restricted to amounts realized for the property by the marshal on execution sale. She would be at liberty to recover actual value, though the marshal might not have realized one-half such value. Application for injunction denied.

INSURANCE COMPANY v. BAILEY.

(18 Wallace, 616-628. 1871.)

APPEAL from the Supreme Court of the District of Columbia.

§ 1130. *Rules for the construction of life insurance policies.*

Opinion by MR. JUSTICE CLIFFORD.

Policies of life insurance are governed, in some respects, by different rules of construction from those applied by the courts in case of policies against

marine risks or policies against loss by fire. Marine and fire policies are contracts of indemnity, by which the claim of the insured is commensurate with the damages he sustained by the loss of, or injury to, the property insured. Such being the nature of the contract, it is clear that an absolute sale of the property insured, prior to the alleged disaster, is a good defense to an action on the policy, as the insured cannot justly claim indemnity for the loss of, or injury to, property in which he had no insurable interest at the time the loss or injury occurred.

Life insurances have sometimes been construed in the same way, but the better opinion is that the decided cases which proceed upon the ground that the insured must necessarily have some pecuniary interest in the life of the *cestui qui vie* are founded in an erroneous view of the nature of the contract; that the contract of life insurance is not necessarily one merely of indemnity for a pecuniary loss, as in marine and fire policies; that it is sufficient to show that the policy is not invalid as a wager policy, if it appear that the relation, whether of consanguinity or of affinity, was such, between the person whose life was insured and the beneficiary named in the policy, as warrants the conclusion that the beneficiary had an interest, whether pecuniary or arising from dependence or natural affection, in the life of the person insured. *Dalby v. The India & London Ins. Co.*, 15 C. B., 365; *Loomis v. Eagle Life & Health Ins. Co.*, 6 Gray, 396; *Lord v. Dall*, 12 Mass., 118; *Trenton Life & Fire Ins. Co. v. Johnson*, 4 Zab., 576; *Rawls v. American Life Ins. Co.*, 36 Barb., 357; *S. C.*, 27 N. Y., 282.

Insurers in such a policy contract to pay a certain sum, in the event therein specified, in consideration of the payment of the stipulated premium or premiums, and it is enough to entitle the insured to recover if it appear that the stipulated event has happened, and that the party effecting the policy had an insurable interest, such as is described, in the life of the person insured at the inception of the contract, as the contract is not merely for an indemnity, as in marine and fire policies.

STATEMENT OF FACTS.—Two policies for insurance upon the life of Albert Bailey, the husband of the appellee, were issued by the appellants, and made payable to the appellee in ninety days after due notice and proof of the death of the husband. He died on the 11th of October following, and due notice of that event was given to the appellants by the appellee, to whom the sums insured, amounting to \$10,000, were payable, but they refused to pay the same, upon the ground that the policies were obtained by fraudulent misrepresentations and by the fraudulent suppression of material facts. They not only refused to pay the sums insured, but instituted the present suit in equity to enjoin the appellee from assigning or in any manner disposing of the policies, and also prayed that she might be compelled by the decree of the court to deliver up the policies to be canceled, and for further relief. Process was issued and served and the respondent appeared and answered, denying all the charges set forth in the bill of complaint, and alleging that the complainants were bound to pay her the entire sums insured in the respective policies. Proofs were taken on both sides, and the cause having been duly transferred to the general term, the parties proceeded to final hearing, and the supreme court of the District entered a decree dismissing the bill of complaint with costs, but without prejudice, and the complainants appealed to this court.

Fraudulent misrepresentations and the fraudulent suppression of material facts are the principal grounds alleged for the relief prayed in the bill of com-

plaint, and it must be conceded that the proofs introduced by the complainants tend strongly to support the allegations which contain those charges. Those allegations in the bill of complaint are denied in the answer, and the respondent has introduced proofs in support of those denials, but it is not going too far to say that the weight of the evidence, as exhibited in the record, is adverse to the pretensions of the respondent, nor does it appear that any different views were entertained by the subordinate court. Grant all that, and still it does not follow that the decree in the court below is erroneous, as the bill of complaint may well have been dismissed upon grounds wholly disconnected from the merits of the controversy.

§ 1131. *A suit in equity will not be entertained when there is a plain, complete and adequate remedy at law.*

Suits in equity, the judiciary act provides, shall not be sustained in either of the courts of the United States in any case where plain, adequate and complete remedy may be had at law, and the same rule is applicable where the suit is prosecuted in the chancery court of this District. *Hipp v. Babin*, 19 How., 271 (§§ 1134-36, *infra*); *Parker v. Lake Co.*, 2 Black, 545 (§§ 696-98, *supra*); *Boyce v. Grundy*, 3 Pet., 210; *Graves v. Ins. Co.*, 2 Cranch, 444; 1 Stat. at Large, 82.

Much consideration was given to the construction of that section of the judiciary act in the case first referred to, and also to the question whether a party seeking to enforce a legal right could resort to equity in the first instance in a controversy where his remedy at law is complete, and the court, without hesitation, came to the conclusion that he could not, if his remedy at law was as practical and as efficient to the ends of justice and its prompt administration as the remedy in equity.

§ 1132. *Under what exceptional circumstances equity will intervene, although there be also a legal remedy.*

Most of the leading authorities were carefully examined on the occasion, and the court came to the following conclusion, which appears to be correct: That whenever a court of law in such a case is competent to take cognizance of a right and has power to proceed to a judgment which affords a plain, adequate and complete remedy, without the aid of a court of equity, the plaintiff must in general proceed at law, because the defendant, under such circumstances, has a right to a trial by jury. *Foley v. Hill*, 1 Phillips, 399; *S. C.*, 2 H. of L. Cases, 28; *Fire Ins. Co. v. Delavan*, 8 Paige, Ch., 422; *Alexander v. Muirhead*, 2 Dessaus., 162; 5 Am. L. Reg., 564.

Exceptions undoubtedly exist to that rule, of which there are many to be found in the reports of judicial decisions, and in which preventive relief was administered by injunction. Such relief is granted to prevent irreparable injury or a multiplicity of suits, or where the injury is of such a nature that it cannot be adequately compensated by damages at law, or is such, as, from its continuance or permanent mischief, must occasion constantly recurring grievance, which cannot be removed or corrected otherwise than by such a preventive remedy.

Authorities to show that equity will interfere to restrain irreparable mischief, or to suppress oppressive and interminable litigation, or to prevent multiplicity of suits, is unnecessary, as that proposition is universally admitted.

Jurisdiction may also be exercised by courts of equity to rescind written instruments in cases where they have been procured by false representations or by the fraudulent suppression of the truth, if it appear that the rescission of

the same is essential to protect the opposite party from pecuniary injury. Equity will rescind or enjoin such instruments where they operate as a cloud upon the title of the opposite party, or where the instruments are of a character that the vice in the inception of the same would be unavailing as a defense by the injured party if the instruments were transferred for value into the hands of an innocent holder. Title deeds fraudulently procured may, under such circumstances, be decreed to be canceled or reformed, as the case may be, and bills of exchange or promissory notes may be enjoined and practically divested of their negotiable quality.

Such jurisdiction also extends to the protection of letters-patent against infringement, and is exercised in many cases to prevent waste, and for many other judicial purposes, but the rule in the federal courts is universal, that if the defendant has a good defense at law, and the remedy at law is as perfect and complete as the remedy in equity, an injunction will not be granted.

§ 1133. *One who has a good defense at law to a purely legal demand will be left to that defense, unless he can show a liability to irreparable injury.*

Whether the remedy sought in this case would have been available if the suit had been instituted before the death of the person whose life was insured it is not necessary to determine, as no such question is involved in the record. Suffice it to say upon that topic that the complainant has not referred the court to any decided case which supports the affirmative even of that inquiry, but the difficulty in the way to such a conclusion in the case before the court is much greater, as by the death of the *cestui que vie* the obligation to pay, as expressed in the policies, became fixed and absolute, subject only to the condition to give notice and furnish proof of that event within ninety days. Notice having been given and the required proof furnished, the obligation to pay certainly became fixed by the terms of the policies, and the sums insured became a purely legal demand, and if so, it is difficult to see what remedy, more nearly perfect and complete, the appellants can have than is afforded them by their right to make defense at law, which secures to them the right of trial by jury. *Foley v. Hill*, 2 H. of L. Cases, 45; *Thrale v. Ross*, 3 Brown's Ch. Cas., 56; *Arundel v. Holmes*, 4 Beav., 325; *Norris v. Day*, 4 Young & Coll., 475.

Where a party, if his theory of the controversy is correct, has a good defense at law to "a purely legal demand," he should be left to that means of defense, as he has no occasion to resort to a court of equity for relief, unless he is prepared to allege and prove some special circumstances to show that he may suffer irreparable injury if he is denied a preventive remedy. Nothing of the kind is to be apprehended in this case, as the contracts embodied in the policies are to pay certain definite sums of money, and the record shows that an action at law has been commenced by the insured to recover the amounts, and that the action is now pending in the court whose decree is under re-examination.

Courts of equity unquestionably have jurisdiction of fraud, misrepresentation and fraudulent suppression of material facts in matters of contract; but where the cause of action is "a purely legal demand," and nothing appears to show that the defense at law may not be as perfect and complete as in equity, a suit in equity will not be sustained in a federal court, as it is clear that the case, under such circumstances, is controlled by the sixteenth section of the judiciary act.

Decree affirmed.

HIPP v. BABIN.

(19 Howard, 271-279. 1856.)

APPEAL from U. S. Circuit Court, Eastern District of Louisiana.

Opinion by MR. JUSTICE CAMPBELL.

STATEMENT OF FACTS.—The appellants filed their bill to recover land within the district in the possession of the defendants, and for an account of the rents, profits and receipts during the period of their occupancy. They allege that James Fletcher, their ancestor, died in 1804, leaving a valid will, by which he devised to his widow and three children the principal portion of his succession, and appointed the former the executrix. The property described in the bill had been sold in 1801, but the purchaser had not paid the price stipulated at this time. The testator directed that, if the purchaser should complete the purchase, the sum received should be put to interest, on good security, for the mother and children, until the children should attain the age of sixteen years, when the succession should be divided. In May, 1806, the executrix agreed with the purchaser to rescind the contract of sale, received a conveyance of his title to the heirs of Fletcher, and refunded to him the money he had paid, being near \$4,000.

In June, 1806, the executrix filed her petition in the superior court of the Orleans territory, being the court of general law, equity and probate jurisdiction for the territory, in which she declares the cancellation of the contract of sale aforesaid; and, to enable her to refund the money, she had borrowed that sum from Daniel Clark; that the land was unproductive, and that she was unable to pay her debt. She prayed an order for the sale of the property to provide for the education and maintenance of her minor children, and the discharge of her debt, and to carry the will of her husband into effect respecting the disposition of the remainder of the purchase money. The court made the necessary order to empower the executrix to sell and convey the lands for such price as she could obtain, and to receive the money therefor; also to appropriate the sum necessary for the payment of her debt, and to put out the remainder at interest as required by the will.

Daniel Clark became the purchaser at private sale from the executrix for the sum of \$9,000, and received her conveyance. The appellants impeach this sale as unauthorized and illegal, and insist upon their title under the conveyance to them. The defendants claim by their answers as *bona fide* purchasers from persons deriving their title by valid conveyances in good faith from Daniel Clark, and affirm that the family of Fletcher left the United States in 1807, and enjoyed the benefit of the money paid to the executrix; that the lands have become valuable by their improvements, and that they, and the persons under whom they claim, have held the possession since 1806. The bill was dismissed by the circuit court, on the ground that the remedy at law is plain, adequate and complete, and from this decree this appeal is prosecuted. The supreme court of Louisiana, in a contest between the appellants and other parties, for other lands, have decided that the executrix was not authorized to convey the shares of her minor children by private act. Fletcher v. Cavalier, 4 La., 268; 10 La., 116, S. C.

§ 1134. *A bill in equity is not the proper remedy to recover land where the legal title is claimed.*

But we are relieved from the duty of applying these decisions or inquiring into the validity of the pleas of the appellees by the opinion we have formed

concerning the jurisdiction of the court of chancery over the cause. The sixteenth section of the judiciary act of 1789 declares "that suits in equity shall not be sustained in either of the courts of the United States in any case where plain, adequate and complete remedy may be had at law."

The bill in this cause is, in substance and legal effect, an ejectment bill. The title appears by the bill to be merely legal; the evidence to support it appears from documents accessible to either party; and no particular circumstances are stated showing the necessity of the court's interfering, either for preventing suits or other vexation, or for preventing an injustice irremediable at law. In *Welby v. Duke of Rutland*, 6 Bro. P. C. Cas., 575, it is stated that the general practice of courts of equity, in not entertaining suits for establishing legal titles, is founded upon clear reasons; and the departing from that practice, where there is no necessity for so doing, would be subversive of the legal and constitutional distinctions between the different jurisdictions of law and equity; and though the admission of a party in a suit is conclusive as to matters of fact, or may deprive him of the benefit of a privilege which, if insisted on, would exempt him from the jurisdiction of the court, yet no admission of parties can change the law or give jurisdiction to a court in a cause of which it hath no jurisdiction.

§ 1185. *Where bill in equity is brought on legal title, the supreme court will dismiss whether the objection is raised or not.*

Agreeably hereto, the established and universal practice of courts of equity is to dismiss the plaintiff's bill, if it appears to be grounded on a title merely legal, and not cognizable by them, notwithstanding the defendant has answered the bill and insisted on matter of title. In *Foley v. Hill*, 1 Phil., 399, Lyndhurst, lord chancellor, dismissed a bill upon an appeal from the vice-chancellor upon the same grounds. He said, "it was a point of great importance to the practice of the court." The objection was not made in the pleadings nor presented in the decree of the vice-chancellor.

This decree was affirmed by the house of lords. 2 H. L. Cas., 28. The practice of the courts of the United States corresponds with that of the chancery of Great Britain, except where it has been changed by rule or is modified by local circumstances or local convenience. This court has denied relief in cases in equity where the remedy at law has been plain, adequate and complete, though the question was not raised by the defendants in their pleadings, nor suggested by the counsel in their arguments. 2 Cr., 419; 7 Cr., 70, 89; 5 Pet., 496; 2 How., 383. In *Parsons v. Bedford*, 3 Pet., 433, the court insists on the necessity imposed on the circuit court in Louisiana to maintain the distinction between the jurisdiction in which legal rights are to be ascertained, and that where equitable rights alone are recognized and equitable remedies administered.

And the result of the argument is that, whenever a court of law is competent to take cognizance of a right, and has power to proceed to a judgment which affords a plain, adequate and complete remedy, without the aid of a court of equity, the plaintiff must proceed at law, because the defendant has a constitutional right to a trial by jury.

The appellants contend that, upon the pleadings and evidence, a proper case for the jurisdiction of chancery appears, and that the circuit court *mero motu* was not warranted in dismissing the bill: 1st. Because it is shown that in 1806 the children of Fletcher were minors, and they are authorized to call upon the defendants for an account as guardians. 2d. That the defendants

being entitled to the estate of the executrix and widow, under her conveyance, the plaintiffs can maintain the bill for a partition. 3d. That the court of chancery is better fitted to take an account for rents, profits and improvements, and may decide the question of title as incident to the account. 4th. That a multiplicity of suits will be avoided.

There are precedents in which the right of an infant to treat a person who enters upon his estate with notice of his title, as a guardian or bailiff, and to exact an account in equity for the profits, for the whole period of his occupancy, is recognized. *Bloomfield v. Eyre*, 8 Beav., 250; *Van Epps v. Van Deusen*, 4 Paige, 64. But in those cases the title must, if disputed, be established at law, or other grounds of jurisdiction must be shown. In the present case, the defendants have all entered upon the lands since the plaintiffs arrived at their majority. They are purchasers of adverse titles under which possession has been maintained for a long period. The bill does not recognize their title to any part of the land, and there has been no unity of possession; so that the bill cannot be maintained, either as a bill for an account on behalf of minors or for a partition. *Adams' Eq.*, sec. 229; 4 *Rand. (Va.)*, 74, 493.

Nor can the court retain the bill, under an impression that a court of chancery is better adapted for the adjustment of the account for rents, profits and improvements. The rule of the court is, that when a suit for the recovery of the possession can be properly brought in a court of equity, and a decree is given, that court will direct an account as an incident in the cause.

§ 1136. *Legal title to land cannot be asserted by bill in equity on the ground that an account is necessary.*

But when a party has a right to a possession, which he can enforce at law, his right to the rents and profits is also a legal right, and must be enforced in the same jurisdiction. The instances where bills for an account of rents and profits have been maintained are those in which special grounds have been stated, to show that courts of law could not give a plain, adequate and complete remedy. No instances exist where a person who had been successful at law has been allowed to file a bill for an account of rents and profits during the tortious possession held against him, or in which the complexity of the account has afforded a motive for the interposition of a court of chancery to decide the title and to adjust the account. *Dormer v. Fortescue*, 3 *Atk.*, 124; *Barnewell v. Barnewell*, 3 *Rid. P. O.*, 24. Nor does the case show that a multiplicity of suits would be avoided, or that justice could be administered with less expense and vexation in this court than a court of law. Decree affirmed.

LEWIS v. COCKS.

(28 *Wallace*, 466-471. 1874.)

APPEAL from U. S. Circuit Court, District of Louisiana.

STATEMENT OF FACTS.—In 1863 Anderson sued one Cocks, in the provisional court established by the president at New Orleans, Louisiana, and obtained judgment against him. Under an execution upon this judgment, two houses and lots of said Cocks were sold, and Izard became the purchaser. Service in the case was not made upon Cocks, but upon one Hyllested, as his agent. Izard mortgaged the property to Lewis, and it was sold under the mortgage and Lewis became the purchaser. Cocks, in 1866, filed a bill in equity against Izard and Lewis, praying that they be decreed to execute a deed of the property to complainant upon payment of the price paid by Izard for the property

under the execution sale, on the ground that the provisional court was a nullity; also of insufficient service upon Cocks; and alleging fraud on the part of Izard. The fraud was, however, not proved. The decree of the court below was for complainant.

Opinion by MR. JUSTICE SWAYNE.

The question of the validity of the provisional court is not an open one. We have held it valid upon more than one occasion when the question has been before us. *The Grapeshot*, 9 Wall., 129. The fraud charged upon Izard is expressly denied by his answer, and is not sustained by the evidence. There is a decided preponderance against it. We are unanimous upon the point. It could serve no useful purpose to examine the proofs in detail in order to vindicate our judgment. Nothing further need be said upon the subject. The remaining part of the case is that which relates to the allegations of the non-service of process. In considering the bill, we must regard it as being just as it would be if it contained nothing but what relates to this subject. Everything else must be laid out of view. It must be borne in mind that the complainant is not in possession of the property.

§ 1137. *When equity will not aid in the recovery of lands.*

If the bill alleged only the nullity of the judgment under which the premises were sold, by reason of the non-service of the original process in the suit, wherefore the defendant had no day in court, and judgment was rendered against him by default, and upon those grounds had asked a court of equity to pronounce the sale void, and to take the possession of the property from Izard, and give it to the complainant, could such a bill be sustained? Such is the case in hand. There is nothing further left of it, and there is nothing else before us. Viewed in this light, it seems to us to be an action of ejectment in the form of a bill in chancery. According to the bill, excluding what relates to the alleged fraud, there is a plain and adequate remedy at law, and the case is one peculiarly of the character where, for that reason, a court of equity will not interpose. This principle in the English equity jurisprudence is as old as the earliest period in its recorded history. *Spence's Jurisdiction of Courts of Chancery*, 408, note b; *id.*, 420, note a.

The sixteenth section of the judiciary act of 1789 (1 Stat. at Large, 82), enacting "that suits in equity shall not be sustained in either of the courts of the United States in any case where plain, adequate and complete remedy may be had at law," is merely declaratory and made no change in the pre-existing law. To bar equitable relief the legal remedy must be equally effectual with the equitable remedy, as to all the rights of the complainant. Where the remedy at law is not "as practical and efficient to the ends of justice and its prompt administration," the aid of equity may be invoked, but if, on the other hand, "it is plain, adequate and complete," it must be pursued. *Boyce v. Grundy*, 3 Pet., 215.

§ 1138. *When a court of equity will decline jurisdiction sua sponte.*

In the present case the objection was not made by demurrer, plea or answer, nor was it suggested by counsel; nevertheless if it clearly exists it is the duty of the court *sua sponte* to recognize it, and give it effect. *Hipp v. Babin*, 19 How., 278 (§§ 1134-36, *supra*); *Baker v. Biddle*, Bald., 416 (§§ 884-96, *supra*). It is the universal practice of courts of equity to dismiss the bill if it be grounded upon a merely legal title. In such case the adverse party has a constitutional right to a trial by jury. *Hipp v. Babin*, 19 How., 278 (§§ 1134-36, *supra*).

Where the complainant had recovered a judgment at law, and execution had issued and been levied upon personal property, and the claimant, under a deed of trust, had replevied the property from the hands of the marshal, and the judgment creditor filed his bill praying that the property might be sold for the satisfaction of his judgment, this court held that there was a plain remedy at law; that the marshal might have sued in trespass, or have applied to the circuit court for an attachment, and that the bill must therefore be dismissed. *Knox v. Smith*, 4 How., 298 (§ 1170, *infra*).

In the present case the bill seeks to enforce "a merely legal title." An action of ejectment is an adequate remedy. The questions touching the service of the process can be better tried at law than in equity. If it be desired to have any rulings of the court below brought to this court for review, they can be better presented by bills of exception and a writ of error than by depositions and other testimony and an appeal in equity.

There is another important point, which we have not overlooked. It is whether the judgment of the provisional court can be pronounced a nullity without the legal representative of Anderson, the deceased plaintiff, being before the court as a party. As the first objection is a fatal one we have not considered that question. Decree reversed, and the case remanded with directions to dismiss the bill.

PLUMMER v. CONNECTICUT MUTUAL LIFE INSURANCE COMPANY.

(Circuit Court for Maine: 1 Holmes, 267-272. 1873.)

Opinion by SHEPLEY, J.

STATEMENT OF FACTS.—The bill in equity in this case is instituted by the complainant, as surviving partner of the firm of B. Plummer & Sons, composed at the decease, in March, 1871, of Watson E. Plummer, of the said Watson E. and the complainant. Complainant is the widow of Benjamin Plummer, deceased, who for many years prior to his death had been an agent for insurance companies, and from 1859 to the time of his decease, in April, 1867, was acting exclusively as agent of the defendant company. The bill alleges an arrangement entered into in February, 1859, between the insurance company and Benjamin Plummer, by which he agreed to act as exclusive agent of the company in the eastern part of the state of Maine, to solicit parties to effect insurances in said company, and to perform other services for the company. In consideration thereof, the company agreed to pay him, or permit him to retain, ten per cent. of all moneys paid for the first year's premiums, and five per cent. upon all subsequent premiums, on all policies issued by the company to any persons taking the same through the influence or solicitations of the said Benjamin. The bill alleges that, upon the faith of this agreement, Benjamin Plummer incurred very great expenses in advertising, in the establishing suitable offices, the employment of clerks, and in traveling and other expenses necessary to develop and increase the business of the company. That he thereby so far increased the business of the company, that, while the company for the year prior to the time of his assuming the exclusive agency had received for premiums in the territory embraced within his agency not over \$2,000, it received in the year ending February 1, 1871, from the same territory, over \$250,000. On the 1st of November, 1861, the company constituted him the general agent of the company for Maine and the adjacent British Provinces, with authority to appoint sub-agents subject to his control and direction, with

the right to retain fifteen per cent. of all moneys paid for first-year premiums on policies subsequently procured by his exertions, and seven and one-half per cent. on all renewal premiums on policies procured by him, whether issued before or after November 1, 1861.

In July, 1863, Benjamin Plummer formed a copartnership with his sons, Oliver B., and Watson E., Plummer, and the business was then conducted under the name of B. Plummer & Sons; and the company accepted the firm as their agents in the place of Plummer alone, and settled its accounts with them on the basis of the agreements with Benjamin. On the 1st of February, 1867, the company entered into a new arrangement with B. Plummer & Sons, agreeing to give them twenty-five per cent. of all first-year premiums, and six per cent. of all renewal premiums, on policies procured by them subsequently to that date.

On the 2d day of April, 1867, Benjamin Plummer deceased, and the business was conducted by the surviving partners, with the acquiescence of the defendant company, until the 10th day of July, 1867, when the complainant became a member of the firm with her two sons, continuing to carry on the business in the name of B. Plummer & Sons, with the knowledge and consent of the company. On the 1st of June, 1869, O. B. Plummer, one of the partners, retired, assigning his interest to the remaining partners, who continued the business as before, with like knowledge and acquiescence of the company. On the 1st day of February, 1870, another modification of the contract was made, by the terms of which the firm was thereafter to receive twenty-five per cent. of first-year premiums, ten per cent. of renewal premiums on the four next succeeding years, and two per cent. on premiums for subsequent years.

In March, 1870, W. E. Plummer deceased, leaving the complainant the sole survivor of the firm, who continued to conduct the agency until the power was revoked by the company. The bill further alleges that it was a consideration of the efforts and expenditures of the said Plummers in securing an enlarged constituency of said company, and that it was distinctly stipulated in all the agreements that they were entitled to receive the stipulated percentage as long as any payments should continue to be made on the policies procured by them; and they were ready to perform the duties of the agency as stipulated; and that their rights were the same by agreement, so far as related to the percentage on the policies procured by them, whether the agency was revoked, or in the event of the death of the agent or agents; that after the death of Watson E. Plummer in March, 1871, the complainant had made arrangements to continue, and did continue, the agency and business with competent and skilful assistants, as it had theretofore been done; but that in May, 1871, the company revoked the agency and all power to collect premiums or percentages on premiums, and refused to allow or pay her anything for the value of the percentages on the future premiums, or in any way to recognize any rights or interests of the complainant therein, or in any premiums whatever paid after the date of the revocation of the agency on policies which had been procured by said Plummer or said firm. When the agency was revoked policies were in force issued prior to 1861; subsequent to 1861 and prior to 1867; subsequent to 1867 and prior to February 1, 1870; and subsequent to the last date.

The amount of the business created by said Benjamin Plummer and said firm is averred to have been so large that the company had received several millions of dollars from it, and at the time of the revocation of the agency

was receiving a quarter of a million dollars annually as premiums on policies secured by them. These policies are averred to be in the hands of the defendant, in the usual form of life insurance policies, with conditions so varied and numerous that it would be impossible to set them out; and the bill prays for discovery and production of the policies, that an account may be taken of the complainant's interest therein.

In October, 1869, the firm of B. Plummer & Sons executed a bond to the company, with J. H. Bowler and others as sureties, in the penal sum of \$10,000, conditioned for the due performance of their duty as agents, and the payment to the company of all sums collected by them for the company. An action has been commenced by the company on this bond, and is now pending in this court against the said Bowler alone, as surety on the bond. Another action has been commenced, and is now pending in this court, against the complainant, claiming to recover the sum of \$50,000, moneys alleged to have been collected by her during the months of March, April and May, 1871. The complainant alleges that the company in equity has no claim against her or said Bowler, but in equity is indebted to her in a sum exceeding \$100,000. In order to save a multiplicity of actions, and to obtain a just application of the indebtedness of the company to the complainant in liquidation and cancellation of bond, and to relieve the surety, whom the complainant is in law bound to protect, the bill prays for an account of the value of her interest in the existing policies, and of the policies themselves, and that the company be decreed to pay her the value of such interest, after deducting all sums belonging to the company in her hands, and for an injunction against the prosecution of the suits at law until the rights of the parties are determined and the value of her interest ascertained under the rules of commutation recognized in the business of life insurance.

To this bill the company demurs; and in support of the demurrer it is claimed that the complainant has a plain and adequate remedy at law, and that there is no need of a court of equity to compel a discovery, as the complainant could compel the agents of the company to produce in a suit at law all the evidence required or material.

§ 1139. *Relief at law must be as adequate and effectual as in equity.*

Where there exists a remedy at law parties are not remitted by a court of equity to their action at law, unless the relief at law is as adequate, complete and effectual as in a court of equity. *May v. Le Claire*, 11 Wall., 217. While the statute declares that there shall be no remedy in equity where there is a plain, adequate and complete remedy at law, the supreme court of the United States have decided that to oust the jurisdiction in equity the remedy at law must be as efficient to the ends of justice and its complete and prompt administration as the remedy in equity. *Boyce v. Grundy*, 3 Pet., 210; *Wylie v. Coxe*, 15 How., 415; *Garrison v. Memphis Ins. Co.*, 19 How., 312; *Brown v. The Pacific M. S. Co.*, 5 Blatch., 531 (§§ 1314-23, *infra*).

§ 1140. *Equity will entertain jurisdiction where there is a remedy at law, if there is need for special equitable remedy in order to do full justice.*

So the equity jurisdiction will be entertained where there is an adequate remedy at law, if the peculiar machinery of a court of equity, as a discovery or an injunction, be necessary to do complete justice between the parties. *Gass v. Stinson*, 2 Sumn., 453 (Bonds, §§ 716-22).

According to the averments of the bill, which for the purposes of this hearing are admitted by the demurrer, a claim exists against the company for the

value of the percentages in money upon all future accruing premiums on policies procured through the instrumentality of Benjamin Plummer, or of the complainant, or any of the firms in which they had been partners, as the commuted value of such prospective percentages at the time of the dissolution of the agency by death, or the act of the company, could be ascertained under the recognized rules of such commutation as administered and applied in the business of life insurance companies. But this remedy could only be enforced at law in a multiplicity of suits. A portion of the sum must be recovered in a suit in her own name as surviving partner; another portion, in her own name individually, for the percentage on policies procured by her after the dissolution of the firm by the death of Watson E. Plummer. Another suit would be requisite, in which the executor of Benjamin Plummer would be a party; and still another, in which the name of Oliver B. Plummer must be joined in an action at law, to reach the case of the percentage to be paid on policies issued before he retired, although he has no interest now in those percentages. And in these various suits, covering the percentages on over two thousand policies, the questions would have to be determined as affected by the four different classes of percentages, varied according to the varied dates of the policies and the different dates of the premiums; so that it would be practically impossible for a jury to make the requisite computations, or even, within any limits of time during which a jury could be kept in deliberation, to verify the computations and results of the most skilful experts in the science of the commutation of such values, who alone could make the requisite computations and apportion the amounts properly in the respective suits. And during the pendency of these actions at law, and after their determination, the aid of a court of equity would be almost necessarily invoked to protect the rights of the sureties to the bond, by making the equitable appropriation of the amounts, if any, found to be due to the complainant in such manner as to protect the rights of the surety. The demurrer, therefore, must be overruled, and the provisional injunction will issue to restrain the defendant from taking out executions in the suits at law until the final determination of the suit in equity, or until the further order of this court.

Injunction ordered.

FERSON v. SANGER.

(Circuit Court for Maine: Daveis, 252-265. 1845.)

STATEMENT OF FACTS.—Baker and Lindsey, being owners of a body of land, sold it to Sanger and others, giving bond to convey at the rate of \$6 per acre, \$1,000 to be paid when the bond should be executed, to be forfeited if the contract should not be carried into effect. The purchasers sold their interest to Webber for \$2,000 bonus on their purchase. To Webber and Ferson were shown Stackpole's certificate of the quantity of timber on the land and other certificates corroborative of his favorable statements. Webber made further investigations. On the 11th of August, 1835, Webber notified Baker and Lindsey of his decision to take the land. On the 24th of August Baker and Lindsey, by Webber's direction, conveyed the land to Ferson, who mortgaged it to secure the payment of the purchase money — \$45,965.25. This mortgage was assigned afterwards to Gore, and was foreclosed in June, 1840, and the title perfected in Gore. The bill was filed May 10, 1841, praying that defendants be compelled to pay to complainant all the money which he had paid

on receiving a deed of release of his rights to the land and on paying the notes which complainant had given with Webber.

Opinion by WARE, J.

This is in substance a bill in equity seeking damages for an alleged fraud and misrepresentation in the sale and assignment of the right of pre-emption of certain lands in this state. A preliminary question is presented, and was discussed at the argument, as to the admissibility of Webber as a witness in the cause. His deposition was taken, subject to the objection made when the interrogatories were filed. These are, first, that he was a party to the contract, and ought to have been a party to the bill; and secondly, if not a necessary party, that he has an interest in the cause.

§ 1141. *Where a party is jointly interested in a purchase, he is not competent as a witness.*

The contract was in fact made by Webber in his own name. He appeared not only as a principal, but as the sole contracting party. He made the purchase, and the assignment of the bond was made to him. He held himself out as the purchaser, and was certainly considered by the defendants as a principal in the contract, if not the sole purchaser. And he continued to act as a principal, if not the sole party in interest in the purchase. He undertook a journey to explore and examine the land, and after going on the land and satisfying himself as to its value, gave notice to Baker and Lindsey of his election to purchase the land in his own name, and obtained from them an extension of the time allowed by the bond to complete the purchase, though, when the transfer was made, it was, by his direction, made to Ferson. But he joined with Ferson in giving the notes for the purchase money. In his deposition he says that he signed the notes as surety, but this does not appear by the notes themselves. He appears, therefore, from the beginning to the end, as a principal in the contract. Indeed, the only circumstance which could lead the defendants to a suspicion that Ferson had any interest in the contract is the fact that he assisted Webber in raising the money to pay the price of the bond. It is true that Ferson wrote the assignment, and was present when the contract was made, but he does not appear to have taken any active part in it, but it seems to have been made entirely by Webber. Ferson put his name to the assignment as an attesting witness. It is stated in the bill that Webber made the contract as the agent of Ferson, but the defendants were not notified of it at the time, and from the fact that he signed the contract as a witness, they had certainly a right to infer the contrary, and that, if he was to have any interest in the contract, it was to come through Webber. Further, it appears to me to be a plain, if not a necessary, inference, from the whole evidence in the case, that Webber was not only directly interested in the purchase of the bond, but also in the purchase of the land. In his own deposition he admits that he contemplated taking an interest in the land to the amount of one-ninth, and in the letters which he wrote to Baker and Lindsey, after the purchase of the land, he writes precisely as he would have done if he had an interest in it. In a letter of June 16, 1838, signed by him and Ferson jointly, relative to the payment of the outstanding notes, they speak of their interest as joint. "We are determined," they say, "*having the land to offer as security*, to make a desperate effort," etc. The natural, if not the necessary, interpretation of such language is that the land was owned by them jointly. In all Ferson's letters he speaks, in the plural number, of others

being interested with him, though he names no individual. Baker, in his deposition, says that he understood that others were interested to the number of seven in all, including Ferson and Webber. In truth, Ferson's letters distinctly show the fact that the land was bought on speculation, not with an intention of holding it, but to sell again at an advanced price. In his letter of May 9, 1837, he says: "We did not intend to keep it, but bought with the design of selling it." And again: "We have used every exertion to sell, from the moment of the lands being purchased;" and, May 24th, referring to the letter of the 9th, he says, "it was adopted by a deliberate consultation of my associates." Now it seems to me impossible to doubt, on the evidence in this record, that Webber was one of these associates, and that he was interested as a principal party in the contract with the defendants, in the purchase of the bond as well as in the subsequent purchase of the land. The bond was assigned to Webber, but the legal title in the land was conveyed to Ferson, but in both cases in trust for other parties who were jointly interested in the speculation.

If so, then undoubtedly Webber is a proper if not a necessary party to the bill. It is not necessary in this case to inquire whether the bill is demurrable for the omission, but certainly one of the joint contractors cannot, by the omission of his name as a party plaintiff in the bill, be rendered competent as a witness, for he would be a witness in his own cause. On this ground I think Webber inadmissible as a witness.

§ 1142. *A covenant not to sue a maker of a note by an indorsee does not render the maker a competent witness, for if the indorser should be compelled to pay the note, he could sue the maker.*

Again, the deposition of Webber is objected to on the ground of interest. A part of the prayer of the bill is, that the defendants may be compelled to pay and deliver to the plaintiff the unpaid notes, given by Ferson and Webber to Baker and Lindsey to secure the payment of the price of the land. These notes are in the possession of Martin Gore, and, in an instrument executed by him, he covenants not to sue Webber on the notes; and there is another by Ferson, which may be construed *perhaps* to release him from his eventual liability on the notes, should they be paid by Ferson. But these notes have been indorsed, and Gore does not release the indorsers. If he calls on them and they pay the notes, they will have their remedy over against Webber. The covenants of Gore do not, therefore, release him from his ultimate liability on the notes, and, of course, he has a direct interest in having them delivered up and canceled. On this ground also, my opinion is that the deposition of Webber is inadmissible.

Without the testimony of Webber, it is quite clear that this bill cannot be maintained, for he is the only witness to prove the fraud. But waiving this question, and considering the testimony of Webber as in the case and entitled to full credit, how will the case then stand? Suppose the contract to have been made, as charged in the bill, with Ferson, through Webber as his agent, it was a contract for the right and interest which the defendants had in the bond, and that only. The bond of Baker and Lindsey conveyed no interest in the land, not even in equity. It merely gave a right of pre-emption, and that to be exercised within thirty days from its date. It gave a mere right of action, by complying with the terms of the condition, of compelling the party, by a bill in equity, to a specific performance of the contract, or a right to

damages at law for the non-performance. All that the assignment transferred was a right to perform the condition, and thus acquire a title to the land, or a claim for damages.

But the time limited for performing the condition is expired. This is not therefore a case in which the court can rescind the contract and replace the parties in the condition in which they were before the contract was made. If the contract is rescinded, the right of pre-emption, which was the object of the contract, is gone. The thing sold is extinct, and has ceased to exist. All the relief which the court can give is damages for the alleged fraud, and this is substantially the prayer of the bill.

This suit must, therefore, be considered as properly a bill to recover damages for a fraud in the sale and assignment of the contract. It cannot be for a fraud in the sale of the land, because the defendants never had any interest in the land which they could sell. The right to purchase the land was what was bought of the defendants, and the land itself was afterwards purchased of Baker and Lindsey. For this fraud, if there was one, there is a perfect remedy at law. Will a bill in equity lie for damages only, arising out of fraud in a contract where no other relief can be given?

§ 1143. *Equity jurisdiction of fraud.*

It is undoubtedly true that equity has a general jurisdiction over matters of fraud. Fraud, accident and trust constitute the ancient and broad foundation of its powers. Com. Dig., Chancery, C., 2; 1 Black. Com., 92; 3 id., 431; 1 Story's Eq., 59. Lord Hardwicke, in the case of *Chesterfield v. Jansen*, 2 Ves. Sen., 155, said that equity had an undoubted jurisdiction to relieve in all cases of fraud, affirming the jurisdiction without any limitation. There is, however, at least one admitted exception to the universality of this proposition; it is, that equity has not jurisdiction to relieve against fraud in obtaining a will, and in Cooper's Equity, page 125, this is said to be the only case in which relief against fraud cannot be had in equity. The jurisdiction is affirmed in terms nearly as strong as in 1 Story's Eq., § 184. With the exception that has been mentioned, it is stated that courts of equity may be said to possess a general, and *perhaps a universal* concurrent jurisdiction with courts of law in cases of fraud cognizable at law. Lord Eldon, in the case of *Evans v. Bicknell*, 6 Ves., 190, appears to have affirmed the jurisdiction of the court in terms quite as large and unqualified. That was a suit in equity for damages, a personal demand against the defendant; and he held that, provided an action might be maintained at law, relief could be had in equity. He remarked that it is an old head of equity, that if a party makes a representation to another person going to deal in a matter of interest on the faith of that representation, if the party who makes the representation knows it to be false, he shall make it good; and the rule equally holds, as it seems, that if he does not know whether it be true or false, if he affirms it to be true, he shall be responsible for its truth. 1 Story's Eq., § 193. And the doctrine of Lord Eldon, in this case, appears to have been fully concurred in by Chancellor Kent. *Bacon v. Bronson*, 7 Johns. Ch., 201.

§ 1144. *Where damages are the sole object of the suit, and the remedy at law is complete, courts of equity will not take jurisdiction, although the cause originates in fraud. It is otherwise where damages are only incidental.*

These are certainly very grave authorities, and they assert the jurisdiction in terms exceedingly broad and comprehensive. And yet, notwithstanding this array of imposing authority, it seems that practically the jurisdiction is

not maintained to the whole extent that is apparently claimed by them. The right to relief in equity, for fraud in the sale of personal chattels, seems to be distinctly denied by Chief Baron Alexander in the case of *Newham v. May*, 13 Price, 752. "It is not," says he, "in every case of fraud that relief is to be administered in equity. In the case, for instance, of a fraudulent warranty on the sale of a horse, or any fraud in the sale of a chattel, no one, I apprehend, ever thought of filing a bill in equity." And the general terms in which the jurisdiction is claimed in the passage in *Story's Equity*, before cited, it seems must be received with considerable qualification in practice; for in a note to that section it is said that courts of equity will not *ordinarily* give relief in cases of warranties, misrepresentations and frauds in the sale of personal property. And in the second volume, in the chapter on compensation and damage (§§ 794-6), the jurisdiction of the court is stated in terms much more limited. It is there laid down as a general proposition, that courts of equity will not entertain jurisdiction over breaches of contract and other wrongs and injuries that are cognizable at law to give compensation or damages, where these are the sole objects of the bill, but only as incidental to other relief, which is sought by the bill, and may be granted by the court. For whenever the bill goes merely for damages, the remedy is perfect at law, and it is more proper that the damages should be ascertained by the jury than by the conscience of the judge. And it appears to me that Lord Eldon, in the case of *Todd v. Gee*, 17 Ves., 278-9, had materially modified the opinion expressed in the case of *Evans v. Bicknell*. The bill, in that case, prayed the specific performance of a contract, and if the defendant was unable to perform it, which was the fact, then for compensation or damages for the non-performance. Lord Eldon said that the court ought not, in a bill for specific performance, except under very special circumstances, to direct an issue or a reference to a master to ascertain the damages. That, he emphatically added, is purely law, and had no resemblance to compensation given out of the purchase money, where a party is unable completely to fulfil his contract. 2 *Story's Eq.*, § 796. Though in the former case he seems strongly to hold that, in fraud, a bill may be maintained whenever an action will lie at law. This doctrine of Lord Eldon is deliberately affirmed by Chancellor Kent, in *Kempshall v. Stone*, 5 Johns. Ch., 195, and is sanctioned in many other cases. *Clinan v. Cooke*, 1 Sch. & Lefr., 22; *Greenaway v. Adams*, 12 Ves., 401; *Russell v. Clark*, 7 Cranch, 87 (*CONTRACTS*, §§ 272-77). It is very pointedly asserted by the court of Kentucky, in *Hardwicke v. Forbes*, 1 Bibb, 212 (quoted 1 *Story's Eq.*, § 184, note). On a review of all the cases, the rule practically established seems to be, that a court of equity will not take jurisdiction of a suit for damages, when that is the sole object of the bill, and when no other relief can be given. The reason is, that in such a case the remedy is as complete and perfect at law as it is in equity. The same evidence will support the claim in both courts, and the assessing of damages is a subject more proper for the jury than for the court. But when other relief is sought by the bill, which a court of equity is alone competent to grant, and damages are claimed as incidental to relief which cannot be obtained at law, then the court, being properly in possession of the cause for the purpose of relief purely equitable, will, to prevent multiplicity of suits, proceed to determine the whole cause.

§ 1145. *Where a discovery is asked for and obtained, whether a court of equity will proceed and award damages.*

Whether, in a case of damages for fraud, where a discovery is sought and

obtained, the court will proceed to ascertain the damages on that ground alone, by directing an issue to the jury, or a reference to a master, has not perhaps been distinctly settled. The general doctrine, which is said to be pretty well established in this country, is that where the court has jurisdiction for discovery, and it is obtained, it will proceed to give relief, although the remedy at law is complete. 1 Story's Eq., § 71. It would seem to follow, that in such a case, where the court has an undoubted jurisdiction to compel a discovery, after it was obtained, that the court would, in its own way, proceed to ascertain the damages and give the relief. This seems to be a regular and necessary inference from the general doctrine. And yet it is said by a great master of equity jurisprudence that there is strong reason for declining the jurisdiction, as damages ought to be ascertained by a jury, and such cases belong appropriately to courts of law. 1 Story's Eq., § 72. But however this may be, it is clear that jurisdiction does not attach when the discovery is not obtained. In this case, the fraud is distinctly and unequivocally denied. It cannot be pretended that the bill can be maintained on any disclosure made in the answer.

§ 1146. *The effect of lapse of time as a bar to relief in equity. How far courts of equity are affected by the statutes of limitations.*

But if the jurisdiction was as indisputable as it appears to me to be questionable, my opinion is that in this case equitable relief is barred by lapse of time. It is true that proceedings in equity are not strictly within the statute of limitations, because the words of the statute apply to particular legal remedies by name, and do not therefore include proceedings in equity. But courts of equity have always held themselves bound by the spirit of the statute, and therefore, where there is a legal title and right, and it is barred at law by the statute, equity, acting in obedience to the statute, will hold it barred in equity. In the present case, the legal bar had not been fully acquired, as six years had not elapsed when the suit commenced, and it may be said, as the remedy was not barred at law, it ought to be held as not barred in equity. But this, it seems to me, would be taking an imperfect view of the effect of time on equitable remedies. Lapse of time in equity operates not only as a positive bar, extinguishing the civil title or right while it leaves the natural right to have all that effect which the law allows it (and this is the case where the court acts in obedience to the statute), but it also has an operation in cases not within the statute, so that there has always been a limitation of suits in equity of every description. It is a rule adopted by the court in the public interest and for the peace of society to discourage the litigation of stale and antiquated demands. On this principle the court refuses to interpose its extraordinary authority, unless the party prosecutes his right with reasonable diligence. If he sleeps on his rights for an unreasonable length of time the court will withhold its hand and leave him to his legal remedy. What delay will amount to what is technically called laches necessarily depends on the nature and circumstances of the case. And this principle is applied, as I understand the practical doctrine of equity, not only to cases not comprehended within the statute in any sense, that is to rights which are purely equitable and for which the forms of law afford no remedy, but rights and titles which are within the statute, and over which the court has a concurrent jurisdiction with courts of law. In these cases it not only acts in obedience to the statute denying the remedy when the statute bar is complete, but will sometimes, on its own peculiar notion of justice, decline to interpose when the prescription is not fully acquired at law. In these cases the court does not

pretend to act on the right, but is simply passive and leaves the party to pursue his legal remedy. If he sleeps on his rights until the course of events and the change of circumstances have put it out of the power of the court to administer that equality of justice between the parties which as a court of conscience it is bound to do, it will decline to act at all. In cases of concurrent jurisdiction, where a party is at liberty to apply either to the tribunals of law or equity, a court of law is bound by the letter of the statute, because the statute speaks to that court in direct and positive terms. If the prescription is full no remedy can be given, but if it wants a single day of being complete it does not exist at all, and the court *ex debito justitiæ* is bound to give the remedy. To refuse to would be a denial of justice. But it is not so in equity. The statute does not address itself to courts of equity, and therefore equity in strictness is not bound by it. But then equity is not bound to interpose at all. It is no denial of justice to leave the party to such remedy as the law will give. Equity therefore says to the suitor that while the statute bar may not be imperative, yet that in equity there is a prescription independent of the statute, not fixed to any invariable time, but depending on the nature and circumstances of the case, which may be a bar to equitable, when it would not be to legal, relief. In these cases of concurrent jurisdiction equity will not interpose with her extraordinary powers unless the matter is brought before the court in such time as will leave to it the power of adjusting all the material equities involved in the case in such a manner that while justice is done to one party injustice will not be done to another. If this cannot be done, and this is the consequence of the delay, equity will not act on the right, but leave it for the decision of law.

If this be a correct view of the practice of equity in cases of concurrent jurisdiction, as to the influence of lapse of time on equitable remedies, it will apply with great force to the facts of the present case. This was a sale of a right of pre-emption of certain lands, that is, of a chose in action. The gravamen of the bill, when reduced to its last analysis, is that the plaintiff was induced by the fraudulent misrepresentation of the defendants to pay for their right an exorbitant price. But after the purchase of the bond the plaintiff went on the land by his agent, for the purpose of satisfying himself by actual examination by a person who was well acquainted with timber lands, and after such examination deliberately made the purchase of the land. It cannot be pretended that the purchase of the land was made principally, if it was at all, on the strength of the representations and certificates of the defendants. The plaintiff chose to trust his own eyes, or those of his confidential agent, and, in fact, co-purchaser of the bond, and it was on the strength of his representations and the additional certificates he obtained that the bargain for the land was ultimately closed. It is quite clear that the plaintiff, by this bill, can claim no relief directly for damages he may have sustained by the purchase of the land. All he can pretend to is that he was induced by the fraud of the defendant to pay too much for the bond, and that, if the defendant made false representations, he is bound to make them good. My opinion is that he is too late in claiming relief for this damage in a court of equity. He should have made his claim before the right of pre-emption expired, or, if not, at least while he had a title to the land, and the power of restoring to the defendants what he received of them, that is, the right to take the land at the bond price. Instead of that, he has held the land for nearly six years, has made constant efforts to resell, demanding a higher price than he gave, has gone on to oper-

ate on the land and taken off a large quantity of the timber, has mortgaged it, and finally allowed the mortgagees to foreclose and extinguish his title. Under these circumstances, my opinion is that, even admitting the fraud (and with respect to Sanger, the only defendant who has answered, Richardson being dead and Stackpole having demurred, the evidence entirely fails, as it appears to me, in making actual fraud), but even admitting it, my opinion is that the plaintiff is barred of equitable relief by his own laches.

The result of my opinion is that the bill must be dismissed with costs for the defendant.

PETERS v. PREVOST.

(Circuit Court for New York: 1 Paine, 64-67. 1818.)

Opinion by LIVINGSTON, J.

STATEMENT OF FACTS.—This is a bill to enjoin the defendants from proceeding in certain actions of ejectment, on the ground that the parties litigating are the same; that the title of the plaintiffs and of the defendants in each cause is the same, and that the same testimony in each will be relied on. The prayer for an injunction is general to stay all the actions until the further order of the court; but the real object of the complainants appears to be to have the proceedings enjoined in some of them only, and to permit the plaintiffs at law to go on in so many as may be deemed necessary fairly to try and decide the right of the parties claiming title to the lands in question, and that all the other actions abide the event of those which may be directed to be tried.

This is neither a bill of peace, which generally lies where a right has been repeatedly tried and decided at law, to restrain further litigation, nor is it an application to have the rights of the parties determined upon issues directed by the court, to save the trouble and expense of suing a number of persons separately; but it is a prayer to consolidate actions; which it is not denied that the plaintiffs have a clear right to prosecute and have decided at law, merely on a suggestion that a multiplicity of trials will thereby be avoided and much expense saved. The attempt to obtain the interposition of a court of equity in this way is novel and of the first impression, although instances of the same nature must very frequently have occurred in this state in prosecuting actions of ejectment. The cases which have been decided on bills in the nature of bills of peace bear but little analogy to the present application. If this be a proper case for consolidation, a court of law is competent to afford relief as well in this as in other cases, and the objections which lie to its interference in this way must apply here as well as there. What right, it may be asked, has this court to say that one verdict in ejectment shall be final, when either party has a right to bring another action for the same land, and that it shall be final, not only in a particular action, but that nearly one hundred other actions shall be governed by it? And if two, three, or any other certain number, are permitted to be tried, who can say but that the verdicts may be so variant or contradictory as to leave the title as doubtful as before? In one point of view the present application is quite unnecessary. If the complainants mean to be satisfied with one verdict, and it should be against them, they can easily prevent the expense of further trials by confessing judgments in the other suits; but this must be left optional with them, as it must be with the plaintiffs at law, whether they will submit to one verdict against them, this court not having a right to impose such terms on either of them.

§ 1146a. *A court of equity will not interfere by injunction to prevent multiplicity of suits at law, there being a clear remedy at law by a rule for consolidating such suits.*

These actions of ejectment must originally have been prosecuted against the different occupants of different parcels of land, and although the landlords may have made themselves defendants in all of them, it cannot deprive the plaintiffs of the right of proceeding, as they might have done, against the original tenants. If the prevention of costs were of itself a reason for a court of equity's interposing in this way, it might encourage tenants who had no right but possession to put the owner to the trouble and expense of asserting his title in a court of justice, in hopes of discovering some defect in it, if they could force him to consolidate his actions, and thus divide the costs of only one suit among them. Upon the whole, I think it improper to allow an injunction. 1. Because the only relief which is sought by the bill, if it be proper at all, can be afforded as well at law as in this court. 2. Because the parties are much too early in making the present application. If the defendants obtain verdicts at law in four or five successive trials, I will not say that the plaintiffs might not then be perpetually enjoined from proceeding in the other actions; but, until then, each party must be left to conduct the suits in such way as they think proper, under such rules as the court where they are pending may prescribe.

§ 1147. *Application for commission to take depositions must be made in open court, when.*

The application for a commission to take depositions in Canada must be made in open court, a judge at chambers having no power to award one; nor is it necessary or proper to come into equity for it, the circuit court, sitting as a court of law, having full power to grant it. I perceive, however, no objection arising out of the war to taking out such a commission. If it be not executed in a reasonable time the court may discharge the rule and permit the plaintiffs at law to proceed.

SPEIGLE v. MEREDITH.

(Circuit Court for Indiana: 4 Bissell, 120-127. 1867.)

Opinion by McDONALD, J.

STATEMENT OF FACTS.—This is a bill to quiet title. It states that George C. Speigle and John N. Stoochle, the complainants, are citizens of Ohio; that Solomon Meredith and Ira Jarrett, two of the defendants, are citizens of the state of Indiana; and that the residence of four other defendants, to wit, William A. Johnson, Martha V. Johnson, Thomas Ray and Elizabeth Siver, is unknown. The bill also makes the Cincinnati & Chicago Railroad Company—an Indiana corporation—a defendant. The bill charges that said railroad company, in May, 1854, had occasion to borrow \$150,000, to effect which the company issued that amount of coupon bonds payable to bearer in five years with ten per cent. interest; and that to secure their payment, the company executed a deed of trust to the defendant Meredith and one William Butler, now deceased, on certain Indiana lands, in the nature of a mortgage.

The bill further charges that the deed of trust embodied a provision to the effect that whenever the railroad company should wish to make sale of any part of said lands, and should secure and surrender to the trustees to be canceled an amount of said coupon bonds equal to the appraised value of the land

so wished to be sold, then the trustees should execute a conveyance for the same to such persons as the company should designate; and that in case of the death of either of the trustees, the survivor should make such conveyance.

The bill also charges that on the 27th of July, 1866, and after the death of the trustee, Butler, the complainants were the holders and owners of \$10,500 of said coupon bonds; that on demand by them of payment, the company failed to pay these bonds for want of funds; that thereupon the company offered to sell one hundred and sixty acres of said lands for said bonds, which offer the complainants accepted, and agreed to take the land at its appraised value as provided in the deed of trust; and that accordingly the coupon bonds so held by them were delivered to the trustee, Meredith, to be canceled, and he thereupon conveyed said one hundred and sixty acres of land to them.

After making these allegations, the bill proceeds to say that the defendants, Ira Jarrett, William A. Johnson, Martha V. Johnson, Thomas Ray and Elizabeth Siver, contriving to injure the complainants, etc., claim to hold said one hundred and sixty acres of land by some pretended title from said railroad company, which is false and fictitious, and, if made at all, was made without sufficient warrant of law or other authority, and in contravention of the rights of the complainants; and that said last named defendants have forcibly taken possession of said land, and wrongfully, unlawfully, and to the great detriment of the complainants, prevent them from enjoying it, and have refused to them the possession of it, though often demanded and requested to give up the possession of the land, etc. The bill prays for the quieting of the title, the cancellation of the defendants' pretended title papers, and the surrender of the possession to them.

The defendants Jarrett, Ray, William Johnson, and Elizabeth Siver have demurred to the bill, on the ground that "said complainants have not, by their said bill, made such a case as gives the court jurisdiction of the same, or entitles them in a court of equity to any discovery," or to any relief in equity whatever.

§ 1148. *A naked power or trust must be literally followed.*

Whether this demurrer ought to be sustained is the question to be decided. 1. In support of the demurrer, it is objected that, on the face of the bill, the conveyance of the one hundred and sixty acre tract of land is void. This objection is founded in the provision in the trust deed, already noticed, that the trustee could only convey the land when the railroad company wished to "sell" it; that the power to convey was a naked power dependent on that precedent condition; that such a power must be literally followed and strictly construed; that the condition must be interpreted to mean a *sale* for cash in hand; and that the transaction stated in the bill was not a sale for cash, but a mere barter or exchange. There can be no doubt that a naked power or trust must be literally followed and strictly construed. Hill on Trustees, 478; Williams v. Peyton, 4 Wheat., 77.

§ 1149. *A power to sell lands does not necessarily mean to sell for cash only.*

But I think that, on the face of the bill, the condition, on which the trustee might, according to the deed of trust, make the conveyance, was strictly and literally followed. A sale of lands does not necessarily suppose a sale for cash. The term barter is not applied to contracts concerning land, but to such only as relate to goods and chattels. Barter is "a contract by which the parties exchange goods." Bouv. Law Dict. This transaction, therefore, was not a barter.

Now was the transaction an exchange? This term, as applied to lands, "is a mutual grant of equal interests"—"as a fee-simple for a fee-simple, a lease of twenty years for a lease of twenty years, and the like." 2 Black. Comm., 323. An exchange is a transfer of lands for lands. This, therefore, was not an exchange; for it was a transfer of lands for coupon bonds.

§ 1150. *A conveyance of lands in consideration of personal property or choses in action is literally a sale.*

There can be no doubt that a conveyance of lands in consideration of personal property or choses in action is strictly and literally a *sale*. If A. convey his farm to B. in consideration of a stock of goods, that is unquestionably a sale of the farm; and it is equally so, if the consideration be public stocks, or corporation bonds. There is nothing in this objection.

2. In support of the demurrer, it is contended that, on the face of the bill, the complainants have a complete remedy at law; and that, therefore, there is no equity jurisdiction. The bill shows that the legal title to the land in question is in the complainants. It charges that the defendants who demur have forcibly taken possession of the land, and wrongfully and unlawfully hold it against the rights of the complainants, under a false and fictitious claim of title from the railroad company. It does not in any way describe this title, nor even show that it is in writing. According to the allegations, it is really no title at all—certainly none that would be a defense in an action of ejectment. If the facts stated in the bill are true, these defendants are mere trespassers. And the question is, will a bill in equity lie against such trespassers merely because they forcibly took possession of the land and held it, as the bill states, under claim of some "false and fictitious" title?

§ 1151. *Equity will not relieve against a pretended title that can be defeated at law.*

Nothing can be better settled than the rule that equity will not take jurisdiction in a case where the complainants have a plain and complete remedy at law. And this rule is expressly declared in the sixteenth section of the judiciary act. It is equally well settled that a court of equity will not entertain a bill where the title which the complainant seeks to enforce is a merely legal one, and presents no special ground for equitable relief. *Hipp v. Babin*, 19 How., 271 (§§ 1134-36, *supra*).

But the solicitor for the complainants insists that this bill, besides setting up a legal title in them, does present special ground for equitable relief; and that this special ground is the false and pretended title claimed by the defendants. It can hardly be contended that every claim of a pretended title to land will entitle the legal owner of it to apply to equity for relief. Almost every intruder upon land pretends to some title; but it amounts to nothing, if it be false and fictitious, and if it be no defense to an action of ejectment by the legal owner. And in no such case will equity aid the holder of the legal title; for he has a plain and adequate remedy at law.

It is certainly unusual for the legal owner to sue a trespasser, who has turned him out of possession, in a court of equity, merely because the wrong-doer pretends that he has a title to the land. I doubt whether such a case can be found in the books. Perhaps a bill in equity might in such case be sustained, if it shows that the pretended title would be an obstruction to the recovery in an action of ejectment. But from anything stated in the bill it cannot be concluded that the defendants' "false and pretended" title would be any obstruction whatever to the assertion of the complainants' rights in an action at law.

§ 1152. *Equity has jurisdiction to remove a cloud from a legal title, but the bill must show that there is such a cloud and that the aid of a court of equity is necessary to remove it.*

The complainants insist, however, that equity has jurisdiction to remove a cloud from a legal title; and that for this reason the bill in question is good. It is indeed true that courts of equity often entertain jurisdiction of bills to remove clouds from legal titles. But in such cases the bill must show that there really is such a cloud, and that the aid of a court of equity is necessary to remove it. No such thing is shown by this bill. I repeat that so far as its allegations are concerned these defendants appear to be mere trespassers. And certainly the mere assertion of a trespasser in possession of lands, that he has a title thereto, does not raise such a cloud on the legal title as to justify the interference of a court of equity.

§ 1153. *A bill filed to remove a cloud from title must indicate clearly what the cloud is.*

But it is contended that, in cases where a plaintiff has occasion to state the title of the defendant, the rules of pleading do not require it to be set out with particularity, because the plaintiff is not presumed to be informed of the particulars of the defendant's title. No doubt this is the rule in pleadings at common law; and the reason of it equally applies in equity pleading. But in the case of a bill to remove a cloud from a legal title, I think that the bill must show enough to indicate plainly what that cloud is; and if it consist of a deed of conveyance, it ought, at least, to show who are the parties to it, whether it is prior or subsequent to the complainant's deed, and such other facts as will fairly indicate that it is a serious obstruction to the complainant's rights. I think the bill shows no cloud whatever on the complainants' title.

§ 1154. *Where the jurisdiction of the court depends upon the citizenship of the parties, the residence of such latter must be stated positively.*

3. There is still another fatal defect in this bill not noticed in the arguments of counsel. The bill, as we have seen, makes Meredith and the railroad company parties. But it is clear they are not necessary parties; for if every allegation in the bill were true no decree could go against them. The real parties to the case are Ira Jarrett, William A. Johnson, Martha V. Johnson, Thomas Ray and Elizabeth Siver. The bill avers that Ira Jarrett is a citizen of Indiana. But as to the four last-named defendants there is no averment of citizenship whatever. On the contrary it avers that their residence is unknown.

This is a case in which the jurisdiction of this court depends on the citizenship of the parties. In such a case the citizenship of each party must be stated positively. And the statement must be in terms conformable with those of the constitution and the judiciary act conferring the jurisdiction. *Bingham v. Cabot*, 3 Dall., 382; *Abercrombie v. Dupuis*, 1 Cranch, 343; *Wood v. Wagon*, 2 id., 9; *Capron v. Van Noorden*, id., 126; *Winchester v. Jackson*, 3 id., 514; *Hope Insurance Co. v. Boardman*, 5 id., 57; *Sullivan v. Fulton Steamboat Co.*, 6 Wheat., 450; *Breithaupt v. Bank of Georgia*, 1 Pet., 238; *Gassies v. Ballou*, 16 id., 761.

It is true that the act of congress of February 28, 1839 (5 Stat. at Large, 321), somewhat alters the rule laid down in the cases above cited, so far as concerns cases where some of the defendants do not reside in the state where the suit is brought. But that alteration does not affect the present question. The rule undoubtedly still is, that in every case in this court where its jurisdiction

depends on the citizenship of the parties, the citizenship of every necessary party must be distinctly stated in the bill or declaration; and it must appear thereby that every necessary party is capable, so far as citizenship is concerned, of suing or being sued in this court.

Nor is this rule affected by the fact that Ira Jarrett, William A. Johnson, Thomas Ray and Elizabeth Siver have appeared and demurred to this bill. In courts of general jurisdiction an appearance and demurrer commonly give jurisdiction over the person so appearing and demurring. But it is not so in the national courts, all of which are courts of limited jurisdiction. Even after a plea in bar has been filed the defendant may withdraw it and plead to the jurisdiction. *Eberly v. Moore*, 24 How., 147. And no consent of parties in such a case as this can give us jurisdiction. *Ballance v. Forsyth*, 21 How., 389.

If without objection to the jurisdiction this cause should proceed to final hearing and decree for the complainants, the decree would be erroneous and might be reversed. *McCormick v. Sullivan*, 10 Wheat., 192.

Nothing, therefore, but a statement in the pleadings of the citizenship of four of these defendants can give us jurisdiction over them. And as the charge against all the defendants against whom, under this bill, any decree could possibly be rendered, is that of a joint and wrongful trespass and possession under a joint, false and fictitious claim of title under the railroad company, jurisdiction of the case as against Jarrett alone, who is alleged to be a citizen of Indiana, could not, in my opinion, be taken for the want of the proper and necessary parties.

Unless, therefore, the complainants take leave to amend their bill, it will be dismissed without prejudice.

VAN NORDEN *v.* MORTON.

(9 Otto, 378-382. 1878.)

APPEAL from U. S. Circuit Court, District of Louisiana.

Opinion by MR. JUSTICE MILLER.

STATEMENT OF FACTS.—The complainant filed his bill addressed to the circuit court sitting in chancery, alleging that he is the owner of dredge-boat No. 3, lying in the river at New Orleans; that Morton, Bliss & Co., having obtained a judgment in the same court against the Mississippi and Mexican Gulf Ship Canal Company for over \$24,000, had issued an execution on said judgment, under which the marshal had seized dredge-boat No. 3, and had advertised to sell it to satisfy the writ; that he, and not the Ship Canal Company, is the owner of the boat; that it is not liable to be taken on said execution; that the seizure has already subjected him to a loss of \$5,000, and that his continued deprivation of its use will cause him much greater loss. He prays for process, that the judgment plaintiffs and Packard, the marshal, be made defendants, and enjoined from interfering with him in the possession of the boat; that he be quieted and maintained in his title and possession, and defendants decreed to pay him \$5,000 aforesaid as damages. A temporary injunction was granted. Answers and a replication thereto were filed, depositions and other testimony taken. On hearing, the court dissolved the injunction and dismissed the bill.

The first question we are called to consider is, whether the circuit court had jurisdiction of this suit in equity. If the case had arisen in any state where

separate jurisdiction at common law and in equity was fully recognized, there could be no difficulty in answering this question in the negative.

The remedy in all times for this trespass, which is a very common one, has been by an action of replevin to take the property out of the hands of the sheriff or marshal and return it to the owner, or to leave the officer to proceed with the sale of the property and sue him or the purchaser in trespass for its value and for any incidental damage. In the one case the party whose property was wrongfully seized recovered possession of it. In the other he recovered compensation for its loss. No case has been cited to us — we presume none can be found — where equity has interfered under such circumstances. *Watson v. Sutherland*, 5 Wall, 74, is cited by the appellant. In that case, Sutherland, the party whose goods were seized, was engaged in a successful dry-goods trade. The seizure was of all his goods, and it closed his store, and if continued would have broken up a profitable business. For this the court held that the action at law for damages could have given no adequate remedy. The equitable jurisdiction, as will be seen by an examination of the opinion of the court, rested solely on that consideration. The case, as it was, is a very close one, and its main feature is absent in the one before us. There is no reason to believe that the value of the dredge-boat would not be adequate compensation for its loss, and no such allegation is made in the bill. On the contrary, the complainant claims \$5,000 damages for the loss of its use while held by the marshal.

§ 1155. *Jurisdiction will not be taken on the equity side of a federal court when there is a remedy at law for the trespass either by replevin or in an action for damages.*

It is said, however, that the code of Louisiana does not give an action of replevin in any case, or its equivalent, and that it does give a specific remedy for cases of this class, which, in its nature, is of an equitable character, and should be administered in the federal courts on the equity side of the calendar. If the first proposition were true, there would still remain an adequate remedy by an action at law for damages. But while it is true that the Louisiana code provides no process by which, in advance of a judgment as to the right of the parties, personal property can be taken from the possession of one party and delivered to the other, it does provide the remedy of sequestration, by which the possession of the property which is the subject of the litigation may be taken by order of the court and held until the right is decided. See Sequestration, Code of Practice, arts. 269–283. Under these articles we see no reason why the complainant might not have brought suit and recovered the ultimate possession of his boat and damages for its detention.

The special provision for such cases as the present is found in article 298, paragraph 7, of the same Code of Practice. The whole of section 5 is devoted to injunctions, and a careful reading of all the subdivisions shows that the word is used as applicable to cases which are in their nature of a common law character, and that it is used as synonymous and interchangeably with prohibition. It is also authorized in some cases which with us would be undoubtedly of chancery cognizance.

§ 1156. *When a new right or remedy is granted by statute, whether it is of legal or equitable cognizance in federal courts depends on the character of the case.*

We think the rule is settled in this court that whenever a new right is granted by statute, or a new remedy for violation of an old right, or whenever such rights and remedies are dependent on state statutes or acts of congress, the

jurisdiction of such cases, as between the law side and the equity side of the federal courts, must be determined by the essential character of the case, and unless it comes within some of the recognized heads of equitable jurisdiction, it must be held to belong to the other. The case of *Thompson v. Railroad Companies*, 6 Wall., 134 (§§ 1115-19, *supra*), had been removed from the state court into the circuit court of the United States. In the latter a bill in chancery was filed and a decree rendered in favor of the complainant. On appeal, this court held that the case had no feature of equitable cognizance, and ordered it to be dismissed without prejudice. It was conceded that if the case had remained in the state court the plaintiff could have recovered.

§ 1157. *The rule as to the adoption of state remedies and practice by federal courts.*

The court said: "The remedies in the courts of the United States are, at common law or in equity, not according to the practice of the state courts, but according to the principles of common law and equity, as distinguished and defined in that country from which we derive our knowledge of these principles. And although the forms of proceedings and practice in the state courts shall have been adopted in the circuit courts of the United States, yet the adoption of the state practice must not be understood as confounding the principles of law and equity, nor as authorizing legal and equitable claims to be blended together in one suit," citing *Robinson v. Campbell*, 3 Wheat., 212, and *Bennett v. Butterworth*, 11 How., 669, to which we take leave to add *Jones v. McMasters*, 20 id., 8, and *Basey v. Gallagher*, 20 Wall., 680.

With this criterion before us, we are of opinion that the remedy provided by the code of practice of Louisiana is a simple application to the court from which the writ issued to remedy the evil of an erroneous levy of the execution. It says: "The injunction must be granted and directed against the defendant himself in the following cases: . . .

"When the sheriff, in the execution of a judgment, has seized property not belonging to the defendant, and insists on selling the same, disregarding the opposition of him who alleges that he is the real owner, or is guilty of any other act in the execution of his office."

Now, this obviously refers to the control of the court over its own officer, in the execution of its own writs, and is as applicable to other misconduct of that officer in the execution of his official duties as in cases of seizure of property not liable under an execution in his hands. The remedy needs no formal chancery proceeding, but a petition or motion, with notice to the sheriff, is not only all that is required, but is the most speedy and appropriate mode of obtaining relief.

This relief does not depend on any inadequacy of an action for damages or by sequestration. It is a short, summary proceeding before the court under whose authority the officer is acting, gives speedy relief, and is very analogous to the statutory remedy given in many of the western states in similar cases to try the right of property at the instance of the party whose property is wrongfully seized. It has no element of equitable right or procedure, and as a court of chancery the circuit court had no jurisdiction of the case.

Although the court below dismissed the bill, it was a decision on the merits, and not for want of jurisdiction. The decree recites that the case was heard on bill, answer, replication, exhibits and proofs, and on consideration thereof the bill was dismissed. This decree would be a bar to any other action which complainant might bring at law.

In accordance with the settled rule of this court, as shown in the cases above cited, of *Thompson v. Railroad Companies* and *Kendig v. Dean*, 97 U. S., 423, this decree must be reversed, and a new one entered dismissing the bill for want of jurisdiction, and without prejudice to the right of complainant to bring any action at law or other proceeding which he may be advised; and it is so ordered.

DUMONT v. FRY.

(Circuit Court for New York: 12 Federal Reporter, 21-24. 1882.)

Opinion by WALLACE, J.

STATEMENT OF FACTS.—The bill in this cause does not present a controversy which this court, sitting in equity, can entertain. It states a cause of action for which there is a plain and adequate remedy at law. The defendants have not demurred, but have answered, and do not even now raise the objection. But the court can only entertain the case made by the bill. As was said in *Washington R. R. v. Bradley*, 10 Wall., 299, 303: "It is hardly necessary to repeat the axioms in the equity law of procedure that the allegations and proofs must agree; that the court can only consider what is put in issue by the pleadings; that averments without proofs, and proofs without averments, are alike unavailing; and that the decree must conform to the scope and object of the prayer, and cannot go beyond them." Story, Eq. Pl., §§ 10, 481.

§ 1158. *The objection of an adequate remedy at law raises a jurisdictional question.*

The objection that there is an adequate remedy at law raises a jurisdictional question, and will be enforced by the court *sua sponte*, although not raised by the pleadings nor suggested by counsel. *Oelrichs v. Spain*, 15 Wall., 211 (§§ 1602-7, *infra*). Even where it is not apparent upon the face of the bill, but the bill is framed so as to avoid the point, if in looking at the proofs it appears that the case is one for which there is a plain and adequate remedy at law, it is the duty of the court to decline jurisdiction and dismiss the bill. *Lewis v. Cocks*, 23 Wall., 466 (§§ 1137-38, *supra*).

There are precedents to the effect that it is too late to raise the question when the cause has gone to a hearing and the point has not been taken by demurrer or answer, but these precedents have not been followed in the federal courts. The case of *Wylie v. Coxe*, 15 How., 415, gives a partial sanction to such a rule by declaring "that it is too late to raise such an objection on the hearing in the appellate court, unless the want of jurisdiction is apparent on the face of the bill." In the present case it is apparent on the face of the bill that the remedy is at law.

The bill alleges that the complainants are the owners of two hundred and thirty-two bonds, of \$1,000 each, issued by the city of New Orleans; that these bonds are in the possession of Fry, the trustee in bankruptcy of Schuchardt & Sons; that, although thereunto requested, Fry refuses to deliver the bonds to complainants; that Fry claims to hold the bonds as security for a pretended indebtedness owing from the assignees in bankruptcy of Caverre & Sons and from the receiver of the New Orleans Banking Association; that in fact the bonds were never hypothecated for any such indebtedness; that a sum of money is now on deposit in the Union Bank of London which belongs either to Fry or to the receiver of the New Orleans National Banking Associ-

ation, and should be applied to the reduction of the alleged indebtedness for which Fry claims to hold the bonds as security; that several other persons who are made defendants "claim to have liens upon the said bonds or some portion thereof, or claims affecting the said bonds, the exact amount whereof your orators are ignorant, and the validity of which your orators dispute." The prayer of the bill is that Fry shall be adjudged to deliver the bonds to the complainants, and that the rights of Fry and the receiver of the New Orleans Banking Company to the money in bank in London may be settled, and the deposit applied where it may belong.

§ 1159. *Where the appropriate remedy is an action at law for conversion or in replevin, equity will withdraw its jurisdiction.*

Inasmuch as the complainants do not allege that they have any interest in the controversy between Fry and the receiver of the New Orleans Banking Association as to the deposit in the London bank, or that their rights are in any manner involved in that controversy, and nothing appears by which such a conclusion is suggested or can be inferred, all the allegations in regard to that controversy, for present purposes, may be deemed eliminated from the bill. The same may be said of the allegations in regard to the claims of the other defendants. It is not alleged, and nothing in the bill authorizes the inference, that such defendants have any control over the bonds, or any apparent or colorable title thereto, or interest therein. No relief is prayed for as to such defendants. If it had been, it can hardly be supposed the court would undertake to adjudicate upon the merits of the naked assertion of these defendants.

The case made by the bill, when analyzed, resolves itself into a controversy between the complainants and the defendant Fry as to Fry's right to withhold from the complainants the bonds to which complainants have the legal title, and Fry no title whatever. This controversy is not of equitable cognizance. An action at law for conversion, or in replevin, is the plain and appropriate remedy. If, indulging in surmise, it should be assumed that the defendants other than Fry have some interest in these bonds, as between themselves and Fry, which they may be able to assert against the complainants if the complainants recover against Fry, the case is no stronger. If the complainants are the owners of property which another wrongfully withholds, their cause of action at law is not changed into one of equitable cognizance because there are other parties who may assail their title after it has been established against him who wrongfully invades it, unless there are present some of the peculiar incidents which authorize the intervention of a court of equity. *Hipp v. Babin*, 19 How., 271 (§§ 1134-36, *supra*).

The fact that Fry is sued as a trustee was suggested on the argument. The reply is, he is not sued as a trustee for the complainants, and no element of trust appears in the controversy set forth in the bill. He is sued in his representative capacity as a trustee in bankruptcy of Schuchardt & Sons, for acts for which he is liable personally, upon the theory of the bill.

Looking outside of the pleadings into the proofs, enough appears to indicate that if the complainants had asserted an equitable title to the bonds, the extent of which is to be determined by ascertaining and settling the rights of various other parties, the jurisdiction would have been properly invoked. The defendants Fry and Saborde and Reynes seem to have supposed that an answer instead of a cross-bill entitles them to affirmative relief. It is much to

be regretted that the parties, all of whom are interested in a speedy settlement of the controversy, should have been subjected to the delay and expense of this fruitless proceeding. The bill is dismissed for want of jurisdiction, without costs.

FOSTER v. SWASEY.

(Circuit Court for Massachusetts: 2 Woodbury & Minot, 217-228. 1846.)

STATEMENT OF FACTS.—The plaintiff seeks to charge defendant with the payment of a certain note which he alleges he received from defendant through his agent in part payment for a quantity of lumber. The note was made by M. M. Rice to E. Rice, and indorsed by the latter. The bill alleges that the maker and indorser are insolvent, charges fraud on the part of the defendant in representing the note as good, and that he obtained it without consideration. A discovery as to certain facts was asked for. The answer denied the allegations of the bill.

§ 1160. *Where the redress is full and appropriate at law, federal courts, sitting in chancery, cannot grant the same.*

Opinion by WOODBURY, J.

This case is one of some difficulty as to entertaining jurisdiction over it in equity, and as to the real merits between the parties. There is enough alleged to give jurisdiction, *prima facie*, by averring fraud on the part of the defendant in selling or delivering the note in part payment to the plaintiffs for this lumber, and asking for a discovery of certain material facts under oath, in order to support the charge. 1 Story, Eq. Jur., ch. 6; 6 Ves., 182; 7 Johns. Ch., 201. But after having obtained all the plaintiffs could by way of discovery, it is difficult to see much in the relief requested from the supposed fraud that could not be given at law. See cases in *Pierpont v. Fowle*, 2 Woodb. & M., 24.

In such cases in England, a court of equity will proceed further and complete the inquiries, or will send the parties to law, when the jurisdiction is there concurrent and the remedy ample, according as to its discretion may seem proper. See cases in *Pierpont v. Fowle*. Here, under the sixteenth section of the judiciary act, it has sometimes been held that a like course will be pursued (2 Mason, 270; 3 Peters, 215; 7 Cranch, 370), while at other times it has been held that the case cannot proceed in equity at all if the power is concurrent in the whole matter at law, and the relief is as full and as good in all respects. *Russell v. Clark*, 7 Cranch, 89; 1 Bald. C. C., 394; 1 Story, Eq. Jur., §§ 91, 194.

§ 1161. *Where the court has once obtained jurisdiction of a case in equity on proper grounds, it will proceed to finish it if proper grounds are set out, rather than send the parties to new actions in courts of law.*

I have been inclined to the latter opinion, and hence would not proceed to sustain jurisdiction longer in equity than to obtain the disclosure, as has been done here already, if it was not as well settled in my judgment, that having once obtained jurisdiction of a case in equity on proper grounds, and what remains to be done being still a proper subject for equity, it is taken out of the operation of the sixteenth section of the judiciary act. The court in equity may, in such a case, proceed to finish it if deemed expedient, and if a good ground in equity is set out, rather than send the parties to new actions and longer delays in the courts of law. *Warner v. Daniels*, 1 Woodb. & M., 92,

and cases there cited; 1 Wheat., 197; *Gaines v. Chew*, 2 How., 619; 9 Cranch, 493.

An additional reason for continuing to act in equity here is that some material facts have been obtained by the disclosure; and in rescinding the contract for fraud, if void, some conditions may be imposed as to the return of the note which could not be at law.

§ 1162. *Objections to a court's jurisdiction may be taken by demurrer when they appear on the face of the bill; it is not too late, however, at the hearing, if after an answer no disclosure is obtained.*

The time of taking this objection is also excepted to; but, as remarked in the case just cited, of *Pierpont v. Fowle*, it need not be by demurrer unless appearing on the face of the bill; and where a disclosure is asked as here, the court should in no case send it to law till after the answer and disclosure are completed in equity.

Continuing then to sustain jurisdiction over this case, it once having been proper for a discovery and still being a matter of fraud to be decided, over which the general jurisdiction of a court of equity is clear, the next inquiry is whether the facts disclosed in connection with the other proof show the defendant to have been guilty of fraud in disposing of this note.

The court here examined and commented upon the evidence as to the alleged fraud, and decreed as follows:

Let the decree be entered that there was fraud as to the note in controversy when sold in part payment for the lumber, and that it be restored to the defendant on his paying the amount for which it was taken by the plaintiff with interest since, and which amount and interest he is decreed to pay.

HOME INSURANCE COMPANY v. STANCHFIELD.

(Circuit Court for Minnesota: 1 Dillon, 424-438; 2 Abbott, 1-14. 1870.)

Opinion by DILLON, J.

STATEMENT OF FACTS.—This is a bill in equity by the Home Insurance Company, of New York, to cancel a policy of insurance against fire, issued by them to the respondent, Stanchfield, and for an injunction to restrain him from commencing any action thereon. The policy was in the usual form of such instruments, and by its terms was to continue in force for *one year*, or until December 15, 1869. In November, 1869, the building covered by the policy was consumed by fire, and in the March succeeding, the present bill was exhibited. The nature of the bill appears above; and it is, in substance, one to have the policy declared void because it was procured by the assured by means of false and fraudulent representations. A temporary injunction to restrain the respondents from commencing any action on the policy was allowed before answer. On the coming in of the answer, which denies the alleged fraud and fraudulent representations, a motion is made to have the order for the injunction vacated; and it is this motion which was argued by counsel and which the court is now to decide. But the solicitors for both parties desired the questions arising on the bill and answer to be disposed of on their merits, and to have the court determine whether bills like the present one are maintainable in equity, when the fraud alleged as a ground for the cancellation of the policy is available to the company as a defense to an action on the policy, and constitutes, if proved, a complete defense thereto.

Under the full denials in the answer of the fraud charged in the bill, there would be little hesitation in holding that the injunction ought to be dissolved; but though dissolved, the bill would yet be pending, and the question as to the right to maintain such a bill would still remain to be determined.

The complainant's solicitor maintains that the bill is sustainable upon two grounds: 1. Because a discovery is sought, and relief consequent upon the discovery. 2. Because courts of equity have jurisdiction concurrent with courts of law in matters of fraud, and will, in all cases, set aside agreements obtained by means of false and fraudulent representations.

§ 1163. *Where the parties may be compelled to testify, it is doubtful whether a bill merely to obtain a discovery in aid of another action or defense ought to be sustained.*

Of these grounds in their order; and first as to the discovery. This is not a bill for discovery in aid of a suit or defense at law; and it is a bill of discovery only in the same general sense that every bill is such which seeks an answer from the defendant under oath. It is simply a bill calling for an answer under oath, and praying that a policy of insurance be set aside because it was procured by fraud. Bills of discovery had their origin at a time when *at law* a party was not entitled to and could not obtain the evidence of his adversary. By the legislation of Minnesota (Stat. 1866, 520) and by that of congress (Act of July 6, 1862, 12 Stat. at L., 588; Act of July 2, 1864, 13 id., 351), parties to suits at law, in equity and admiralty, are not only permitted to testify in their own behalf, but compellable to testify at the instance of the adverse party. The effect of this legislation is to remove the grounds or reasons which originally existed for bills of discovery; and it may admit of doubt whether a bill merely to obtain a discovery in aid of another action or defense ought longer to be sustained; but this is a point not now necessary to be determined. If the present bill be treated as one for discovery and relief, and as one where the necessity of obtaining a discovery is the ground of equity jurisdiction, the discovery sought has failed, for the answer denies all the essential averments of the bill charging fraud, and where this is the result the bill must be dismissed.

Speaking of such a case, Mr. Justice Story says: "If the discovery is totally denied by the answer, the bill must be dismissed, and the relief denied, although there might be other evidence sufficient to establish a title to relief; for the subject-matter is, under such circumstances, exclusively remediable at law." Story, Eq. Jur., § 691; id., §§ 74, 690. As to the first ground of equitable jurisdiction, viz., the necessity of a discovery from the defendant, it fails, because the complainant has failed to obtain the discovery which he sought. *Brown v. Swann*, 10 Pet., 497; *Russell v. Clark*, 7 Cranch, 69, 89 (CONTRACTS, §§ 272-77); *Young v. Colt*, 2 Blatch., 373 (§§ 2129-32, *infra*).

We are thus brought to the main question argued by counsel, viz.: Whether equity will entertain a bill to cancel a fire policy, filed *after* a loss has happened, where the foundation for the relief sought is the fraudulent representations of the assured in procuring the policy, with respect to the property, its ownership, value, the state of the incumbrances, etc., when such fraudulent representations are a good defense at law to an action on the policy, and available, as such, to the company.

If such a bill will lie, the present suit having been brought, and properly brought, the assured would not be allowed afterwards to sue at law on the policy, pending the equity suit to cancel it; and hence an injunction to restrain

the commencement of such an action, if threatened, would be proper. But if, on the other hand, equity will not entertain such a bill as the present, of course the injunction should not have been allowed, and ought to be dissolved.

The injunction feature of the present suit is thus dependent upon the principal inquiry before us, and we shall give no separate consideration to it. The policy to which this suit relates contains two provisions, usual in such instruments, to which reference may be made, as bearing upon the question to be decided. One is that the loss, if any happens, is not payable *immediately*, but only after the preliminary proofs required by the policy are furnished. The other is, "that no suit or action of any kind against said company, for the recovery of any claim upon, under or by virtue of this policy, shall be sustainable in any court of law or chancery, unless such suit or action shall be commenced within the term of *twelve months* next after any loss or damage shall occur," etc.

§ 1164. *A condition in an insurance policy requiring an action to be brought within a given time is binding.*

It may be here remarked that it is settled law that a condition in a policy requiring any action to be brought within a limited and specified time is valid and binding. *Ripley v. Aetna Ins. Co.*, 30 N. Y., 136; *Roach v. New York Ins. Co.*, id., 546; *Carter v. Insurance Co.*, 12 Ia., 287; *Gray v. Hartford Ins. Co.*, 1 Blatch., 280. It is our opinion that the present bill sets forth no sufficient grounds for equitable interference; and we now proceed to state the reasons on which this opinion rests.

§ 1165. *Where the law affords a full, complete and adequate remedy, equity will not interfere.*

No principle is more familiar than the one that where the law affords a full, complete and adequate remedy, equity will not interfere. "Chancery," says Lord Bacon, "is ordained to supply the law, not to subvert the law." 4 Bac. Works, 488. In other words, the parties must litigate in the law courts, unless there are good or legal reasons for invoking the aid of equity. This principle or rule must have full effect given to it in the courts of the Union, for it is recognized by the constitution and by the judiciary act. The constitution declares that "in suits at common law . . . the right of trial by jury shall be preserved." Const. Amend., art. VII. And the judiciary act, in terms, provides that "suits in equity shall not be sustained in either of the courts of the United States in any case where plain, adequate and complete remedy can be had at law." 1 Stat. at L., 82, § 10.

In the case before us no reason is set forth in the bill showing that the insurance company needs the aid of a court of equity to relieve itself of liability on the policy. Before the bill was filed the loss had happened. By the terms of the policy the assured is bound to sue within a year, or be forever barred. The bill alleges that he is about to bring an action on the policy. If the facts averred in the bill are true, they constitute a complete defense to such an action, and nothing is set forth showing that any obstacles stand in the way of making this defense at law. If no loss had happened, and especially if the policy were one having many years to run, such as life policies, there would seem to be a necessity to sustain a resort to equity to cancel the contract, where it had been procured by fraud. But such is not the case now before the court. There are, however, other and perhaps more satisfactory grounds for not entertaining the present bill. The bill is one to have a contract made between the parties decreed to be delivered up to be canceled.

This cannot be done without wholly taking the matter out of the law courts, and cutting off all actions in those courts. If this bill is not sustained, the parties are simply left to their legal rights and remedies. If no hardship, no injustice, will result, and no necessity appears for not leaving the parties to their rights and remedies at law, equity will leave them there. Now, it is well settled, to use the language of Mr. Justice Story, that an application to equity, to have "instruments canceled or delivered up, is not, strictly speaking, a matter of right, . . . but of sound discretion, to be exercised by the court, either in granting or refusing the relief prayed, according to its own notion of what is reasonable and proper under all the circumstances of the particular case." 2 Story, Eq. Jur., § 693.

Chancellor Kent, in holding that a court of equity had full power to order instruments to be delivered up, whether void or not at law, and even if void on their face, after reviewing some of the leading English cases, says: "But, while I assert the authority of the court to sustain such bills, I am not to be understood as encouraging applications where the fitness of the exercise of the power of the court is not pretty strongly displayed. Perhaps," he adds, "the cases may all be reconciled on the general principle that the exercise of this power is to be regulated by sound discretion, as the circumstances of the individual case may dictate; *and that the resort to equity, to be sustained, must be expedient*, either because the instrument is liable to abuse from its negotiable nature, or because the defense, not arising on its face, may be difficult or uncertain at law, or from some other special circumstances peculiar to the case, and rendering a resort here highly proper and clear of all suspicion of any design to promote expense and litigation." *Hamilton v. Cummings*, 1 Johns. Ch., 517, 523, referred to by Marshall, Ch. J., in *Peirsoll v. Elliott*, 6 Pet., 95 (§ 812, *supra*).

Applying these principles to the present case, we do not deny that equity has jurisdiction, by reason of the fraud alleged, to entertain the suit, but are of opinion that it is inexpedient to exercise it under the case made by the bill. To leave the parties to their remedy at law seems to be a more reasonable and proper exercise of the discretion which the court has in bills to cancel contracts, than to retain the bill and exercise the authority asked. Because,

1. The company has a full, plain and perfect defense to the policy at law, and no reason is shown why a resort to equity is either necessary, expedient, or proper.

2. Action at law on the policy must (as we have seen) be brought in a short, limited time after the loss. In the present case, only about seven months remained to the assured, and the bill alleges that he was about to bring suit; the purpose of the present bill is, therefore, manifest, viz.: to force the assured to litigate in equity instead of at law, thereby depriving the party of the right to a trial by jury.

3. If the bill be entertained because the insurance company has the right to resort to equity, then all similar bills must likewise be entertained in equity, and this gives the companies the advantage of a choice of forum. If the company prefers to litigate in equity, it will file its bill before the preliminary proofs are furnished, and thus compel the assured to settle the controversy in that court. If, on the other hand, the company prefers to litigate at law, it will simply omit to file a bill, and await the action of the assured, who, unless there is some special ground for going into equity, must be content with his legal remedies.

4. The effect of sustaining the present resort to equity would be to transfer the great bulk of all litigation arising out of losses under policies from the courts of law into the courts of equity. The business of insurance is now almost wholly carried on by companies of large capital, and these are, in most instances, foreign corporations. From the supposed sympathy of jurors in favor of the assured as against the insurance company, and from the supposed even-handed impartiality of the judge, it is not difficult to see that companies, having the choice of courts, would prefer the equitable to the legal forum in almost all cases. And the court must say that it is the result of its experience in the trial of insurance cases, that the fears which the companies entertain as to the sympathy of the jurors in favor of the assured, have, by far, too much foundation. But the remedy lies in the more liberal exercise by the common law courts of the duty to grant new trials where verdicts are clearly wrong, and not in an extension of equity cognizance over controversies and issues in their nature essentially legal.

Having discussed the case on principle, it is due to its intrinsic importance, as well as to the importance which counsel attach to it, and the care with which they have prepared their arguments, that we should also examine it in the light of authority. All the cases referred to by counsel and others have been examined. Many of them are meagerly reported, and very unsatisfactory, and some of them conflicting. The result of the examination is the belief that the weight of modern judicial opinion is in favor of rather than against the views above expressed.

It may be admitted that the early English cases below mentioned would favor the retention of the present bill, for equity seems then to have exercised a very free jurisdiction, and to have canceled policies with a liberal hand, even where there was a complete remedy or defense at law. Referring to this, Sir James Mansfield, Ch. J., in a case before him, said: "Courts of equity formerly exercised an odd jurisdiction on this subject" (*Cousins v. Nantes*, 3 Taunt., 517); "alluding perhaps," says Mr. Phillips, who quotes the passage, "to cases of interference by equity courts where there was an adequate remedy at law." 2 Phill. Ins., pl. 1933.

But at the present day insurance contracts are regarded by the courts as standing upon the same footing with other contracts, and there must be some good reason for a resort to equity with respect to them, else the parties, both insurer and insured, must remain satisfied with their legal remedies.

The true doctrine is stated by Mr. Phillips (2 Phill. Ins., pl. 1933). He says: "Courts of law have the usual jurisdiction upon policies of insurance." After noticing the former course of the equity courts, he adds: "The limits of the jurisdiction in law and equity in respect to policies are now as well settled as in respect to any other species of contracts, the general jurisdiction being in the courts of law, with exceptions upon the same grounds as other contracts." It is proper to observe that he subsequently says: "A court of equity is the proper tribunal to which to apply to compel the assured to surrender a policy fraudulently obtained." *Id.*, pl. 1938. And Mr. Angell adopts his language. *Fire Ins.*, § 384. The material cases referred to by these authors, together with other cases, will now be briefly noticed in the order of their occurrence.

In *Whittingham v. Thornburgh*, 2 Vern. Ch., 206, A. D. 1690; S. C., 3 Eq. Cas. Abr., 635, a life policy was obtained by fraud. After the loss the court ordered the policy to be delivered up to be canceled, and a perpetual injunction against the verdict obtained thereon at law. This case is very briefly

reported, occupying but a few lines. The grounds on which equity interfered, not only with the policy but with the verdict at law, are not stated. No point appears to have been made upon the jurisdiction in equity. In the report in 3 Eq. Cas. Abr., *supra*, it is said the answer confessed the fraud. In *Goddart v. Garret*, 1 Eq. Cas. Abr., 371, A. D. 1692; S. C., 2 Vern. Ch., 269, which was a bill to have a marine policy delivered up because the insured had no interest in the property covered by the policy, the court made a decree as prayed, although there appears no reason why the defense was not open to the insurer at law. No question is made or discussed as to the ground of equitable interference; and this was the case cited by counsel when Mansfield, Ch. J., made the observation above quoted from 3 Taunt., 517, as to the odd jurisdiction formerly exercised by equity over policies of insurance. In *De Costa v. Scandret*, 2 P. Wms., 170; S. C., 3 Eq. Cas. Abr., 636, A. D. 1723, the assured fraudulently concealed from the underwriter information which he had that his ship was in danger. Without anything being said, in the very brief report of the case, about jurisdiction, Lord Macclesfield, on a bill for injunction (against what does not appear) and relief, decreed the policy to be delivered up with costs. In *French v. Connelly*, 2 Anst., 454, 1794, which was a bill by underwriters for an injunction to restrain a suit at law, and for discovery and relief from the policy because obtained by fraud, the court overruled a general demurrer to the bill, and properly enough, for at all events the underwriters were entitled to a discovery to aid the defense at law. The next case which it is deemed necessary to notice is that of *Duncan v. Worrall*, 10 Price (Exch.), 31, 1821. In this case a bill by the underwriters for an injunction against an action at law on the policy, and to have the same canceled because of false and fraudulent representations as to the neutral character of the property insured, "was dismissed on the ground that it was founded on matters which, if true, afforded a defense to the action at law, and therefore there was no equity on the part of the plaintiff to warrant the interference of the court of equity."

The Lord Chief Baron Richards alludes, in strong language, to his experience of over forty years respecting bills to stay actions on policies and to cancel them; said he had never known one to have been brought to a hearing, and observed: "That Lord Chief Baron Eyre, who was always, we know, considered a strong-headed man, used to say that he considered bills for discovery and injunction by underwriters, in these cases, as being filed, for the most part, merely with a fraudulent intention to create delay; and I never remember one to have been acted on further than the dissolving the injunction."

Fenn v. Craig, 3 Younge & C., 216, 1838, also occurred in the exchequer in equity. It was a bill by a life insurance company to cancel a policy on the life of a third person, obtained by the defendant by fraudulent representations as to the habits of the assured. The bill was filed promptly the next year after the insurance was made, and *before the death occurred*. It was held on demurrer that the bill would lie, Alderson, Baron, observing that the equity was strengthened because suit was brought in the life-time of the person who was insured. This was right, and is not in conflict with the views expressed in the foregoing opinion, but rather coincident with them.

Thornton v. Knight, 16 Sim., 508, 1849, holds that, even after a verdict at law against a policy, equity will not entertain a bill to cancel it unless some equitable ground be shown, such as fraud. In *India, etc., Co. v. Dalby*, 7 Eng.

L. & Eq., 250, 1851, the vice-chancellor, on a bill to restrain an action at law, overruled a demurrer to the bill on the ground that there was an *equity* stated against the action. It is not readily perceived what equity was stated not available as a defense to the law action; but if an equity was alleged, the case is consistent with correct principle, viz., that equity will not interfere except where the remedy at law is inadequate, difficult or uncertain.

The foregoing are the leading adjudications on the subject under consideration in England, and it is quite a significant circumstance against the present bill, that the American reports do not show that any similar bill has been filed.

The cases in the English books show that, when bills are entertained, injunctions are refused or dissolved, thus leaving the real litigation to be had at law. If the verdict is for the policy, of course the bill is dismissed. If against it, then the bill may be brought to a hearing, and the court will, in proper cases, order the policy to be surrendered — an order which, after such a verdict, is quite unnecessary and useless. The English cases referred to are not, as before observed, very satisfactorily reasoned, and are not free from conflict. The old cases are entitled to very little respect as authority, and the modern ones tend to show that equity will not oust the law jurisdiction or interfere with the legal remedies where there is a full defense at law, and no obstacle in the way of making it. Insurance contracts should stand upon the same footing as other contracts with respect to equity interference, else we have an anomaly in the law without any reason to justify it. The result is that the motion to dissolve the injunction is well taken, and must be sustained.

HUNT v. DANFORTH.

(Circuit Court for Rhode Island: 2 Curtis, 592-607. 1856.)

STATEMENT OF FACTS.—The bill in this case is filed by Mrs. Hunt, a *feme covert*, by her next friend, her husband joining in the action, to recover a sum of money which was held by the testator of the defendant, B. Anthony, in trust for Mrs. Hunt, and was a part of her separate estate. None of the statements of the bill are denied, but the bill is demurred to on grounds set forth in the opinion of the court, in which the further facts sufficiently appear.

Opinion by CURTIS, J.

Mrs. Mary Hunt, by her next friend, her husband also joining, brings this bill, against the executor of Burrington Anthony, to enforce the execution of a trust expressly declared by the latter in his life-time in her favor for her sole use. The bill is demurred to; and the first ground taken in support of the demurrer is, that as the bill shows that a liquidated sum of money is due from the estate of the testator, the remedy is exclusively at law by an action for money had and received in the joint names of the husband and wife.

§ 1166. *A suit to recover a specific sum of money due to the sole and separate use of a married woman should be brought in equity and not at law.*

The provision of the sixteenth section of the judiciary act of 1789 (1 Stat. at Large, 82), that suits in equity shall not be sustained when there is a plain, adequate and complete remedy at the common law, is merely declaratory, and made no change in equitable remedies; to bar which the remedy at law must be as efficient to secure all the equitable rights of the complainant as that in equity. *Boyce v. Grundy*, 3 Pet., 210. The right of a *feme covert* to receive and enjoy a sum of money to her separate use cannot be deemed sufficiently

protected by a suit at the common law in the joint names of her husband and herself. Such a suit reduces the chose in action to his possession, not to hers. And so far from its being the only remedy for the recovery of money due to the wife under a trust for her sole use, I apprehend a court of equity would enjoin the husband, on the application of the wife, from prosecuting such a suit, if he were to commence one. Moreover this is the case of an express trust; and though the bill avers that a particular sum was obtained by the trustee from the sale of the trust property, yet an account must be taken of the proceeds of the sale, and of any allowances claimed for the trustee by his executor.

§ 1167. *What covenants run with the land.*

The next objection is that the assignment to Anthony, in trust for the complainant, did not convey the right of the lessee to the buildings, or to be paid for them by the landlord, under the special contract contained in the lease.

I am of opinion it transferred all the rights of the lessees, and, among others, the right now in question. The covenant of the lessor to purchase the building at a valuation, or allow it to be removed, being a covenant which touched the thing demised, namely, the messuage and land, and affected its mode of occupation, was a covenant which ran with the land. It is not necessary that the particular subject of the covenant should be *in esse* to cause it to run with the land. In *Bally v. Wells*, Wilmot's Notes, 344, Lord Chief Justice Wilmot says of such covenants, if they relate to a thing not *in esse*, but yet the thing to be done be upon the land demised, as to build a new house or wall, the assignees, if named, are bound by the covenants. So a covenant to apply insurance money to rebuild runs with the land. *Vernon v. Smith*, 5 Bar. & Ald., 1. And the rules laid down in *Spenser's Case*, 5 Co., 17, lead to the same result. The right to the benefit of this covenant of the lessor, therefore, passed to the assignee by the assignment of the lease, and the money received by virtue of the covenant was received by the assignee in trust for this complainant.

§ 1168. *A representation of insolvency does not prevent foreign creditors from coming into this court to establish their claims.*

The remaining objection grows out of the fact that the estate of Burrington Anthony has been represented insolvent by the executor to the probate court of the state, and that Mrs. Hunt, the complainant, through her attorney, presented this claim to the commissioners appointed to receive and report upon claims against the estate, and it was rejected by them.

It was rightly conceded at the bar that the mere fact that an estate has been represented insolvent does not prevent citizens of other states from coming into this court to establish their claims. No state law can, *proprio vigore*, deprive this court of jurisdiction conferred by the constitution and laws of the United States. *Suydam v. Broadnax*, 14 Pet., 67, is in point, and has been affirmed by a decision made by the supreme court at the last term.

§ 1169. *How far the determination of the commissioners appointed to examine claims of creditors against insolvent estates is binding.*

But it is insisted that the jurisdiction of the commissioners was concurrent with that sought for in this case; and the complainant having voluntarily submitted to that jurisdiction, and had a decision against her, is barred. The statute of Rhode Island (Pub. Laws, 253, etc.), after providing for the appointment of commissioners to receive and examine all claims of creditors, further says (section 5) that, notwithstanding the report of the commissioners, any

creditor whose claim is wholly or in part rejected, may have the same determined at common law, in case he shall give notice thereof in writing in the clerk of probate's office, within twenty days after such report shall be received, and bring and prosecute his action as soon as may be. The seventh section provides that "when a claim shall be settled by referees, or in the course of the common law as aforesaid, execution shall not issue," etc. It thus appears, either that the only claims which could be determined by the commissioners were such as could be tried according to the course of the common law, or that their determination of all equitable claims was to be final, and no further proceeding could be had thereon before any tribunal at the instance of the claimant. It is extremely improbable that the latter was intended by the legislature. No valid reason is perceived why the claimant of an equitable right should be concluded by the report of the commissioners, when all legal rights are expressly allowed to be prosecuted before the ordinary judicial tribunals, as if no report had been made thereon.

And this improbability is greatly strengthened by the sixth section, which enacts that, "in case the executor or administrator shall be dissatisfied with any creditor's claim allowed by the commission, and shall give notice thereof in the clerk of probate's office, and also to the creditor within twenty days as aforesaid, such claim shall, by the court of probate, be stricken out of the commissioner's report." It can hardly be supposed that a creditor whose equitable claim had been disallowed was not to have power to object and prosecute further, while the administrator or executor had power to object if it was allowed, and thus annul the report in his favor; that a report, final and conclusive, upon one party should be of no avail against the simple objection of the other party. But further, suppose an equitable claim having been allowed and stricken out on the objection of the administrator; how is the creditor to proceed? The act has provided only for the trial of claims before the courts, in the course of the common law. This appears not only from the fifth section, which grants to the creditor only a right so to have his claim determined, but also from the seventh section, which regulates what is to be done when the amount of the claim shall have been ascertained; and which confirms its provisions to "claims settled in the course of the common law." So that if the commissioners have jurisdiction to decide on merely equitable claims, their report against the claimant binds him; but their report in his favor may be annulled by the objection of the administrator; and as such a claim cannot be prosecuted according to the course of the common law, it is finally defeated by that objection. No one can suppose such is the law of Rhode Island, and the only alternative is to hold that of merely equitable claims the commissioners have no jurisdiction.

Though at first view this conclusion may seem to present an anomaly in the system for the distribution of estates of persons deceased insolvent, on further consideration it will be found not of much practical importance; because a court of equity, in which alone the claims under consideration can be prosecuted, can so mould its decrees as to prevent any disturbance of the rights of other creditors, and to protect executors and administrators from exposure to injustice. I believe it to be true, also, that at the time this system was framed, merely equitable claims not cognizable at the common law were but little considered in the legislation of the state, and that it should not excite surprise that in this matter no special provision was made for them.

I am not aware that the supreme court of Rhode Island has ever considered

this question. I should have been much relieved to find that learned court had done so. In Connecticut, it was held in *Brown v. Slater*, 16 Conn., 192, that commissioners on insolvent estates have the powers of courts of equity as well as of courts of law. But the statutes conferring their power differed materially from those of Rhode Island.

Having come to the conclusion that the commissioners had not jurisdiction over a claim which cannot be prosecuted according to the course of the common law, and as this claim by a married woman in her own name, for an account of property held by a trustee for her separate use, could not be thus prosecuted, it follows that the presentation of this claim by her, and its disallowance by the commissioners, cannot affect her right to go into a court of equity for relief. If any authority be necessary in support of this last position it may be found in *Varick v. Edwards*, 1 Hoff. Ch., 412, where the vice-chancellor has carefully examined the cases. His decision, that a judgment of a court of common law, upon a claim which is exclusively of equitable cognizance, does not bar relief in equity, is supported both by authority and principle.

My opinion is, that the complainant has not submitted to a jurisdiction which could act on her claim; and that the case stands as if it had not been presented to the commissioners. The demurrer is overruled; and the defendant must answer.

KNOX v. SMITH.

(4 Howard, 208-317. 1845.)

Opinion by MR. JUSTICE McLEAN.

STATEMENT OF FACTS.—This is an appeal from the decree of the circuit court for the district of West Tennessee. In their bill, the complainants state that they recovered a judgment in the circuit court against Thomas Eckford and Probert P. Collier, for the sum of \$3,462.20, etc.; and that execution was issued the 24th of April, 1840, which, about the 18th of July ensuing, was levied on seventeen negroes and four mules; and that the marshal took a delivery bond and security, under the statute of Tennessee.

That one Peyton Smith, a citizen of the state of Tennessee, pretending to claim said property levied upon by virtue of some fraudulent deed of trust executed by Probert P. Collier to him, filed a bill, which prayed for an injunction in the circuit court, and which was refused. That the delivery bond being forfeited, an execution was issued on it against the principals and sureties, which was levied upon the same negroes and mules; upon which execution the marshal returned that "the property levied on had been taken from him by the sheriff of Tipton county, under the order of the chancery court, at Brownsville, 5th December, 1840." The bill alleges that the negroes and mules belonged to Collier, and it prays that they may be sold in satisfaction of the judgment.

§ 1170. *Seizure by a sheriff, under order of a state court, of property levied upon by and in the hands of a United States marshal, no ground for interference by a court of equity, there being a plain remedy at law.*

There is no allegation in this bill which authorizes a court of equity to take jurisdiction of the case. Fraud is not charged; nor is anything stated going to show that the remedy at law is not complete. It is stated that Peyton Smith, pretending to claim the property, after the first levy, by virtue of some

fraudulent deed of trust executed to him by Collier, applied to the circuit court, by bill, for an injunction, which was refused. The present bill was not filed by the complainants until after execution was issued on the delivery bond and levied, and the property was taken, as returned by the marshal, under state process.

Now, if the object had been to set aside the deed of trust as fraudulent, the fraud, with the facts connected with it, should have been alleged in the bill. Or, if the negroes and mules were about to be taken out of the state, and beyond the jurisdiction of the court, unless restrained by an injunction, such fact should have been stated. But the principal allegation in the bill is, that, under the state authority, the sheriff had no right to take the negroes, etc. If this be admitted, it does not follow that the remedy of the complainants is in a court of equity. On the contrary, from the showing in the bill, there is a plain remedy at law. The marshal might have brought trespass against the sheriff, or applied to the circuit court for an attachment.

Out of the answer which sets up the deed of trust, the complainants insist they are entitled to relief. Now, no relief can be given by a court of equity, except a proper case be made in the bill. The inquiry is not only whether the defendant, from his own showing or by proof, has acted unjustly and inequitably, but also, whether the complainants, by their allegations and proof, have shown that they are entitled to relief. The decree of the circuit court is affirmed, with costs.

THE MAGIC RUFFLE COMPANY v. THE ELM CITY COMPANY.

(Circuit Court for Connecticut: 14 Blatchford, 109-117. 1877.)

Opinion by SHIPMAN, J.

STATEMENT OF FACTS.—The bill of complaint herein alleged, in substance, that the plaintiffs were the owners of letters patent granted to George B. Arnold, on May 8, 1860, for a new and useful "improvement in ruffles," and that an executed agreement of license, dated February 21, 1863, was entered into between the plaintiffs and defendants, by which the former licensed the latter to manufacture and sell the ruffle then manufactured by them, and known as the double ruffle, and the latter agreed to manufacture only said ruffle, and admitted the validity of said patent. The bill also alleged that, after the date of said agreement, the defendants, in violation thereof and of said letters patent, made and sold many thousand yards of single ruffles, each of which contained the invention described and claimed in said letters patent, and prayed for a disclosure of all their gains and profits, and of the number of yards so made and sold, and that they account for and pay over such gains and profits, and also all damages which the plaintiffs had sustained by reason of the premises. The patent had expired before the bill was brought. The court was of opinion that, while the averments of the bill were sufficient to justify a court in holding, if necessary, that it was a bill for an injury to patent rights, yet it was manifest that the pleader intended to make the alleged breach of agreement the foundation of the action, and that he sought to recover damages for an injury to the plaintiffs arising out of the violation of the contract. In reply to the objection that a bill in equity, based upon the contract, could not be sustained, because for a breach of contract there was a complete and adequate remedy at law, the court held that it properly had jurisdiction of the case, inasmuch as the proper averments of the bill made it a bill for a discov-

ery, and that the ascertainment of the facts from which damages are to be estimated, in case of injury to property in letters patent, is peculiarly within the province of a court of equity, and whether having jurisdiction it would proceed to grant further and more complete relief, and what relief would be granted, were questions which could be determined after the master's report had been made. The court also found that the agreement had been broken, and that the defendants had made and sold ruffles in violation of said agreement, and which ruffles contained the improvement described and claimed in said letters patent. An interlocutory decree was passed in which it was adjudged that the plaintiffs were entitled to a discovery from the defendants of facts from which damages for the violation of said contract could be computed and ascertained, and that an account be taken by a master to ascertain and report the number of yards of ruffles made and sold by the defendants during each year between February 21, 1863, and May 8, 1874, which contained the improvement claimed in said letters patent, and to ascertain the gains and profits which had been made by the defendants during the period aforesaid from said manufacture and sale. The opinion of the court detailing the pleadings and the facts in the case at length is to be found in 13 Blatch, 151.

The master's report states that after a number of hearings and adjournments the parties "agreed upon the number of yards of ruffling manufactured and sold by the defendants, and that the gains and profits on the whole of the goods so manufactured and sold amounted to the sum of \$30,000, the agreement being made upon the basis of the facts proved in the examination of the business transacted in the years 1863 and 1864." The whole number of yards is two million three hundred and sixty-three thousand and eighty, and the number of yards of each article and the profits upon each are stated in an exhibit attached to the report. The plaintiffs now ask for a final decree for the amount which has been reported by the master. The defendants insist that inasmuch as the court has held that the violation of the agreement was the foundation of the action, and jurisdiction was obtained merely for purposes of discovery, and as the relief which is desired is simply the payment of damages for a breach of contract, the court has not jurisdiction to grant further relief. They claim that the jurisdiction which has been exercised in ordering a discovery is exhausted, and cannot empower the court to retain the case for the relief prayed for.

§ 1171. *When in a proper case a discovery has been sought and obtained, a court of equity will proceed and grant relief in damages. Cases cited.*

When a bill is brought for a discovery and for other equitable relief within the appropriate jurisdiction of a court of equity, and the ultimate object of the plaintiff is to obtain damages, in such case the court having granted a discovery will proceed and give the proper relief in damages, and not compel the plaintiff to undergo the delays and expenses of a suit at law. "The jurisdiction having once rightfully attached, it shall be made effectual for the purposes of complete relief." 1 Story's Eq. Juris., sec. 64k, 8th ed. This rule is expressed in 1 Fonblanque's Eq. (book 1, chap. 1, § 3), as follows: "The court having acquired cognizance of the suit for purposes of discovery will entertain it for the purpose of relief in most cases of fraud, account, accident and mistake," all of which are subjects of equitable jurisdiction. In some cases courts have laid down the principle more broadly, and have apparently held that when jurisdiction once attaches for discovery in any case, the court

will entertain a bill for relief, although no equitable relief is or could be sought, and where the only relief that can be granted is in damages. The cases of *Parker v. Dee* (2 Ch. Cas., 200), *Ryle v. Haggie* (1 Jac. & Walker, 234), *Armstrong v. Gilchrist* (2 Johns. Cas., 424), *King v. Baldwin* (17 Johns., 384), assert this doctrine, and the language of Ch. J. Marshall in *Russell v. Clark* (7 Cranch, 69), if interpreted literally and not in connection with the facts of the case, justifies the assertion. Other courts have disclaimed this extensive jurisdiction, and have held that where a party comes into equity for discovery merely, and this is the only ground upon which a court of equity obtains jurisdiction, and no other equitable relief is or can be sought, the case will not be retained for purposes of assessing damages, but the parties will be remitted to an action at law. In *Middletown Bank v. Russ* (3 Conn., 135), Ch. J. Hosmer says: "This brings me to consider whether a court of chancery, having taken jurisdiction for enforcing a discovery, will universally assume cognizance of the cause, settle every question which may arise, and grant ultimate relief. I have no hesitation in giving a negative to this question."

§ 1172. *Where a bill is brought for a discovery, if it is not a proper case for an account it will not be granted, although the discovery may be.*

The cases of *Hipp v. Babin*, 19 How., 271 (§§ 1134-36, *supra*), and *Ins. Co. v. Bailey*, 13 Wall., 616 (§§ 1130-33, *supra*), are illustrations of the indisposition of courts of equity to entertain jurisdiction of suits which are merely for the enforcement of a legal demand. It may be regarded as generally true, that a court of equity ought not to sustain a bill which, although it may contain matter which can give the court jurisdiction, is merely for the assessment of damages for a breach of contract (*Hatch v. Cobb*, 4 Johns. Ch., 559; *Kempshall v. Stone*, 5 Johns. Ch., 193; *Milkman v. Ordway*, 106 Mass., 232); and that where a bill is brought for discovery, in a case which is not the proper subject of an action or bill for an account, the fact that the plaintiff is entitled to a discovery does not necessarily entitle him also to an account. *Foley v. Hill*, 2 House of Lords Cases, 28; *Frietas v. Dos Santos*, 1 Y. & Jerv., 574.

§ 1173. *Where it is a proper case for discovery, and the relief to be obtained is in damages, and the ascertainment of such damages is difficult and intricate, the court will assume jurisdiction of the whole case and grant the proper relief.*

There is, however, a class of cases in which the relief to be ultimately rendered is the payment of damages alone, and where the party seeking such relief needs the aid of a court of equity for discovery, in a case which is not of trusteeship or agency, but where the ascertainment of damages is complicated and intricate, and the action at law cannot be adequately tried without great difficulty, resulting from the nature of the accounts or from other circumstances. In such cases a court of equity assumes jurisdiction of the whole case, and proceeds to a final decree upon the merits. In *Foley v. Hill* (cited *supra*), a case in which a debt against a banker for a deposit in his bank was sought to be recovered, the lord chancellor says: "It is not because you are entitled to a discovery that therefore you are entitled to an account. That is entirely a fallacy that would, if carried to the extent to which it would be carried according to the argument at the bar, make it appear that every case is matter of equitable jurisdiction, and that where a plaintiff is entitled to a demand he may come to a court of equity for discovery. But the rule is that where a case is so complicated, or where, from other circumstances, the remedy at law will not give adequate relief, there the court of equity assumes jurisdiction." To the same effect are *Corporation of Carlisle v. Wilson*, 13 Ves., 276,

and *O'Connor v. Spaight*, 1 Sch. & Lef., 305, and the principle is fully recognized in *Fowle v. Lawrason*, 5 Pet., 495.

In my opinion this case comes fully within the rule which has been considered. A discovery was certainly necessary, for the facts which are embodied in the master's report required an expenditure of much time, labor and painstaking by the defendants' treasurer before they could be stated, and it would have been impracticable to obtain them in the ordinary method of trial by jury. These facts having been thus obtained, the court is now asked to leave the parties to the remedy at law, where the main question must be, in fact, the ascertainment of damages for an injury to the patent rights of the plaintiffs, oftentimes one of the most complex and difficult questions of patent law, one which demands careful study, reflection and experience upon the part of the master; and which can often be very inadequately solved in a jury trial. The careful and accurate computation of damages in this case is a matter which will require time and labor, for, as will be seen hereafter, I do not think that all the elements from which damages are to be computed have been ascertained by the agreement of the parties.

There is another reason which induces me not to remit the parties now to an action at law. It is disclosed in the testimony taken before the master that since the commencement of this suit the defendants have gone into insolvency, and their estate is now being administered upon in the probate court under the insolvent system of this state. This creates no bar to an action at law against the defendants, but as their estate is entirely in the custody of a court for the benefit of their creditors, and a dividend can only be expected, it is for the advantage of all the parties and the creditors that the dividend should not be diminished by protracted and expensive litigation and a multiplicity of suits.

§ 1174. *Rule of damages for infringement of patent.*

It is next claimed by the plaintiffs that the report of the master discloses all the facts from which damages can be ascertained, and that, it having been agreed that the profits of the defendants upon the ruffles manufactured and sold by them were the sum of \$30,000, such sum is the measure and rule of damages. I do not understand that, in all cases and invariably, the amount of profits upon the manufactured article is the rule of damages for an infringement. *Cowing v. Rumsey*, 8 Blatch., 36; *Bell v. Daniels*, 1 Fish. Pat. Cas., 372. In this case, as was stated in the former opinion, "the Magic ruffle of the plaintiffs is an unfinished article, to be attached by the band to ladies' or children's undergarments. The Princess ruffle is a finished article, having a band with an even and finished edge, and is designed to be worn as a neck ruffle. Still, the distinguishing character of the Magic ruffle is found in the Princess ruffle." The defendants' ruffles contain the patented improvement which is embodied in the Magic ruffle; but the ruffles of the two parties are different in the eye of the trade and of the purchaser. The endeavor of the court should be to ascertain the damages which resulted to the plaintiffs from the unauthorized use of their improvement, how much the plaintiffs have lost in consequence of the violation of this contract by the manufacture and sale of the twenty-two kinds of ruffles which are mentioned in the report; and the fact that, upon the entire ruffles of the character which the defendants manufactured, they made a profit, is not sufficient to enable a court to determine that the plaintiffs suffered that amount of damages from the use of their pat-

ented improvement. *Mowry v. Whitney*, 14 Wall., 620; *Littlefield v. Perry*, 21 Wall., 205.

There should, therefore, be a reference to a master to ascertain the amount of damages which the plaintiffs have suffered in each year, from the year 1863 to 1874, from the breach of the contract by the use of the patented improvement in the manufacture of the ruffles which it has already been found were manufactured and sold by the defendants during said years.

The defendants made the point, upon the former hearing, that they had been manufacturing the Princess ruffle ever since the date of the agreement, with the knowledge and acquiescence of the plaintiffs, and were not notified that such manufacture and sale were regarded by the plaintiffs as a violation of the agreement or of the patent, until after it had expired, and about the time of the commencement of this suit; and that this claim had become stale, and should not be favored by courts of equity, by reason of the laches of the complainants in the vindication of their rights, and their acquiescence in the assertion of adverse rights. It was said, in the opinion, that, "if I was satisfied, from the evidence, that the defendants have manufactured and sold the Princess ruffle since 1862 in such quantities that the attention of the plaintiffs must have been early called to the infringement, or that they actually knew of the violation of the agreement ever since the year 1862, I should be of opinion that their delay in making known their claim was such as to prevent them from now receiving the aid of a court of equity to the extent of its powers." "This doctrine is found in the very nature and character of the jurisdiction exercised by courts of equity on this and other analogous subjects." *Wyeth v. Stone*, 1 Story, 273. There was at that time no adequate evidence of laches on the part of the plaintiffs. It now appears, from the report of the master, that two million three hundred and fifty-nine thousand and seventy-four yards of infringing ruffles were sold by the defendants from 1863 to 1874, in which amount is included one million fifty-five thousand two hundred and forty-six yards of the Princess ruffle, the one which was the principal subject of discussion upon the former hearing. The defendants renew their claim, from these facts, that there must have been laches on the part of the plaintiffs, who properly say that they have had no opportunity to introduce any testimony upon their part, because they did not know that the question of laches was to be made an issue before the master.

§ 1175. *If a master's report under an interlocutory order indicates a necessity for further investigation, it will be ordered.*

Enough is brought to the attention of the court, from the evidence properly received by the master, to show that the evidence in regard to laches was not exhausted in the proofs which were taken before the interlocutory decree. The order which has been heretofore passed being only interlocutory, if the master's report discloses facts properly heard by him upon the order of reference, which, in the opinion of the court, should be further investigated, it is competent for the court to direct such an investigation. Interlocutory orders and decrees are subject to revision until a final decree is made. *Perkins v. Four-niquet*, 6 How., 206 (APPEALS, § 339). The decree should also provide that the master should take proofs as to whether the plaintiffs have had knowledge of the manufacture and sale of said ruffles which have been manufactured and sold by the defendants in violation of said agreement, and during what period of time the plaintiffs have had such knowledge, and whether the defendants

have manufactured and sold said ruffles since 1862, in such quantities that it must have come to the attention and knowledge of the plaintiffs, or that they actually knew of such manufacture during said period.

The second exception to the master's report, in regard to the admission of patents subsequent to the plaintiffs' patent, is sustained. The master's report is confirmed, with said exception. Let a decree be passed in conformity with this opinion.

§ 1176. *In general.*—The federal courts have equitable jurisdiction when there is no plain, adequate and complete remedy at law. *Boyce v. Grundy*, 8 Pet., 210.

§ 1177. Where there exists at law a complete and adequate power, either for the prosecution of a right or the redressing of a wrong, courts of equity, with the exception of a few cases of concurrent authority, have no jurisdiction or power to act. *Magniac v. Thomson*, 15 How., 281; *Shapley v. Rangeley*,* 1 Woodb. & M., 218; *United States v. Myers*, 2 Marsh., 516 (§§ 933-41).

§ 1178. In all cases where courts of law and equity have concurrent jurisdiction, the party must seek his relief at law if the law gives him a plain, adequate and complete remedy for the wrong complained of. *Gray v. Beck*,* 6 Fed. R., 595.

§ 1179. Where a case is otherwise proper for the jurisdiction of a court of equity, it is no objection to its exercise that the plaintiff may have a remedy at law. *Harrison v. Rowan*, 4 Wash., 202.

§ 1180. That a part of the matters contained in a bill in equity are open at law is no objection to the jurisdiction of equity, where that jurisdiction is invoked for other purposes and other relief, for a discovery, for an injunction to proceedings at law, and for other general relief upon all the merits which a court of law is incompetent to administer. *Gass v. Stinson*, 2 Sumn., 453 (BONDS, §§ 716-22).

§ 1181. It is the design of the judiciary act not to permit proceedings to go on in chancery, if it turns out in the progress of the inquiry that full and adequate relief can be had at law, and therefore no necessity exists for going into equity, or, after being in, to proceed further there. *Pierpont v. Fowle*, 2 Woodb. & M., 28.

§ 1182. Where proper averments give a court of equity jurisdiction, it can, in proper cases, and will, sustain proceedings once duly begun there, though a good remedy exists at law. Much more will it be done if the relief in equity is more full or appropriate. *Almy v. Wilbur*, 3 Woodb. & M., 371.

§ 1183. Where a bill seeking discovery of facts useful in a trial at law has succeeded in material respects, the court will not dismiss the bill and leave the party to use the evidence thus obtained at law, if lapse of time or some other circumstance has rendered relief at law impracticable or defective, or so difficult as to justify the court in continuing its jurisdiction over the case. *Ibid.*

§ 1184. *Remedy at law must be effectual.*—It is settled by the supreme court, in regard to the equity jurisdiction of the courts of the United States, that, in view of the statute which declares that there shall be no remedy in equity where there is a plain, adequate and complete remedy at law, the remedy at law must be as efficient to the ends of justice and its complete and prompt administration as the remedy in equity. *Brown v. Pacific Mail Steamship Company*, 5 Blatch., 525 (§§ 1814-23); *Crane v. McCoy*,* 1 Bond, 423; *Sullivan v. Portland, etc., R. Co.*, 4 Otto, 806; *Boyce v. Grundy*, 8 Pet., 210; *Morgan v. Beloit*, 7 Wall., 618 (CORP., §§ 2177, 2178); *Bunce v. Gallagher*,* 5 Blatch., 481.

§ 1185. Although there be a remedy at law, yet if the remedy in equity is more complete, this is sufficient to sustain the jurisdiction. *Wylie v. Coxe*,* 15 How., 415.

§ 1186. The only test, to decide whether a federal court has equitable jurisdiction in a given case, is to see whether the common law side of that court furnishes an adequate remedy. It makes no difference whether, by statute, the common law courts of the state would give an equitable remedy. *Breeden v. Lee*,* 2 Hughes, 487.

§ 1187. Whenever a court of law is competent to take cognizance of a right, and has power to proceed to a final judgment, which affords a plain, adequate and complete remedy without the aid of a court of equity, a court of equity has no jurisdiction, because the defendant has a constitutional right to a trial by jury; but a court of equity may exercise jurisdiction where the remedy is doubtful, difficult, incomplete, or less efficient and practicable. *Baker v. Biddle*, Bald., 394 (§§ 884-96).

§ 1188. *Objection will be noticed by the court.*—The objection that there is an adequate remedy at law goes to the jurisdiction and will be enforced by the court *sua sponte*, though not raised by the pleadings nor suggested by the counsel. *Oelrichs v. Spain*, 15 Wall., 211 (§§ 1602-7);

Gray v. Beck, * 6 Fed. R., 595; *Curry v. McCauley*, 11 Fed. R., 365; *Sullivan v. Portland, etc.*, R. Co., 4 Otto, 806; *Morgan v. Beloit*, 7 Wall., 618 (CORP., §§ 2177-78).

§ 1189. The fact that the state laws give a legal remedy does not oust the jurisdiction of the United States courts. *Hay v. Alexandria & Washington R. Co.*, * 1 Hughes, 172; *Gordon v. Hobart*, * 2 Sumn., 405; *Breeden v. Lee*, * 2 Hughes, 487; *Mezes v. Greer*, McAL., 401; *Mayer v. Foulkrod*, 4 Wash., 349 (§§ 1120-26); *Bean v. Smith*, 2 Mason, 252; *Loring v. Downer*, * McAL., 360.

§ 1190. No law of a state can force an alien or citizen of another state, in controversies with a citizen of such state, to forego a remedy which would otherwise exist in equity under the constitution and laws of the United States. The plain, adequate and complete remedy at law spoken of in the judiciary act (1 Stat. at Large, 78) refers to the common law, and not the statutes of a state. *Cropper v. Coburn*, * 2 Curt., 465.

§ 1191. The circuit court of the United States, as a court of equity, has jurisdiction of a bill by the United States against one owing their insolvent debtor to recover the amount due them, as a priority under the act of 1799, although the statutes of the state provide a remedy at law by a creditor against the debtor of his debtor, since the remedy in equity is more complete and adequate, and the amount due is more easily ascertained there, and since the chancery jurisdiction of the courts of the United States is the same in all states. *United States v. Howland*, 4 Wheat., 108.

§ 1192. Statute declaratory.—The provision in the laws of the United States, that no suit in equity can be sustained in any case where plain, adequate and complete remedy may be had at law, is merely affirmative of the general doctrine maintained in courts of equity, and has never been construed in any way to abridge the original equity jurisdiction. *Harding v. Wheaton*, * 2 Mason, 378; *Bean v. Smith*, 2 Mason, 252; *Bunce v. Gallagher*, * 5 Blatch., 481. And it does not apply where the remedy at law is not as practical and efficient to the ends of justice and to its prompt administration as the remedy in equity. *Oelrichs v. Spain*, 15 Wall., 211 (§§ 1602-1607).

§ 1193. Setting aside satisfaction of judgments.—A party purchased certain judgments, and afterwards purchased the property of the judgment defendant, which was sold under a deed of trust, and marked his judgments satisfied. Subsequently the deed of trust and the sale under it were held void, and a bill was filed for relief on the judgments. *Held*, that the bill was properly filed, there being no adequate remedy at law. *Hay v. Alexandria & Washington R. Co.*, * 1 Hughes, 168.

§ 1194. Specific performance.—In cases of specific performance the parties are sometimes remitted to a court of law. But this is never done where the remedy is not as effectual and complete there as a chancellor can make it. *May v. Le'Claire*, * 11 Wall., 217. See CONTRACTS; LAND.

§ 1195. Where there is an adequate remedy at law, equity cannot enforce specific performance of a contract respecting a chattel. *Boundtree v. McLain, Hemp.*, 245.

§ 1196. When every part of a contract has been executed, except the payment of money, the remedy at law (if one exists) is fully adequate to the case, and equity will not enforce a specific performance. *Heine v. The Levee Commissioners*, * 1 Woods, 251.

§ 1197. Levy against wrong person.—Where the property of a non-resident is levied upon under a judgment in Virginia against another person, the federal courts will enjoin; an indemnifying bond, or a suit on the sheriff's bond, is not an adequate remedy. *Breeden v. Lee*, * 2 Hughes, 486.

§ 1198. The remedy of the holder of bonds secured by deed of trust against the trustee, for negligence, is by bill in equity and not by action at law. *Hukill v. Page*, 6 Biss., 183.

§ 1199. Complicated titles.—Courts of equity are better adapted to the settlement of questions relating to the title to land, where different titles are claimed under different patents and entries, and such questions ought to be excluded from courts of law. *Polk v. Wendal*, 9 Cr., 87.

§ 1200. Adequate remedy in damages.—Persons contracted with a railroad company to iron and equip its road, furnish all the rolling stock and locomotives, and to erect the necessary buildings, the company agreeing to obtain the right of way and have the grade ready for the iron by a certain day. The contractors were to be paid in first mortgage bonds and stock. The company having failed to locate the route and complete the grade in readiness for the work of the contractors, and being about to make a contract with others for the equipment of the road, the contractors filed a bill in equity to enforce specific performance of the contract. *Held*, that, in view of the difficulties which the court might expect in attempting to enforce the specific execution of the work in all its parts, and the fact that a remedy in damages would be just as adequate and less injurious to the defendant, a demurrer to the bill must be sustained. The court also refused to retain a bill for compensation. *Fallon v. Railroad Co.*, 1 Dill., 121 (CONTRACTS, §§ 1484-85).

§ 1201. Where a bill in equity set up certain acts of the defendant in delaying to assign a patent under an agreement to assign it, and in discouraging persons from buying the patented machines, which acts it alleged caused damage to the plaintiff, it was held that, the plaintiff's remedy by action at law in damages being adequate and complete, the damage set up was not a subject of affirmative relief in equity. *Wheeler v. Helmbold*, 5 Blatch., 508.

§ 1202. If any person or class of persons, pursuing a lawful branch of commerce upon a river within the boundaries of a state, take or exercise too exclusive or unreasonable a use or possession of the river, to the injury of persons pursuing a different branch of commerce, the law affords an adequate remedy in damages, and a court of equity will not give relief. *Heerman v. Beef Slough, etc., Co.*, 8 Biss., 834.

§ 1203. Rescission of contract.—Where a bill was brought to obtain the rescission of a contract on the ground of fraudulent representations, it was held by the supreme court that the bill could be maintained though the fraud would be a defense in an action at law. *Boyce v. Grundy*, 3 Pet., 210.

§ 1204. Where an agreement is perpetual in its character, and to keep it on foot is a fraud against parties, the only remedy is by an amendment, and this relief can only be given by a court of equity and not by a court of law. *Jones v. Bolles*, 9 Wall., 869.

§ 1205. Irregular levy of income tax.—If an assessment of income tax under the internal revenue act of July 1, 1862, is not made in such a form as to give a legal right to levy and collect the tax, the objection must be urged in a court of law and not in a court of equity. If made in a legal form, the act gives a remedy; and, failing to avail himself of this remedy, the plaintiff cannot ask relief from a court of equity, unless such failure be excused by some allegation of fraud, accident or mistake. *Magee v. Denton*, 5 Blatch., 130.

§ 1206. Violation of contract.—Where a bill in equity alleged that the defendants had violated a contract of license by manufacturing and selling a ruffle which they were not authorized to make, and which they had agreed not to make, and that the complainants had been injured by the violation, and the redress ultimately sought was payment in damages, it was held that there could not be an adequate remedy at law, as the bill alleged that the complainants did not know and could not set forth the number of yards of ruffle which had been made in violation of the patent and of the agreement, and prayed for a disclosure of the quantity which had been made and sold, and for an account, and as the ascertainment of the facts from which the damage was to be estimated was peculiarly within the province of a court of equity. *Magic Ruffle Co. v. Elm City Co.*, 13 Blatch, 151.

§ 1207. Mistake or misconduct of officers in issuing a patent.—If in issuing a patent the officers took mistaken views of the law, or drew erroneous conclusions from the evidence, or acted from imperfect views of duty, or even from corrupt motives, a court of law can afford no remedy to a party alleging that he is thereby aggrieved. He must resort to a court of equity for relief, and even there his complaint cannot be heard unless he connect himself with the original source of title, so as to be able to aver that his rights are injuriously affected by the existence of the patent; and he must possess such equities as will control the legal title in the patentee's hands. *Smelting Co. v. Kemp*, 14 Otto, 636.

§ 1208. Action on a note—Want of consideration.—Ordinarily want of consideration may be set up in an action at law on a note, but when the determination of the question of consideration depends upon the settlement of the affairs of a partnership, some of the members of which are not before the court, the defendant must resort to a court of equity for relief. *Courtright v. Burnes*, 3 McC., 60 (CHAMPERTY, §§ 11-15).

§ 1209. Pre-emption claim—Adverse claimant.—It is held that one in possession and occupancy of public land of the United States, and claiming a right to pre-empt it under the pre-emption laws, has a remedy at law against any one claiming adverse interests and interfering with his possession, and cannot maintain a bill in equity to restrain interference with his possession. *Jordan v. Updegraff*, McCahon, 108.

§ 1210. Remedy against stockholders.—That an action at law to enforce contribution against an individual stockholder may be maintained under the act by which a corporation is formed does not deprive the circuit court of the United States, as a court of equity, of jurisdiction to entertain a bill filed against numerous stockholders for discovery, account and contribution against them all. The jurisdiction is maintainable under any one of the following heads of equitable jurisdiction: discovery, account, contribution, and to prevent a multiplicity of suits. *Holmes v. Sherwood*, 3 McC., 405 (CORP., §§ 390-94).

§ 1211. Suit against remote indorser.—Under the law of Virginia, the holder of a promissory note, being unable to sue a remote indorser at law, such a suit may be maintained in equity, at least where, on account of the insolvency of the maker and the immediate indorser of the holder, payment cannot be obtained at law. The defendant has a right to insist that the other indorsers be made parties. *Riddle v. Mandeville*, 5 Cr., 322.

§ 1212. **Mortgages — Concurrent remedies.**—The election to sue at law upon a note secured by a mortgage does not make it necessary for the holder to exhaust his remedies in that forum before he can go into equity to enforce his mortgage. He may proceed at law and in equity at the same time, and until actual satisfaction of the debt has been obtained. *Ober v. Gallagher*, 3 Otto, 199 (COURTS, §§ 887-91).

§ 1213. That the evidence is merely voluminous or tedious is not a sufficient cause for removing a case from a court of law to a court of equity. *Bowen v. Chase*, 4 Otto, 812.

§ 1214. Where an action at law would be inconvenient.—Where the complainant, being the owner of a patent right, had given to the defendant a license to use the patented machine upon making weekly payments in proportion to the amount of lumber planed by the machine, and the defendant, while still using the machine, had ceased to make the weekly payments, the complainant was held entitled to a remedy in equity, on account of the inconvenience, delay and expense of a weekly suit at law. *Brooks v. Stolley*, 8 McL., 523.

§ 1215. **Suits against states.**—The fact that the eleventh amendment to the constitution interposes an obstacle to a suit at law in the courts of the United States against a state by citizens of another state does not give a court of equity jurisdiction to enforce the same contract on the pretext that there is no remedy at law. *McCauley v. Kellogg*, 2 Woods, 13.

§ 1216. **The remedy against tenants in possession of land, holding under one who is a constructive trustee, on account of a fraud committed by him, is at law, and not in equity, where they are not charged to have been parties to the fraud.** *Ringo v. Binns*, 10 Pet., 269 (§§ 643-54).

§ 1217. **Failure to defend at law.**—A suit in equity will not lie to restrain a seizure under an execution issued on a judgment at law, upon grounds which might have been urged as a defense in the action at law. So held in a case in which the judgment was against a city, and the relief by injunction was sought on the ground that the obligation on the part of the city, upon which the judgment was obtained, pledged in perpetuity to the obligee certain property, and created no other obligation, and that therefore the plaintiff in the judgment could not resort to other property of the city. *City of New Orleans v. Morris*, 8 Woods, 103.

§ 1218. **Equitable titles belong particularly to courts of equity and cannot be sent to courts of law.** The fact that the equitable title to property is in dispute is a good cause for bringing a suit in equity for partition as between heirs holding the legal title, and joining as a party defendant the person claiming the adverse equitable interest. *Lamb v. Burbank*, 1 Saw., 227.

§ 1219. Where the complainants filed a bill in equity to recover certain land in the possession of the defendants, admitting that they did not have the legal title, but claiming the equitable title, and asking the interference of a court of equity on the ground that they could not maintain an action at law, but did not state any facts going to show that the defendants were in the least affected by the equity which they set up, it was decided that the bill could not be sustained. *Young v. Porter*, 8 Woods, 342.

§ 1220. **Multiplicity of suits.**—The court refused to sustain a bill in equity on the ground of a multiplicity of suits, where only three suits were specified for that purpose in the bill, and each of these had a distinct object, was founded on a distinct ground, and was instituted by a distinct class of claimants, who had a perfect right to institute the suit they did. *Haines v. Carpenter*,*1 Otto, 254.

§ 1221. A court of equity will always interfere to prevent a multiplicity of suits, when the rights of the parties can be fairly determined by a single proceeding. Thus, where the Central Pacific Railroad Company brought a bill in equity (under a local statute allowing an action in the nature of a bill of peace without a prior judgment at law establishing the right), against numerous citizens of Nevada, to determine the estate and interest claimed by them, by purchase from the government, in the land over which the road was constructed, it was held to be no objection to the suit that there were numerous defendants claiming distinct and separate parcels by a similar title, and threatening distinct actions for injuries to their respective parcels. *Central Pacific R. Co. v. Dyer*, 1 Saw., 641.

§ 1222. **Bill for partition — Fraud — Cloud on title.**—Certain heirs of one who died seized of certain lands brought a bill in equity seeking a partition between themselves and certain other heirs, and also joining as defendant a third person who claimed an equitable interest in the premises under a fraudulent sale by one who claimed to hold a power of attorney from the deceased, the sale having been made before the deceased acquired the legal title, which was obtained by a patent from the government, and being made to those who occupied the lands in common with the deceased. It was held, upon a demurrer filed by this defendant, based upon the ground that the legal title was in the plaintiffs and they had a complete remedy at law, that, as to him, equity had jurisdiction, upon the ground that his claim was a cloud upon the title of the plaintiffs and hindered and obstructed the partition of the property between the heirs. *Lamb v. Burbank*, 1 Saw., 227.

§ 1223. Recovery of property conveyed under a will fraudulently proved.— Where a bill was filed claiming property alleged to have been conveyed by executors in a will fraudulently proved, the purchasers having notice of such fraud at the time of their purchases, the controversy being rendered complicated by the numerous parties and the various circumstances under which the purchases were made, many facts essential to the complainants' rights being within the knowledge of the defendants, and a discovery to which the complainants were entitled being prayed for, it was held that a suit at law would not give adequate relief, and that the powers of a court of chancery were required to do complete justice. *Gaines v. Mausseaux*, 1 Woods, 118.

§ 1224. Relief of judgment creditor.— After a creditor has issued execution against the principal debtor and obtained nothing, it cannot be objected to a suit in equity against a guarantor that there is a remedy at law against the principal debtor. *Railroad Company v. Howard*, 7 Wall., 393 (Conv., §§ 1848-54).

§ 1225. In a judgment creditor's suit to enforce the payment of the creditor's demand out of the equitable assets and interests of the defendant which are not subject to execution at law, the precise ground of relief is, that a court of equity can enforce the remedy sought, while a court of law cannot; and in such suits the court ought not to allow the parties to go through a long course of expensive litigation, when it is apparent that it must be fruitless in its result. *Winans v. McKean Railroad and Navigation Co.*, 6 Blatch., 215.

§ 1226. Where the objections to a tax deed consist in the want of conformity to the requirements of the statute in the proceedings at the sale preliminary to it, or in the assessment of the tax, or in any like particulars, they may be urged at law in an action of ejectment. But where the sale is not open to objections of this nature, but is impeached for fraud or unfair practices of officer or purchaser, to the prejudice of the owner, a court of equity is the proper tribunal to afford relief. It was so held in a case where competition at the sale was prevented by the fraudulent declaration of the purchaser, made to effect that purpose, that the complainant would redeem the land from the purchasers. *Slater v. Maxwell*, 6 Wall., 268.

§ 1227. In cases of fraud, in the sale of real estate, when a court of equity can set aside the sale, and a court of law cannot, the jurisdiction of the former is generally held to be clear. *Warner v. Daniels*, 1 Woodb. & M., 90.

§ 1228. Claim for damages.— Where the entire ground for equitable relief fails, the bill cannot be retained to recover damages. If the plaintiffs have a claim for damages, they must sue at law. *Dakin v. Union Pacific R'y Co.*, 5 Fed. R., 665.

§ 1229. Settling aside sale of goods.— A purchaser of goods seeking to set aside the contract of purchase, in equity, should offer to return the articles, and not sell them, and then come into equity for damages, since there is a complete remedy at law for the recovery of the damages. *Simpson v. Wiggin*, 3 Woodb. & M., 413.

§ 1230. Infringement of copyright.— Where a bill in equity was filed for an injunction against the infringement of a copyright, for certain disclosures relating to the title and printing and sale of the books, and for an account for the proceeds of sales already made, the fact that the title to the copyright under a contract of sale was in dispute was held not to make it necessary to send the parties to law to settle the title. *Pierpont v. Fowle*, 2 Woodb. & M., 23.

§ 1231. It cannot be said that the remedy at law is as appropriate and efficient, where the bill in equity seeks to enjoin a sale of books which infringes the plaintiff's copyright, and a disclosure as to the title, printing, and sale of the books, and also an account for the proceeds of sales already made. *Ibid.*

§ 1232. Where a case has been tried at law.— Although a court of equity has concurrent jurisdiction with a court of law in case of fraud, yet, where the case has already been tried at law, it cannot be afterwards brought into a court of equity, without the existence of some additional ground of equity jurisdiction. *Smith v. McIver*, 9 Wheat., 532.

§ 1233. Rescission of contracts.— It is no objection to the jurisdiction of equity to rescind a contract for fraud, that there is a remedy at law on a written warranty against one of the respondents, who is insolvent, there being no such remedy against the others. *Smith v. Babcock*, 2 Woodb. & M., 246.

§ 1234. Trusts.— Where there is a trust expressly created by deed of the debtor in which the creditor is *cestui que trust*, the remedy at law does not prevent a suit in equity to enforce the trust. *United States v. Myers*, 2 Marsh., 516 (§§ 938-41).

§ 1235. Infringement of patent.— Chancery has no jurisdiction of a suit for the infringement of a patent where there is an adequate remedy at law. But where, from assignments and re-assignments of the patent, it is doubtful whether an action at law can be brought so as to obtain relief for the injury complained of, the jurisdiction of chancery may be sustained. *Bicknell v. Todd*, 5 McL., 236.

§ 1236. An assignee in bankruptcy cannot maintain a suit in equity to recover a sum of money or the value of personal property transferred by the bankrupt in fraud of his creditors. The remedy is at law. *Gray v. Beck*, * 6 Fed. R., 595.

§ 1237. A bill in equity by an assignee in bankruptcy is not demurrable on the ground that he has an adequate remedy at law, where questions of fraud, trust and partnership are involved. *Taylor v. Rosch*, * 5 N. B. R., 399.

§ 1238. Injury to ferry.—Where an injury is done to an established ferry an action at law is the appropriate remedy. But where the defendant is in possession of the ferry under color of right, and claims in virtue of a right sanctioned by public authority for nearly forty years, and this right has the proprietorship of the soil to support it, and the claim of the plaintiff is hostile to this, the relief to be given must be either an injunction against the defendant or a transfer of the receipts or ferry rights to the plaintiff, and the proper remedy is in equity, since this relief cannot be given at law. *Bowman v. Wathen*, 2 McL., 376.

§ 1239. Suit against surety—Bond canceled.—A court of equity has no jurisdiction of a suit against a surety upon a bond which has been given up and canceled by reason of the fraudulent representations of the principal, where no discovery is asked and the bond is substantially set forth in the bill. There is a complete remedy at law. *Girard Insurance Co. v. Guerard*, * 3 Woods, 427.

§ 1240. Ejectment—Bill to stay proceedings and to quiet title.—In an action of ejectment where a bill is filed to stay the proceedings and to quiet title, on the ground that there is no adequate remedy at law, the plaintiff cannot be ruled to a trial at law, without notice from the complainant in the equity bill that he insists on the trial. *Baptist Missionary Union v. Turner*, 6 McL., 43.

§ 1241. Negligence of agent.—A court of equity cannot maintain a bill for redress, in cases of loss or injury occurring to the principal, by the negligence or omission of duty of his agent. The appropriate remedy is at law for damages. *Vose v. Philbrook*, 3 Story, 335.

§ 1242. Recovery of land—Equitable title.—A court of equity will not entertain a suit to recover the possession of land where the complainant sets up an equitable title which has become merged in a grant. The title in such a case is a legal one and is enforceable in a court of law. *Preston v. Tremble*, * 7 Cr., 354.

§ 1243. Bill to enforce a decree.—A bill in chancery is not the appropriate remedy to enforce a decree in chancery for the payment of a specific sum of money. *Tilford v. Oakley*, * Hemp., 197.

§ 1244. Suit for rent—Set-off.—A suit in equity will be dismissed for want of jurisdiction where it appears that the complainant seeks to recover rent, and the defendant sets up, by way of offset, sums due for goods sold and delivered and moneys advanced, where no discovery is asked, and the items of offset are not contested. The remedy is at law. *Fowle v. Lawracon*, * 5 Pet., 495.

§ 1245. Objection may be raised at any stage.—A defendant may, at any stage of a case, rely on a want of equity in a bill on the ground that the plaintiff has a complete remedy at law. *Baker v. Biddle*, Bald., 394 (§§ 884-96).

§ 1246. Foreclosure of mortgage.—Upon a bill brought to foreclose a mortgage it appeared that the mortgagor had no title to the land upon which the mortgage was given. *Held*, that as soon as the proof showed that fact the jurisdiction of the court of equity was ousted, and that, as the remedy was at law, the bill should be dismissed without prejudice. *Dowell v. Mitchell*, * 15 Otto, 480.

§ 1247. Setting aside void sale.—A party cannot invoke the aid of equity to set aside sales of his land under proceedings which are null and void; he has an adequate remedy at law by ejectment. *McQuiddy v. Ware*, 20 Wall., 14 (§§ 149, 150).

§ 1248. Suit on injunction bond.—It cannot be objected to a suit in equity to enforce a liability for damages arising under injunction bonds, that there is an adequate and complete remedy at law, where, if judgments were recovered upon the bonds at law, a proceeding in equity would still be necessary to settle the respective rights of the several obligees to the proceeds; where a direct proceeding in equity will save time, expense and a multiplicity of suits, and settle finally the rights of all concerned in one litigation; and where, besides, there is an element of trust in the case. *Oelrichs v. Spain*, 15 Wall., 211 (§§ 1602-7).

§ 1249. Reaching assets of deceased partner.—Equity will not lend its aid to reach assets of a deceased partner in the hands of his executors when a complete, adequate and effectual remedy exists at law against surviving solvent partners. *Van Reimsdyk v. Kane*, 1 Gall., 371 (§§ 919-29).

§ 1250. Bill to compel levy of tax to pay bonds.—The remedy of the holders of city bonds, to enforce payment by the levy of a tax, is by obtaining judgment on the bonds, and then obtaining a writ of *mandamus* to the proper officers to levy the tax. This remedy at law

being plain and adequate, a bill in equity will not lie to enforce such payment. *Maenhaut v. New Orleans*, 3 Woods, 4.

§ 1251. The United States circuit court has no jurisdiction of a bill in equity brought to compel the levee commissioners to levy a tax to meet the interest due on bonds issued by them to get money for their duties. A *mandamus*, after judgment obtained, would lie to compel them to perform the ministerial portions of levying a tax. *Heine v. Levee Commissioners*,* 1 Woods, 247.

§ 1252. *Instances.*—Plaintiffs were induced to extend to Pierce a line of credit upon the representations of Sharpe that he owned a valuable farm, which he would loan to Pierce as a basis of credit, and never claim anything of Pierce in respect to it as long as he desired to hold it; and delivered the goods to Pierce upon the execution of the conveyance of the farm to Pierce and the execution of a mortgage thereon. At the same time Sharpe secretly took judgment notes from Pierce for the farm, and, after placing them in judgment, levied executions upon the very goods which plaintiffs had sold to Pierce. The farm was not worth more than one-third of what Sharpe represented it to be, or of the amount of the judgment notes. Plaintiffs brought an action of deceit, attached the goods already in the hands of the sheriff under Sharpe's executions, and also filed a bill in equity setting forth the facts, and praying that Sharpe's executions be adjudged fraudulent and void as against the plaintiffs, and be postponed in payment to the attachments of the plaintiffs, and that Sharpe be enjoined from selling under the executions, and for a receiver, and for general relief. It was held to be a proper case for relief in equity, against the objection that there was a complete and adequate remedy at law. *Perry v. Sharpe*, 8 Fed. R., 15 (§§ 1366-67).

§ 1253. A decree in equity against a stockholder of an insolvent bank was to the effect that he was liable on his subscription to the capital stock in a certain amount, and that he should pay, by way of contribution, with other stockholders similarly liable, such amount, not exceeding the said sum, as, with the other funds, would pay the debts of the bank. Upon a bill in equity to enforce this decree, it was held that it could not be objected that there was an adequate remedy at law, as an action at law could not be maintained upon it, the sum not being certain, and a court of law having no way of making it certain, and as the bill called for a discovery by the defendant of the amount of debts and assets of the bank and the per cent. on the stock debts required to make up the deficiency. *Bank of Circleville v. Iglehart*, 6 McL., 568 (§§ 167-68).

§ 1254. The complainant brought a bill against a railroad company and a county to compel a transfer to him by the company upon its books, and an issue of certificates to him, of about \$30,000 worth of stock of the company, standing in the name of the county, and which he had purchased at an execution sale of such stock for the sum of \$50, one H. having been the plaintiff in the judgment under which the sale was made. Prior to all this the stockholders and bondholders of the company had entered into an agreement consenting to a foreclosure of a mortgage to another company, in pursuance of which they deposited their stock with a trust company and received therefor sixteen per cent. of the value thereof in money or bonds of such other company. In this state of affairs, and still prior to the suit of H., certain creditors, including H., had filed a bill attacking this arrangement as fraudulent, and had, before the issuing of the execution of H. under which the stock was sold to the complainant, obtained a decree that this sixteen per cent. should be given up by the stockholders to satisfy their claims. These claims were more than sufficient to absorb the whole of this fund. It was held that as the stock of the company, by the foreclosure and sale of its property under the mortgage, had become completely valueless, if it had not ceased to exist for any purpose except the perception of the sixteen per cent. before mentioned, and as that sixteen per cent. was entirely absorbed and taken away by the outside creditors of the company under the decree mentioned, the sale under execution was a vain and useless transaction, that the attempt to keep the stock afloat for speculative purposes was not such as to recommend it to a court of equity, and that the parties to the transaction ought to be left to their remedy at law. It was further held that if there was any contingency of obtaining the sixteen per cent. appropriated to this stock claimed by the complainant, his equity, which was based upon a mere hazard and not upon the payment of an adequate consideration, could not be treated by the court as superior to that of the county, and that he should be left to his remedy at law. *Mississippi & Missouri R. Co. v. Cromwell*,* 1 Otto, 643.

§ 1255. The treaty of September 27, 1830, with the Choctaw Indians, ceded to the United States certain territory in Mississippi. But by supplementary articles certain reservations were made to Indians by name, the right being to locate sections in any portion of the ceded territory. Assignees of one of these reservees, by a deed conveying no particular section but only the right generally, procured a patent to be issued to them by the president, for the sixteenth section in a certain township, and brought an action of ejectment therefor against trustees of school lands who claimed said section under the acts of congress of March 3, 1803, and April

21, 1806, granting to the state every sixteenth section for school purposes. The trustees then brought a bill to enjoin this proceeding, to set aside the patent and remove the incumbrance from their title, upon the ground that the patent had been procured by fraud. The charge of fraud not having been proved, it was held that the question, being one of conflicting title under the treaty on the one side, and the acts of congress on the other, was purely a question of law, and could not be determined by a court of equity. *Gaines v. Nicholson*, 9 How., 356.

§ 1256. P., as a member of a firm who were agents and factors of V., sold to C. certain merchandise consigned to the firm by V., for which C. refused to pay, claiming that one of the partners owed him. Subsequently the firm shipped certain goods to V. for sale, the proceeds to be passed to the credit of P. V. died, while a creditor of the firm on account of the transactions. After the death of P., his administratrix sued for the proceeds of this sale; and the administratrix of V. filed a bill in equity to restrain the suit at law, claiming a lien upon, or set-off against, the proceeds for the amount of the debt due from the firm, averring that P. and his firm had been negligent in not collecting the debt from C. Held, that no suit in equity could be maintained with reference to the claim for damages arising from the negligence alleged, until the claim had been reduced to a debt by an appropriate judgment. *Vose v. Philbrook*, 8 Story, 835.

§ 1257. A bill in equity by a defendant against whom a judgment in ejectment has been rendered in favor of one claiming under a prior grant, alleging that the grant under which the plaintiff claims is a pretended one, and, if genuine, does not cover the land in dispute, because it contains a larger amount within its boundaries than it calls for; that the grant is not founded on any warrants, or, if upon any, on those previously granted; that the numbers of the warrants have been inserted in the plat and certificate by the grantees since the grant issued; that it is probable that no grant ever issued, but was stolen and filled up by the grantees, of all which the plaintiff in ejectment had notice before he received his conveyance; that the plaintiff in ejectment sometimes claims under one set of warrants and sometimes under another, and has caused the grant to be registered in one way in one county and in another way in the other, and to avoid detection has torn the plat and certificate of survey from the grant; and finally that the state had no power to issue the grant, alleges no facts which are not examinable at law. In such a case it is indispensable to the jurisdiction of equity that there should be some fact which disables the party having the law in his favor from bringing his case fairly and fully before a court of law, some defect of testimony, or some disability, which a court of law cannot remove. *Smith v. McIver*, 9 Wheat., 532.

§ 1258. One who has purchased from a part of the legatees in a will their interests in the real estate out of which the legacies are payable may maintain a bill in equity against the executor or his administrators for discovery of the amount of the real estate that has been sold, and to compel an account to the complainant of his share of the proceeds. It is no objection to the jurisdiction of equity that the law affords a remedy for the recovery of a legacy, when such jurisdiction is based on the ground of discovery and account. *Mayer v. Foulkrod*, 4 Wash., 849 (§§ 1120-26).

§ 1259. A., having obtained a patent for stereotype steel plates for engraving bank notes, gave to B., his brother, a power of attorney to carry on the business of engraving; and subsequently, on his removal abroad, leased to B. all his plates and tools, the latter agreeing to conduct the business and account to the former for half the net proceeds after deducting all necessary expenses, also to keep regular accounts of the business, and surrender the tools and plates at the end of the term. A. assigned his interests to his son, and B., though making large profits, failed to account according to his agreement, and subsequently transferred all the tools and plates to another company of which he himself was a member. It was held that a bill in equity by the son of A., for discovery and account, would lie against B. and also the members of the company to which the plates and tools were transferred, notwithstanding the remedy at law on B.'s covenant. *Perkins v. Currier*, 8 Woodb. & M., 70.

§ 1260. Where in execution of a judgment at law the marshal had levied on a crop of sugar and molasses, and third persons filed an intervention and third opposition, claiming a lien or privilege on the crop superior to that of any other creditors; praying that the marshal be directed to retain the proceeds of the sale until the intervention and third opposition could be heard, and that judgment be rendered in favor of the intervenors, and directed to be paid first out of the proceeds in the hands of the marshal, it was held that these were proceedings on the common law side, and that a bill in equity was not necessary. *The Bank v. Labitut*, 1 Woods, 11.

§ 1261. An indorser, against whom a judgment has been rendered, cannot maintain a suit in equity to compel payment of the judgment out of real estate, the equitable title to which was formerly in the maker, but which has been assigned by him to the payee, who is also an indorser, and by him fraudulently (as alleged) assigned to the children of the deceased maker, when he does not allege that he has ever commenced a suit at law against the maker or payee,

nor that their estates are insolvent, nor that there is no other property which can be reached by execution, nor that he has satisfied the judgment obtained against him, nor that the assignment from the maker to the payee was fraudulent, nor seeks to charge the real estate as the property of the maker. *Coombe v. Meade*, 2 Cr. C. C., 547.

§ 1262. A bill by one claiming to be the owner of certain judgments by purchase from the respondent, and averring that the respondent has collected them and holds the money to the complainant's use, does not call for the aid of a court of equity where no discovery is prayed. The remedy is complete at law. *French v. Hay*, 22 Wall., 281 (§§ 58, 59).

§ 1263. Where an act of the legislature, declaring that certain lands are needed by a municipal corporation for an alms-house, provides that the corporation shall be seized in fee of such lands on making compensation therefor, if any change in the destination of the property, after a continuance for twenty-six years of the use of it first contemplated, raises any interest or right on the part of the original owner, his heirs or devisees, it is of an equitable character, cognizable only in chancery, and not at law. *De Varaigne v. Fox*, 2 Blatch., 95.

§ 1264. The owners of certain real estate known as the Wilson Mill Privileges formed themselves into a voluntary association, and appointed certain persons as their agents and attorneys, who, in pursuance of instructions, took charge of the property and made extensive improvements thereon, for which they were put to great personal expense and advanced large sums of money. The association ratified the acts of the agents, and was subsequently incorporated. All the property of the association was transferred to the corporation, which undertook to pay the debts and liabilities of the association. The stockholders voted to settle the accounts of the agents, and one of them was continued as the agent of the corporation. No settlement was ever made, and their assignee in bankruptcy brought a bill in equity against the corporation for that purpose. It was held to be a fit case for the interposition of a court of equity, especially as a court of law could not do justice in the matter. *Mitchell v. Great Works Milling and Manuf'g Co.*, 3 Story, 648.

§ 1265. Equity has jurisdiction of a suit between an heir at law and purchasers of the property of the deceased, where the controversy is rendered complicated by the number of the purchasers and the various circumstances under which the purchases were made, and the facts essential to the plaintiff's rights are within the knowledge of the defendants and may be proved only by their answers, and where the fraud charged against the executors in obtaining a probate of the will, and notice of such fraud to the purchasers, if established, will make the purchasers trustees of the disputed property for the heir. *Gaines v. Chew*, 2 How., 619.

§ 1266. If certain facts, essential to the merits of a claim purely legal, be exclusively within the knowledge of the party against whom the claim is asserted, he may be required in a court of chancery to disclose those facts; and the court, being thus rightly in possession of the cause, will proceed to determine the whole matter in controversy. But this rule cannot be employed as a mere pretext for bringing causes, proper for a court of law, before a court of equity. If the answer of the defendant discloses nothing, and the plaintiff supports his claim by evidence in his own possession, unaided by the confessions of the defendant, the plaintiff will be dismissed from the court of chancery, and permitted to assert his rights in a court of law. *Russell v. Clark*, 7 Cr., 69 (CONTRACTS, §§ 272-77).

§ 1267. One railroad company filed a bill in equity against several other railroad companies to enforce the obligations of a contract, part of which was a lease between the parties, and of which some of the defendants were guarantors. The contract had been performed for a time, and then the parties had failed to meet their engagements. Plaintiff asked that various restraining orders be made against some of the defendants, to prevent injustice from being done. The application was made because of the contract, and of various relations which existed between the parties; for example, the holding by some of the defendants of certain bonds which were the subject of controversy, and in relation to which the plaintiff claimed that the defendants should not be permitted, while they were under the obligations of the contract, to collect interest due upon the coupons. It was held to be a proper case for an application to a court of equity, as there might not be a full remedy in a court of law. *St. Louis & T. H. R. Co. v. Indianapolis & St. L. R. Co.*, 9 Biss., 144 (COURTS, §§ 1365-68).

§ 1268. A. was indebted to a bank upon a note discounted at the bank, and upon which B. was indorser. On the promise of B. to pay the note upon which he was indorser to the bank, A. gave to him certain bonds. A. was afterwards compelled to pay the note to the bank, and was held entitled to relief in equity against a judgment by B. on the bonds. The remedy at law was held to be inadequate, since payment of the note could not be set up as a defense to a suit upon the bonds, nor as a set-off in such suit. *Scott v. Shreeve*, 12 Wheat., 605 (BONDS, §§ 29-34).

III. INJUNCTIONS.

1. *In General.*

[See I, 4, *supra*. Also DEBTOR AND CREDITOR and PATENTS.]

SUMMARY — *Remedy at law*, §§ 1269, 1270. — *Wrongful levy*, § 1270. — *Not granted till after final hearing*, § 1271. — *Embezzlement; enjoining payment of money by bank*, § 1272. — *Protection of title and possession*, §§ 1273-1275. — *Common and special*, § 1276. — *Threatened wrong in the election of directors of a corporation*, § 1277. — *Bill to enjoin ejectment and to reform deed*, § 1278. — *Valid objection at law to municipal bonds*, §§ 1279-1281. — *Sale of property of minor; disaffirmance*, § 1282. — *To stay execution*, § 1283. — *To stay proceedings at law*, § 1284. — *Threatening to sue a showman for exhibiting without a license*, § 1285. — *Question proper to be decided in defense to the suit at law*, § 1286. — *Railroad company enjoined from interfering with telegraph*, § 1287. — *Contract calling for continuous services for a term of years*, §§ 1288, 1289. — *To control register and receiver of land office*, § 1290. — *Against state officers*, §§ 1291-1295. — *Controlling discretion of officers of executive department*, § 1296. — *Against the United States*, § 1297. — *Proceedings in state courts*, §§ 1298, 1299.

§ 1269. To deprive equity of jurisdiction to enjoin an act on the ground that a remedy for its injury may be had at law, such remedy at law must be plain and adequate; that is, as practical and efficient to the ends of justice and its prompt administration as the remedy in equity. *Watson v. Sutherland*, §§ 1900, 1901.

§ 1270. A merchant whose stock of goods in trade is levied upon as the property of the defendant in a suit between others may invoke the jurisdiction of equity to restrain the levy upon the ground that his remedy at law by an action of trespass is inadequate, since the damages recoverable in such an action would be limited to the injury done to the goods, while the injury to the business and credit of the complainant would go unredressed. *Ibid*.

§ 1271. An injunction is never granted requiring a person to do a particular thing, as to restore the possession of land, until after final hearing and decree. *Kamm v. Stark*, §§ 1302-6.

§ 1272. The clerk of the complainant had clandestinely and fraudulently, and in violation of the trust reposed in him, abstracted and appropriated to his own use money and effects of the complainant to a large amount. The clerk having a large sum to his credit in a bank, the complainant sought to enjoin the bank from paying it to him, and to restrain the clerk from receiving or transferring it, alleging that the money so deposited was the money of the complainant, or had arisen from complainant's money and property which the clerk had abstracted. The bill also alleged that the clerk had no other property and was about to remove from the district. The debt was not stated to be such an equitable debt as to justify the court in granting a *ne exeat*. It was held that, as the money was not positively alleged to be money of the complainant, and as the bank could not be considered as a trustee, the bill could not be sustained. *McKenzie v. Cowing*, §§ 1307-8.

§ 1273. Complainants alleging that they are in possession of land as tenants in fee, and that the defendants have instituted a suit to eject them from possession, upon a documentary title which is fraudulent for causes which they can only avail themselves of in equity, state a case which entitles them to the interposition of a court of equity by injunction. *Lawrence v. Bowman*, §§ 1309-13.

§ 1274. Section 254 of the practice act of California, enacting "that an action may be brought by any person in possession by himself or his tenant of real property, against any person who claims an estate or interest therein adverse to him, for the purpose of determining such adverse claim, estate or interest," is but a reiteration of general principles of equity. The fact that the assertion of the adverse interest is made in the form of an action at law does not deprive the complainant at any time after the claim is asserted of the right of vindicating his claim in opposition to the adverse one, if the circumstances are such as to authorize the court, as a court of equity, to take cognizance of the case. Nor will the court withhold from the complainant relief until he submits to judgment in the other suit. *Ibid*.

§ 1275. The defendant in an ejectment suit can maintain a bill for an injunction against the proceeding without first confessing a judgment as a prerequisite. *Ibid*.

§ 1276. In England, injunctions are common, or those which issue of course; and special, or those which issue on due notice and must rest on the circumstances of the case. This distinction does not exist in the federal courts; in this country on every application for an injunction the court has to decide whether the injunction shall issue and to what extent. *Ibid*.

§ 1277. A large part of the stock of the Pacific Mail Steamship Company was held by a firm as trustees for the owners with an irrevocable power of attorney to vote upon it, in order to create a permanent shareholding body not subject to the changes and fluctuations of the market. Certain stockholders in this company brought a bill for an injunction against its inspectors of election, and certain persons who were interested in and directors of the Atlantic Mail Steamship Company, a rival line, alleging that an election of directors was about to take place in the company in which the complainants held stock; that the defendants who were interested in the rival company had purchased stock in the Pacific company, and had also been soliciting proxies for the purpose of voting on shares of stock at such election, with a view to change the directors and control the company; that these persons intended to obtain an *ex parte* injunction from some judge or court forbidding the trustees from voting upon the stock held by them; that they intended to obtain this upon the pretense that the trustees had improperly acquired or were about to improperly make use of the stock held by them, or upon some inaccurate, partial or ill-founded statements; that such pretenses would be wholly unjust and unfounded; that the injunction would be served immediately before the election: that the effect would be to exclude the trustees from voting upon the stock held by them, whereby a minority of the stockholders would succeed in electing directors against the wishes of the majority, and that the consequences of this meditated transaction would be disastrous to the company and to the common interest of all of its shareholders. The manner in which the disasters would be brought about was pointed out with particularity. None of these allegations were denied. It was held that the case was a proper one for the interposition of equity to prevent by injunction this irreparable injury, and that the remedy at law would be inadequate and incomplete. *Brown v. Pacific Mail Steamship Company*, §§ 1314-23.

§ 1278. In 1824 A. died, having devised a piece of land to B., her mother, C., her brother, and D., her niece, "and to the survivor of them, and to the heirs and assigns of such survivor." In 1834 B. died, leaving the other two surviving; and shortly afterwards C. sold his whole interest to D., declaring in the deed that this was his purpose, but without covenants of warranty. D. subsequently married, and together with her husband conveyed to one through whom the complainant in this case claimed. D. died, leaving C. and two children surviving. C., on his death, devised the land to the husband of D. and her two children. The husband and one of the children died intestate, the latter without any and the former without other children; and the other child of D. brought ejectment for the land. The complainant brought a bill in equity praying that the plaintiff in ejectment might be enjoined from prosecuting the suit; that the deed from C. to D. might be reformed so as to effectuate the intentions of the parties, as appearing upon its face; that the plaintiff in ejectment might be compelled to release to the complainant; and for general relief. It was held that, if the bill were simply to restrain the suit at law, it would be not only necessary for the complainant to set out some ground of equitable relief, but also admit that he had no defense at law; that the question was one of proceeding, and that in all such questions it was the duty of the court to direct the course which would tend to diminish useless litigation; that, if the plaintiff should succeed in the ejectment, the equitable ground for relief would still remain to be met by him; and that, as it seemed better that all the parties should meet in a single proceeding where the whole controversy and the rights of all might be settled, the injunction should issue restraining the suit until further order. *Apgar v. Christophers*, § 1324.

§ 1279. A valid objection at law to municipal bonds, which objection has been made in a suit at law upon the bonds, can furnish no ground for the interference of equity by injunction against the judgment obtained thereon. *Town of Mount Zion v. Gillman*, §§ 1325-26.

§ 1280. Where municipal bonds have not matured and the coupons are falling due from year to year, and judgments have been rendered against the town on some of them, equity cannot enjoin further suits upon coupons as they fall due, upon the ground of preventing a multiplicity of suits. *Ibid.*

§ 1281. It is doubtful whether tax payers in a town can maintain a suit to enjoin judgments rendered against the town on the interest coupons on its bonds, where there is no charge made against the town or intimation that it has been derelict in its duty to defend the suits. *Ibid.*

§ 1282. A court of probate in Connecticut having authority, for a just and reasonable cause, to order the sale of the land of a minor on the application of the guardian, ordered such a sale to be made. The order of sale was valid, but it was defectively executed, and the deed was defective because it did not sufficiently recite the order of sale, nor the authority of the grantor, nor the notice of sale. The full value of the property was paid by the purchaser, which was received by the minor and never offered to be returned. The purchaser went into possession of the property and made valuable improvements on it, and held until many years afterward, when the minor, then of age, brought ejectment for the land. It was held that equity would aid the defective execution of such a valid power where there was no countervailing equity;

that there was no such opposing equity in this case; that the plaintiff in the ejectment should be enjoined from further prosecuting the action at law, and decreed to release and convey to the purchaser, and that there was no adequate remedy at law on the covenants in the deed. *Segee v. Thomas*, §§ 1327-38.

§ 1283. An injunction may issue to stay an execution no less than a trial or judgment. *Sawyer v. Gill*, §§ 1339-41.

§ 1284. Fraud is a ground for an injunction to stay proceedings at law; and the injunction, when proper, may go to a part or all of the proceedings as may be found necessary to defeat the fraud, or it may go only against a levy of the execution on particular goods improperly attached. *Ibid.*

§ 1285. It seems that the threatening to bring a suit at law against a showman for showing without license cannot be considered as a mischief against which an injunction may be granted. *Rogers v. City of Cincinnati*, §§ 1342-45.

§ 1286. The complainant had built a steamboat, and taken out a coasting-trade license and had the vessel enrolled under the act of congress, using the boat to exhibit a floating circus. Having moored at the public landing at Cincinnati, outside of the city, and exhibited his show, he was sued by that city for showing without license. He then brought his bill in the circuit court of the United States to enjoin this proceeding, upon the ground that the ordinance of the city under which the suit was brought was in conflict with the commercial clause of the federal constitution. It was held that as the question might be made in the suit at law, and, if decided against the complainant, taken to a higher court and thence to the supreme court of the United States, there was an adequate remedy at law. *Ibid.*

§ 1287. A railway company will be enjoined from interfering by force with the property of a telegraph company erected along and upon its line under a contract entered into between the telegraph company and the company owning the road, and acquiesced in for several years, even though the contract is one which might be declared invalid. *Western Union Telegraph Co. v. St. Joseph & Western R'y Co.*, §§ 1346-48.

§ 1288. While a court of equity will not compel a specific performance of a contract calling for continuous services, it may, nevertheless, enjoin its violation. *Ibid.*

§ 1289. In cases where a contract requires continuous services for a term of years, and the parties disagree, a court of equity may decree a dissolution of the contract upon a full settlement of their accounts and the payment of any balances, even though the contract is not absolutely void. *Ibid.*

§ 1290. A bill in equity will not lie to enjoin the register and receiver of a local land office from taking any action whatever in relation to certain lands to which the complainant claims title, and especially where the persons claiming rights in such lands are not joined as defendants. *Litchfield v. Register and Receiver*, §§ 1349-50.

§ 1291. Although a state cannot be sued by an individual without its consent, yet when a plain official duty requiring no exercise of discretion is to be performed, and such duty is threatened to be violated by some positive official act, any person who will sustain personal injury thereby, for which adequate compensation cannot be had at law, may have an injunction to prevent it. If the officer pleads the authority of an unconstitutional law for the violation of his duty, it will not prevent the issuing of the writ. It was so held where a board of liquidation, consisting of the governor and other officers of the state, were sought to be enjoined from using certain bonds for the liquidation of a certain debt. *Board of Liquidation v. McComb*, §§ 1351-53.

§ 1292. The legislature of Louisiana passed an act, called the Funding Act, creating the governor and other officers of the state into a board of liquidation, with power to issue bonds of the state to an amount not to exceed \$15,000,000, or so much thereof as might be necessary, for the purpose of consolidating and reducing the floating and bonded debt of the state. Outstanding bonds of the state and valid warrants of the auditor were the only debts provided for in this act, and they were to be exchanged for the consolidated bonds at the rate of sixty cents in consolidated bonds for \$1 in outstanding bonds and warrants. The consolidated bonds were to be issued for no other purpose. The act, and also a constitutional amendment passed at the same time, declared that the act should be a valid and inviolable contract between the state and every holder of the bonds issued under it. The act also declared that its purpose and object was to reduce the whole indebtedness of the state to a sum not exceeding \$15,000,000, and to agree with the holders of the consolidated bonds that said indebtedness should not be increased beyond that sum during a certain period. The consideration for the exchange was the better security to be obtained by it (a tax for the payment of the consolidated bonds being provided for), and the enhancing of the general credit of the state by the reduction of its indebtedness. Subsequently the state passed an act authorizing the board of liquidation to issue a portion of the consolidated bonds to the Louisiana Levee Company in liquidation of a debt not within

the Funding Act, for which debt a levy of taxes had been provided before the passage of the Funding Act, which taxes had failed to reach their destination. A citizen of another state, holding consolidated bonds, brought a bill in equity to enjoin the board of liquidation from carrying out the provisions of this act, on the ground that it would be increasing the state debt; that the state had by the Funding Act deprived itself of the right to issue any bonds at all except the consolidated bonds to be exchanged as provided, and that, as the act proposed the liquidation of the levee debt by the issue of consolidated bonds, dollar for dollar, this would break up the whole scheme of the Funding Act and destroy all the benefits anticipated from it. It was held that he could not maintain his bill upon the first ground, being a mere creditor resident in another state and complaining of a supposed violation of the state constitution by an increase of the debt, and that the liquidation of the levee debt would not be an increase of the state indebtedness; that he could not complain of such a use of the consolidated bonds unless he showed that the limit of \$15,000,000 to the issue of such bonds would thereby be exceeded; but that he had a right to the injunction, upon the ground that the consolidated bonds were to be used to liquidate the levee debt at par, while he had reduced his demand to sixty cents on the dollar to obtain the benefit of the scheme. *Ibid.*

§ 1293. There is a distinction between a condition precedent until the performance of which no title is to rest, and a condition subsequent operating by way of defeasance. In the former case equity can give no relief. But the rule of law with reference to a condition subsequent, that if rendered impossible of performance after it is made, by the act of God, or of the law, or the grantor, the estate becomes absolute, is not applied to that extent in equity. It will regard the condition as if no particular time for performance were specified, and allow a performance within a reasonable time. The state of Texas granted a charter to a railroad, and under it made large land grants to the road. There were certain conditions subsequent attached to the grant; but the state by plunging into the war put it out of the power of the company to comply with the conditions within the time specified. By subsequent legislation it opened these lands to entry by settlers. The company (or rather the receiver of the company which, by authority of the state, had become its successor) filed a bill in equity to enjoin the governor and the commissioner of the land office of the state from issuing patents to settlers in pursuance of this legislation. It was held that this legislation was void as impairing the obligation of contracts; and that as a reasonable time for the performance of the conditions had not, under the circumstances, elapsed, the injunction should be granted. *Davis v. Gray*, §§ 1354-62.

§ 1294. If a state, by legislation, open for settlement and location land claimed by a railroad company, and the governor and the commissioner of the land office proceed to issue patents to the locators, a case is presented of such irreparable injury and clouding of title as to call for an injunction, provided that otherwise it is a proper case. *Ibid.*

§ 1295. The circuit court of the United States, in a proper case in equity, may enjoin a state officer from executing a state law in conflict with the constitution or statutes of the United States, when such execution will violate the rights of the plaintiff. Especially may this be done where the local law allows like suits against public officers. The jurisdiction was sustained in this case, where a state governor and a commissioner of the land office were sought to be enjoined from issuing patents to lands which had been granted to the railroad company of which the complainant was receiver, but subsequently forfeited and made subject to location and survey by an act claimed to be void as impairing the obligation of contracts. *Ibid.*

§ 1296. Equity will not interfere by injunction to control the judgment or discretion of officers in the executive department of the government. Canceling an entry for land by the secretary of the interior and commissioner of Indian affairs, being a discretionary act, will not be enjoined. *Gaines v. Thompson*, §§ 1363-64.

§ 1297. The government of the United States not being liable to be sued except by its own consent given by law, the circuit court of the United States cannot entertain a bill filed against it, and praying process immediately against it to enjoin it from proceeding upon a judgment obtained by it. *Hill v. United States*, § 1365.

§ 1298. The circuit court of the United States has no power to enjoin a proceeding in a state court. *Rogers v. City of Cincinnati*, §§ 1342-45.

§ 1299. Section 720 of the Revised Statutes, providing that no injunction shall be granted by any court of the United States to stay proceedings in any court of a state, has been held to prohibit the issue of an injunction against the sale of property under an execution issued by a state court, although the application be made by a third party. But by virtue of section 640 of the Revised Statutes, providing, in reference to all cases removed from a state court, that "all injunctions, orders and other proceedings had in such suit prior to its removal shall remain in full force and effect until dissolved or modified by the court to which such suit shall be removed," the former section does not prevent the court of the United States to which the

cause is removed from continuing or making final a preliminary injunction granted by the state court before the removal; but such an injunction is to be disposed of upon the merits precisely as it ought to have been disposed of by the state tribunal if no removal had been made. *Perry v. Sharpe*, §§ 1366-67.

[NOTES.— See §§ 1368-1591.]

WATSON v. SUTHERLAND.

(5 Wallace, 74-80. 1866.)

STATEMENT OF FACTS.—This bill was filed by Sutherland to enjoin the levy of an execution in favor of Watson & Co., and against Wroth & Fullerton, upon a stock of merchandise claimed by Sutherland. There were allegations as to the irreparable injury that would result from the levy, such as loss of business, credit, etc. The answer alleged that the property belonged to Wroth & Fullerton, and that it was fraudulently transferred to Sutherland to hinder and defeat creditors. A temporary injunction was granted, and was made perpetual after proof taken.

Opinion by MR. JUSTICE DAVIS.

There are, in this record, two questions for consideration. Was Sutherland entitled to invoke the interposition of a court of equity; and if so, did the evidence warrant the court below in perpetuating the injunction?

§ 1300. *Rule as to remedy at law.*

It is contended that the injunction should have been refused, because there was a complete remedy at law. If the remedy at law is sufficient, equity cannot give relief, "but it is not enough that there is a remedy at law; it must be plain and adequate, or in other words, as practical and efficient to the ends of justice, and its prompt administration, as the remedy in equity." *Boyce v. Grundy*, 3 Pet., 210. How could Sutherland be compensated at law, for the injuries he would suffer, should the grievances of which he complains be consummated?

§ 1301. *Levy on goods owned by one not a defendant in the execution enjoined, when.*

If the appellants made the levy, and prosecuted it in good faith, without circumstances of aggravation, in the honest belief that Wroth & Fullerton owned the stock of goods (which they swear to in their answer), and it should turn out, in an action at law instituted by Sutherland for the trespass, that the merchandise belonged exclusively to him, it is well settled that the measure of damages, if the property were not sold, could not extend beyond the injury done to it, or, if sold, to the value of it when taken, with interest from the time of the taking down to the trial. *Conard v. Pacific Ins. Co.*, 6 Pet., 272, 282.

And this is an equal rule, whether the suit is against the marshal or the attaching creditors, if the proceedings are fairly conducted, and there has been no abuse of authority. Any harsher rule would interfere to prevent the assertion of rights honestly entertained, and which should be judicially investigated and settled. "Legal compensation refers solely to the injury done to the property taken, and not to any collateral or consequential damages, resulting to the owner, by the trespass." *Pacific Ins. Co. v. Conard*, 1 Bald., 142. Loss of trade, destruction of credit, and failure of business prospects, are collateral or consequential damages, which it is claimed would result from the trespass, but for which compensation cannot be awarded in a trial at law.

Commercial ruin to Sutherland might, therefore, be the effect of closing his store and selling his goods, and yet the common law fail to reach the mischief. To prevent a consequence like this, a court of equity steps in, arrests the proceedings *in limine*; brings the parties before it; hears their allegations and proofs, and decrees either that the proceedings shall be unrestrained, or else perpetually enjoined. The absence of a plain and adequate remedy at law affords the only test of equity jurisdiction, and the application of this principle to a particular case must depend altogether upon the character of the case, as disclosed in the pleadings. In the case we are considering, it is very clear that the remedy in equity could alone furnish relief, and that the ends of justice required the injunction to be issued.

The remaining question in this case is one of fact. The appellants, in their answers, deny that the property was Sutherland's, but insist that it was fraudulently purchased by him of Wroth & Fullerton, and is subject to the payment of their debts. It seems that Wroth & Fullerton had been partners in business in Baltimore, and suspended payment in March, 1861, in debt to the appellants, besides other creditors. Although the appellants did not recover judgments against them until after their sale to Sutherland, yet other creditors did, who were delayed in consequence of the then existing laws of Maryland, which provided that executions should be stayed until the 1st of November, 1862. Taking advantage of this provision of law, the answer charges that Wroth & Fullerton, after their failure, collected a large portion of their assets, but appropriated to the payment of their debts only a small portion thus realized, and used the residue to buy the very goods in question, which Sutherland fraudulently purchased from them on the 27th of October, 1862, in execution of a combination and conspiracy with them to hinder, delay and defraud their creditors. The answers also deny that the injury to Sutherland would be irreparable, even if the stock were his, and insist that he could be amply compensated by damages at law. After general replication was filed, proofs were taken, but, as in all contests of this kind, there was a great deal of irrelevant testimony, and very much that had only a remote bearing on the question at issue between the parties. It is unnecessary to discuss the facts of this case, for it would serve no useful purpose to do so. We are satisfied, from a consideration of the whole evidence, that Wroth & Fullerton acted badly, but that Sutherland was not a party to any fraud which they contemplated against their creditors, and that he made the purchase in controversy in good faith, and for an honest purpose.

The evidence also shows conclusively, that, had not the levy been arrested by injunction, damages would have resulted to Sutherland, which could not have been repaired at law.

The decree of the circuit court is, therefore, affirmed.

KAMM v. STARK.

(Circuit Court for Oregon: 1 Sawyer, 547-553. 1871.)

Opinion by DEADY, J.

STATEMENT OF FACTS.—On February 14, 1871, Benjamin Stark obtained judgment in this court in an action at law for the recovery of the possession of the south half of lot 3, in block 27, in the city of Portland.

On February 15, Kamm filed a bill in equity in this court against Stark, setting forth certain facts and circumstances from which he claimed that in equity

he was entitled to the premises, and praying that Stark might be compelled to release his claim to the premises, and that in the meantime an injunction might be allowed to restrain Stark from enforcing the judgment for the recovery of the possession. On the same day that the bill was filed, notice was given to the attorney of Stark in the action at law, that on March 8 application would be made to one of the judges of this court for the provisional injunction prayed for in this bill; and also that a motion would then and there be made for an order to serve the subpoena in this suit upon W. W. Page, the attorney of Stark in the action at law.

On March 8 and 9, the matter was heard at chambers, when it appeared from the affidavit of Kamm that Stark was a non-resident of the district, and could not be found therein, and that W. W. Page, Esq., was his attorney in the action at law.

Stark's attorneys (Messrs. Page & Hill) were present but declined to appear, suggesting that it appeared from the records of the court, to wit: The *præcipe* and execution, in Stark v. Kamm, that the judgment had been enforced, and that therefore they were no longer the attorneys of Stark in that matter. Upon inspection of these papers it appeared that a writ of possession issued to enforce the judgment in question in pursuance of a *præcipe* filed by Stark's attorneys on February 27, and that in obedience thereto the marshal of the district, on the same day, dispossessed Kamm and put Stark into possession by delivering the same to his attorneys.

§ 1302. *After a judgment has been executed it is too late to enjoin its enforcement.*

Counsel for Kamm, in reply to the suggestion that after Stark had been put into possession upon the execution, it was too late to enjoin the enforcement of the judgment, insisted that, from the time of service of notice of the motion for injunction until the hearing thereof, Stark's right to enforce his judgment by reason of such service was in some way suspended, and that consequently the issue and execution of the writ of possession were done in disregard of the authority of this court and fraud of Kamm's rights, and should be treated as nullities.

In support of this extraordinary proposition counsel cited no authority except Barb. Ch. Prac., 634, which lays down the rule that although a party has not been regularly served with an injunction, he is liable for a breach of it, if in fact he had notice of its being granted.

But this is an application for an injunction, and not to punish the defendant for a breach of one after knowledge that it was granted, and before service of it. And if this were otherwise, certainly the authority is not in point, unless it be further shown that notice of an intention to apply for an injunction is equivalent in law to the granting of it—at least until the application is denied. If such were the doctrine in regard to the effect of an application for an injunction, the granting of provisional injunctions to restrain a defendant until the final hearing could never have been necessary. Upon the filing of a proper bill with a prayer for a perpetual injunction and service of a subpoena, there would be an application for an injunction certainly entitled to as much consideration and effect as a mere motion for a temporary one.

§ 1303. *An injunction requiring the defendant to do a particular thing, as to surrender possession of land, is never granted until final hearing.*

The fact is, the plaintiff is too late to enjoin Stark from enforcing his judgment for possession. It is already enforced, and it is now physically impossible

to prevent it. Nor can a provisional injunction now issue to restore the possession of the property to Kamm. An injunction is never granted requiring a party to do a particular thing until after final hearing and decree. Stark has the legal title to this property, and lawful possession under the judgment and process of this court. If Kamm wished to have the proceedings at law enjoined so as to enable him to retain the possession until the determination of a suit in equity to establish his title, he should have commenced in time, and not delayed until Stark had judgment and possession under it. True, notice had to be given of the motion for injunction, but that notice might have been shortened upon application to the judge to one day, or even less time if necessary. Besides, ten days elapsed after judgment, before the notice was given, and moreover, as Kamm had no defense to the action at law, he should have filed his bill and asked for an injunction, as soon as the action for the possession was commenced against him. The special injunction applied for must be denied.

§ 1304. *Practice in case of bills to stay proceedings at law where defendant is a non-resident or abroad.*

The motion for substituted service of the subpoena will next be considered. In the English chancery, in case of a bill to stay proceedings at law, and in case of a cross-bill, if the plaintiff at law or in the original bill was "abroad"—beyond seas—the practice was, upon motion of the complainant, to order service of the subpoena to be made upon the attorney for his absent client. Smith's Ch., 116, 605. The same practice *ex necessitate rei* prevails in the United States courts, when the plaintiff in the action at law or the original bill is a non-resident of the state where the court is held, and cannot be served personally therein. Conk. Treat., 143.

The motion may be and usually is made *ex parte* (Smith's Ch., *supra*), and regularly the subpoena should be taken out before it is made. In the United States courts, notice of an application for an injunction is required by statute to be given in all cases. On this account it would seem necessary, when service of the subpoena is made upon the attorney, to serve it before the application for an injunction can be made, because until the service of the subpoena, or at least the allowance of the order for serving it, there is no one within the jurisdiction of the court to whom notice of such application can be given.

§ 1305. *How long and for what purposes an attorney's authority in a case exists.*

The subject of the controversy must be the same in the action at law and the suit in equity, because the court cannot presume the attorney who represents a party in one cause to be his representative in another, except for the identity of the subject of the litigation. *Hitner v. Suckley*, 4 Wash., 465. Assuming, for the present, that the subject of the controversy in this suit and the action at law are identical, the only question to be considered upon this application is, whether or not the relation of attorney and client still subsists between the defendant Stark and Mr. Page? It is shown that it did exist in the action at law. Upon the facts, is such relation presumed to continue after judgment, and if so, how long and for what purpose?

Under the code, the authority of an attorney in an action continues, unless there be a change, during the pendency thereof and for three years after judgment, for the purpose of receiving payment and acknowledging satisfaction of the same. Or. Code, 400. At common law the authority of an attorney continued "until judgment, and for a year and a day afterwards, to sue out exe-

cution, and for a longer term, if the execution be continued." 1 Att'y Prac., K. B., 67. An attorney's authority determines with the judgment, or at least with the issuing of the execution within the year. *Jackson v. Bartlett*, 8 John., 367. His power after judgment extends only to the issuing of execution and receiving the debt. Ch. J. Kent, in *Kellogg v. Gilbert*, 10 John., 221.

From these authorities and others that might be cited, it seems not to admit of question that an attorney's authority ceases with the obtaining of judgment, except for the purpose of issuing execution and acknowledging satisfaction, and that, whenever the judgment is enforced or satisfied by execution or otherwise, it ceases absolutely.

In this case the execution was issued, executed and returned before the application for the order to serve the subpoena on Mr. Page was made. But Page's authority as an attorney in the action at law being then at an end, as to that he was no longer the attorney of the party. True, it may or may not be that Mr. Page is Stark's attorney in other matters, or even upon a general retainer. That matters not so far as this motion is concerned. To authorize an order permitting service of the subpoena to be made upon Page for Stark, and thereby give this court jurisdiction over the person of the latter, it must appear that Page is now in fact the attorney of Stark in an action at law, in which the complainant now seeks and may be entitled to enjoin further proceedings.

Now, the fact is, there is no action at law pending between these parties concerning this property. There was once, but Kamm took no steps to enjoin the proceedings therein, until the action had ripened into a judgment, and that had been enforced. For this reason there is no longer an attorney of the plaintiff in that action upon whom to serve the subpoena in that suit, so as to enable the plaintiff herein to maintain the same, and enjoin the proceedings in such action, nor would it be of any avail to the complainant in this respect if there was such an attorney, or if he had service on Stark in person, because, the latter having prosecuted his action to judgment and obtained possession of the property by execution thereon, there are no further proceedings which can be had therein, and consequently there is nothing to enjoin.

§ 1306. *How long service of process on an attorney is sufficient.*

In what has been said it is, of course, assumed that an attorney cannot be deemed the representative of an absent party, so as to be considered capable of receiving service of the subpoena for him, only so long and so far as authority as attorney for such party exists and extends; Mr. Page's authority as attorney for Stark in the action of *Stark v. Kamm* having necessarily ceased with the termination of the proceeding,—the enforcement of the judgment therein,—he is no longer his representative touching the subject-matter of that action.

Upon the question as to whether Mr. Page is still attorney for Stark, counsel for Kamm made the point that Stark's judgment at law was not presumed to be yet satisfied, because it did not appear that the plaintiff's costs and expenses in the action had been paid or collected. The entry of judgment was not read on the hearing, but, in the absence of anything to the contrary, I suppose it is proper to suppose that the judgment was given for costs and expenses, as well as possession of the property. The *præcipe* directs the execution to issue to put Stark in possession in accordance with the judgment. Nothing is said in it about costs. The execution contains no clause concerning the costs and expenses. If there was a judgment for costs and expenses, and it

was intended to enforce it, a clause to that effect should have been inserted in the execution. The writ was executed by putting Stark into possession, and returned on February 28th. Under this state of facts, I think it reasonable to conclude that, if there was any judgment for costs, it must be considered satisfied.

But admitting that there was a judgment for costs and expenses which remains unsatisfied, and that therefore Page is still Stark's attorney, in respect to the judgment he would only be so, so far as it remains unsatisfied. As to the title and possession of the property which is the subject of this suit the judgment is satisfied. They are no longer in litigation in the action at law, and Page is not, therefore, Stark's attorney in respect to them. The subject-matter of this suit is not the costs and expenses of the action at law, but the title and possession of the real property, and as to these there is no judgment pending between the parties.

Motion denied at cost of complainant.

MCKENZIE & CO. v. COWING.

(Circuit Court for the District of Columbia: 4 Cranch, C. C., 479-483. 1834.)

Opinion by CRANCH, J.

STATEMENT OF FACTS.—The facts stated in the bill, and which, upon the motion to dissolve the injunction for want of equity, are to be taken as true, are that, from 1828 to 1834, the plaintiffs employed the defendant as their clerk, book-keeper and salesman, in the retail dry goods business, at a salary of about \$350 a year, and that during that time he clandestinely and fraudulently, and in violation of the trust reposed in him, abstracted and appropriated to his own use money and effects of the plaintiffs to an amount exceeding \$9,000.

That he has a large amount of money deposited to his credit with the Bank of the United States at Washington, which, to that extent, if so much he has, is the money of the plaintiffs, or has arisen from their property and money so abstracted by the defendant. That the plaintiffs have brought suit at law against him to recover the money and effects so clandestinely taken and appropriated to his own use.

That the defendant is about to remove from the District of Columbia, and that he has no property except the money in bank and two boxes at William Gregory's, the contents of which are unknown.

That the defendant will remove and secrete the money before the determination of the suit at law against him, unless restrained by the court, etc., and that the plaintiffs want his answer and discovery in some material points necessary to the prosecution of the suit at law.

∴ 1807. *When a writ of ne exeat will not be granted.*

This is not stated to be such an equitable debt, nor averred in so positive a manner, as to justify the court in granting a writ of *ne exeat* if it had been asked for; and it was not asked for, probably, because the counsel of the plaintiffs correctly supposed that if it could be considered as a simple debt, it was recoverable at law, and would be a case for legal bail. If it is not a case for a *ne exeat*, to detain the person of the defendant, upon which alone a court of equity can act, there seems to be as much reason for not detaining the property of the defendant upon which a court of equity cannot act, unless by means of an execution specifically authorized by statute.

§ 1308. *When an injunction will not be granted to restrain a party from disposing of funds alleged to have been derived from embezzlement.*

The only question remaining is whether this money is, according to the statement of facts in the bill, to be considered as the money of the plaintiffs.

The bill avers that it is the money of the plaintiffs, or has arisen from their property or money so abstracted, etc.

If the averment had been positive and absolute that it is the plaintiffs' money, there could be no doubt that it might be retained by injunction. The doubt arises from the alternative averment that it has arisen from the plaintiffs' property and money so clandestinely, fraudulently and in violation of his trust, abstracted and appropriated to his own use.

If the fact be, as suggested by this averment, that this money is the proceeds of the plaintiffs' money abstracted by the defendant and appropriated to his own use, can the court consider it as specifically the money of the plaintiffs? The plaintiffs themselves did not so consider it or they would not have made the alternative averment; for if, in either case, it be the plaintiffs' money, it was sufficient to have so averred it to be. The question then occurs, can this court follow and specifically detain the money that has arisen from the abstracted money of the plaintiffs?

The strongest case which has been cited in favor of the plaintiffs is that of Lord Chedworth in 8 Ves., 46. In that case, however, the injunction was only to prevent a transfer of stock which had been purchased directly with the plaintiff's money by his agent, who had placed it in his own name instead of that of the plaintiff; and the injunction was only granted until the defendant should, by his answer, distinguish the property of his master which he had mingled with his own; and the lord chancellor says: "The case, though new, stands upon a principle that will maintain it only till he informs me what part of this property is not his master's." It is true that the injunction was at first extended to the money at the banker's as well as to the stock, but a few days afterward the lord chancellor varied the order by confining the injunction to the stock.

And in the case of *Cox v. Paxton*, subsequently reported in 17 Ves., 329, "Lord Eldon said he had consulted with Lord Ellenborough, and thought he had gone too far." This is stated in 1 Madd. Ch. Pr., 155, and in *Eden on Injunctions*, 211, although it does not appear in the case of *Cox v. Paxton*, as reported in 17 Ves. That case, however, does, in principle, overrule that of Lord Chedworth in 8 Vesey.

In the case of *Cox v. Paxton*, the plaintiffs' clerk had embezzled their money by false entries in his accounts of receipts and payments, and laid it out in the purchase of policies of life insurance, which he had delivered to the defendants on account of a debt due by him to them, with notice that they were the produce of the plaintiffs' property. This embezzlement was a felony within the 39 Geo. 3, ch. 85; but independently of that objection Lord Chancellor Eldon said: "You cannot denominate him" (the clerk) "a trustee in any way; there was no trust to lay out this money upon policies of insurance, nor any obligation except to account. His application of the money in this way could never, even without this act of parliament, have given the plaintiffs a title to these policies of insurance. How, then, are they to be considered the plaintiff's property in the hands of the defendants?" "If this case is to be taken according to the representation of the bill (as it must be upon this demurrer, but only for the purpose of the argument), that the defendants,

knowing that the plaintiffs' money was laid out in these policies, insist upon holding them, the morality of it is obvious; but that cannot be the foundation of a rule in equity." The demurrer was allowed.

The case of *Rhodes v. Cousins*, cited by the defendant's counsel, from 6 Rand., 188, states the doctrine very strongly that a court of equity cannot control a debtor as to the disposition of his property until final judgment or decree.

If, therefore, the money in the bank is not the specific money of the plaintiffs, and if the defendant cannot, according to the judgment of Lord Eldon, be denominated a trustee in any way, we do not see that we have any authority to deprive the defendant of the control of it.

If the transaction amounts to a felony there is no civil remedy. If it be not a felony, it can only be a tort or a contract, express or implied. If a tort, the remedy is in damages; if it be a contract, the remedy is in debt or *assumpsit*; if it be a debt, it is as much a debt at law as in equity; and the plaintiffs may have bail at law if they can make out a proper case.

We think the injunction cannot be supported upon the face of the bill, and that it must, therefore, be dissolved.

LAWRENCE v. BOWMAN.

(Circuit Court for California: 1 McAllister, 419-430. 1858.)

Opinion by McALLISTER, J.

STATEMENT OF FACTS.—The bill in this case is exhibited for the purpose of obtaining an injunction to stay the trial of an action of ejectment pending on the common-law side of this court. The trial of the action at law was fixed by consent of parties for the 24th day of the current month. On the day previous an order was obtained from the judge to be served on the plaintiffs, to show cause why an injunction should not issue to stay the proceeding at law until complainant could obtain a hearing on the merits of his bill. As the trial at law was fixed for the succeeding day, and as the judge could grant no injunction without previous notice to the adverse party, he was obliged to act upon the idea that under no circumstances could an injunction issue in any case when applied for on the day preceding the trial of the cause sought to be restrained, and thus leave the complainant without remedy by injunction. The facts stated in the bill on a motion for an injunction are to be taken as true; and the bill charged gross fraud of a character which it was alleged could not be availed of by the complainant in a court of law. On the following day the parties appeared, and among other grounds taken against the motion by defendants' solicitor was the briefness of the notice and the *laches* of complainants in not moving at an earlier moment. The court, acquiescing in the propriety of the suggestion as to the briefness of the notice, proffered an extension of time, which was declined by defendants' solicitor, who proceeded to the argument; and the first ground taken against the motion was the *laches* of the complainant; and the fifty-fifth rule of this court was cited as a reason for the denial of this motion.

§ 1309. *Injunctions in the circuit court are special and granted only on "due" notice. What is due notice depends on circumstances; one day's notice generally insufficient.*

That rule prescribes that special injunctions shall be granted only on due notice to the opposite party. No fixed rule can be recognized as to what shall

constitute "due notice." "Due" is a relative term, and must be applied to each case in the exercise of the discretion of the court in view of the particular circumstances.

§ 1310. *Power of a court of equity over its rules.*

Referring to rules generally, in *Ex parte Poultney v. City of Lafayette*, 12 Pet., 472, the court say: "Every court of equity possesses the power to mould its rules, in relation to the time and manner of appearing and answering, so as to prevent the rule from working injustice; and it is not only in the power of the court, but it is its duty, to exercise a sound discretion upon this subject." These views apply to all the rules of a court, and if the power to mould them is given, it certainly possesses that of construing them for similar purposes. In ordinary circumstances, the application for an injunction to stay a proceeding at law fixed, as this was, by consent of parties for trial on the following day, will be viewed with suspicion. But in this case there are circumstances which arrest the attention of the court. The parties are differently represented in this case than in the action of law. The solicitors for the respective parties before this court are not those who are the attorneys of the parties in the action of ejectment. The latter evidently intended to place their defense in a court of law on equitable grounds. Those recently engaged for complainants fear to risk that movement, and now seek the interposition of a court of equity. The question to be decided has never been before this tribunal, and it has been understood that there have been conflicting decisions upon it in the courts of this state. The wavering policy indicated by a change of counsel, produced by such a condition of things, disaffirms wilful *laches* by the party, and is a circumstance which the court, in exercising its discretion, should take into consideration, particularly where its action is to affect seriously the rights of the party. If the motion be granted, the injury to defendants would be slight; as the court will give a hearing on the merits at once, if desired by them. I cannot think, then, that the delay in filing this bill, in view of the circumstances, should, *per se*, prevent all inquiry into the alleged fraud.

§ 1311. *It is not indispensable that a bill for an injunction should contain a prayer for a discovery.*

I shall proceed to investigate the other objections made to the motion. It is urged that the bill sets forth no equity; that it prays no discovery; that it admits the legal title of plaintiff, and that defendant only avers an equitable right. It is also urged that by the bill and exhibits, and showing of complainants, the defendant is entitled to judgment and costs, and such damages on an issue to be had which he may recover at law; and that in the ordinary course of chancery proceedings, no injunction can issue save upon the terms that the complainant (defendant in the ejectment suit) suffer a judgment to go against him for the land, and upon the further condition of furnishing bond with sufficient security for the costs and such damages as may be recovered on the issue. These objections involve following propositions, and may be considered together: 1. There is no equity in the bill to restrain the prosecution of the suit at law, because no discovery in and of it is asked, and the legal title in defendant is admitted. 2. That if an injunction is granted it must be upon terms that the defendants at law submit to a judgment for the land with costs.

By section 254 of the practice act of this state it is enacted "that an action may be brought by any person in possession by himself or his tenant of real property, against any person who claims an estate or interest therein adverse

to him, for the purpose of determining such adverse claim, estate or interest." The complainants have filed a bill to determine the adverse claim of defendants, who have asserted one in the most emphatic manner, by bringing an action at law for the recovery of the land. The fact that the assertion is made in the form of an action at law does not deprive complainant, at any time after the claim is asserted, of the right of vindicating his claim in opposition to the adverse one, if the circumstances are such as to authorize this court, acting as a court of equity, to take cognizance of the case. This section of the practice act is but a reiteration of general principles of equity, and is not without influence on the action of this court in the present case.

The language of the statute is unrestricted. The right of a party in possession is not defeated by the fact that the adverse claim is being asserted by an action. The complainant comes within the very letter of the law; and it is doubtful whether any course of chancery practice would authorize this court to consider the fact that the adverse claim was pending in the form of an ejectment suit, a reason to compel complainant to submit to a judgment at law, before he could have extended to him any equitable relief. It may be urged that the statute of a state cannot affect the jurisdiction of this court, in the exercise of its equity jurisdiction. But this question has been before the supreme court of the United States. In the case of *Clark v. Smith*, 13 Pet., 195, the legislature of Kentucky had passed a law, the only difference between which and the statute of this state is that the former authorized one who had both the legal title and possession of real estate to institute a suit, and described the decree to be made in case of a determination against the adverse claim; whereas the latter gives the right to any one who is in possession, and prescribes no form of decree. The reasoning of the court in that case, relative to the statute of Kentucky, is applicable to that of this state. "Kentucky" [say they] "has the undoubted power to regulate and protect individual rights to her soil, and to declare what shall form a cloud on titles; and, having so declared, the courts of the United States, by removing such clouds, are *only applying* an old practice to a new equity created by the legislature, having its origin in the peculiar condition of the country." "The state legislatures certainly have no authority to prescribe the modes and forms of proceeding in the courts of the United States; but having created a right, and at the same time prescribed the remedy to enforce it, if the remedy prescribed is substantially consistent with the ordinary modes of proceeding on the chancery side of the federal courts, no reason exists why it should not be pursued as it is in the state courts." 18 Pet., 203.

§ 1312. *A party who applies for an injunction to stay proceedings at law is not bound to confess judgment at law as a prerequisite to his obtaining relief in equity.*

Now, if this suit had been instituted in a state court, not controlled by chancery proceedings, is it probable such tribunal, had it deemed the complainant entitled to the relief asked for, would withhold it until the party would submit to a judgment in the other suit? Apart from all foregoing considerations, arising out of the statute, we will inquire whether the proposition urged by counsel, that, according to the course of chancery proceedings, before an injunction can issue the complainant must submit to judgment for the land and costs, be correct. The authorities cited by defendant's solicitor are two cases from the Irish chancery and exchequer courts, one from the English chancery and two decisions from the state of New York. The two cases from Ireland

are cited from Chitty's Equity Digest, sections 7 and 11, page 2265. The reports from which the notices are taken are not accessible. These authorities, similar to most insertions in digests, are without a statement of the case, or of the reasons of the court, no authorities cited, and depend for correctness on the conclusions of the digester. Lord Mansfield has said, "There is no cause of greater ambiguity than arguing from cases without distinguishing *accurately* the grounds upon which they are decided."

In every case of a digest cited, the *accuracy* of the digester has to be relied on. The unreliable character of such authority, if such it can be called, forbids confidence. From what can be gathered from the digest in the first case, that of *Horn v. Thompson*, some fact not mentioned in the case must necessarily differ it from this; for instance, it appears in that case, that if the injunction had been granted the defendant would still have had a trial at law. In the second case (*Redmond v. Goodoll*), the digester states, generally, that an injunction to restrain proceedings in ejectment until the hearing will not be granted except the defendant give a complete judgment at law; and when defendant refused to do so, the injunction was refused. What were the facts or grounds of decision are not stated. Was the decision founded upon a rule of court similar to one existing in New York, or based upon the general course of chancery proceedings? Nothing is said upon the point. In the English case, *Barnard v. Wallis*, cited, 1 Craig & Phill., 85, three questions were involved in the defense,—two purely equitable and one legal; a common injunction having issued, motion was made to dissolve it, which was granted. This case belongs to a peculiar class, where the defense is composed of both legal and equitable questions, referred to by Daniell in his treatise on Equity Practice (p. 1844). "Sometimes [he says] the question between the parties depends partly upon a legal title, and partly upon an equity which will arise only in the event of that title being decided in one way. In this case, the practice of the court is, to require that the party applying to the court for its interposition should admit the legal title of the other party, as in the case of giving judgment in ejectment." The case of *Barnard v. Wallis* belongs to such class of cases, and is totally dissimilar from this. It is true that the judge, in his opinion, by way of recital alludes to the giving judgment in ejectment suits, as a common case. It was for this reason, perhaps, that the case was cited by counsel as authority. The next case relied on is that of *Carroll v. Sand*, 10 Paige, 298; but this was decided with express reference to the thirty-third rule of chancery in New York. Even that rule contains a *proviso* that a party may make special application to the court to restrain all proceedings at law after issue joined. The last case cited is *Ham v. Schuyler*, 2 Johns. Ch., 141. This is the only authority which sustains the proposition. The whole is comprehended in eight lines, and a single authority cited, that of Hinde's Chancery. Still, it is the opinion of an eminent chancellor, entitled to profound respect; and if the doctrine enunciated had not been repeatedly repudiated, would control the action of this court. This decision was made more than forty years ago, and rests upon an ancient text-writer, who wrote prior to the time of Lord Eldon, who was the founder of the modern practice of injunction. Lord Campbell has said, "Almost all the principles upon which this relief is granted or refused, the terms and conditions upon which it is dissolved, continued, extended or made perpetual, are to be found in Lord Eldon's judgments *alone*." Lives of Chan., vol. VII, p. 496. A case was decided in Virginia which enunciates doctrines similar to that announced by Chancellor Kent in

above case, which has not been brought to the notice of this court. *Warrick v. Nowell*, 1 Leigh, 96. The only authority cited is 1 Vernon, 120; an ancient authority, obnoxious to the objections heretofore stated as to *Hinde's Chancery*.

Having commented on each of the authorities cited for this motion, a reference will be made to some which announce a different doctrine. Eden, in his treatise on Injunctions, states the general rule "that injunctions to stay proceedings at law are granted either before or after the commencement of the action, or to stay proceedings, or after verdict to stay judgment, or after judgment to stay execution," etc. The court, he says, are unwilling to interfere where it appears the plaintiff has lain by till after a verdict has taken place, if it is necessary for the obtaining a fair decision. Eden on Inj., by Waterman, 68, 69. In *Hoffman v. Livingston*, 1 Johns. Ch., 211, an injunction had been issued to stay proceedings at law, for in that case the defendant moved to be permitted to go to trial for a portion of the lands not claimed; and the motion for a dissolution of the injunction *quoad hoc* was refused. In *Pike v. Northwood*, 1 Beav., 152, the same doctrine is enunciated. In *Apthorp v. Comstock*, Hopk., 143, the bill was filed for relief against a deed of conveyance of lands alleged to be fraudulent, and for an injunction to restrain the prosecution of certain actions of ejectment brought for the recovery of the lands. No discovery was prayed. Neither plaintiff nor defendant had any knowledge regarding the early transactions out of which the alleged fraudulent deed arose. This case was decided in 1824; and it enunciates the principle that it is a proper head of equity jurisdiction to relieve against fraudulent deeds, and that an injunction, in such a case, is properly auxiliary to the relief sought, as this court takes the whole controversy into its own hands, to prevent double litigation, and give more effectual relief than can be given at common law. In the case of *The State v. Reed*, 4 Harris & MoH., 6, 8, 10, 11, ejectment was enjoined before trial, and made perpetual on the hearing. No discovery was prayed in the bill. The next case is that of the *Duke of Beaufort v. Neeld*, decided in the house of lords, on appeal from the chancellor, in the year 1845. Separate opinions were delivered by Cottingham, Brougham and Campbell. The case is reported in 12 Cl. & Fin., 249. In that case the Duke of Beaufort was legal owner of the premises; but Mr. Neeld was in possession, obtained under circumstances which gave him a *mere* equity against the duke, who brought ejectment to recover possession. Mr. Neeld filed his bill to enjoin the further prosecution of the suit. Injunction was granted; but after answer filed, which denied the equity of the bill, the injunction was dissolved by the vice-chancellor, and the ejectment was proceeded in by the plaintiff at law. An appeal was taken from the vice-chancellor to the chancellor, who reversed the decision. An appeal was taken to the house of lords, who decided the vice-chancellor was wrong. Lord Campbell, in delivering the opinion, uses the following language: "With regard to the first injunction (the one issued to restrain the ejectment suit before trial), I must own that I never entertained a doubt, and down to this moment I have not been able to learn on what ground the vice-chancellor of England dissolved that injunction." *Ibid.*, 284. In that case, the bill prayed for no discovery in aid of the suit at law. The last authority to which the court will refer is the case of *Gaines v. Nicholson*, 9 How., 356. The bill in that case is set out in *totidem verbis*. No discovery was prayed. The case was an appeal from the decree of the circuit court of the United States, in Mississippi, granting a perpetual injunction to enjoin a

pending ejectment suit on the common-law side of the court. The supreme court admit the regularity of the proceeding. They say: "And, undoubtedly, if the facts thus charged have been established by the pleadings and proofs, a right to such equitable interposition for the relief sought has been made out, and the decree of the court should be upheld." After looking into the pleadings and proofs, they concluded that the charge of fraud had not been made out; and on that ground alone reversed the decision of the court below. This court has entered more minutely into the authorities in this case by reason of the large interests at stake, and because there has been some conflict in the authorities.

Against the decisions invoked in favor of this motion, from the Irish chancery and exchequer, from New York, and a case from the English chancery, we find two decisions from New York, one from Kentucky, two from England—one of them in 1845, by Cottingham, Brougham and Campbell,—and one by the supreme court of the United States. The weight of authority is decidedly against the principle embodied in the present motion. The court can, therefore, consult the spirit and policy of the statute of this state, without violating any of the rules of chancery proceedings.

§ 1313. *Distinction between the form and effect of injunctions in England and in the United States.*

The remaining question is, does this case present such equitable claim as to call for the interposition of this court?

In England common injunctions are those which issue of course. The special are issued only on due notice, and founded on the circumstances of each case as they arise. 3 Daniell's Ch. Pr., 1810. The distinction between them does not exist in the federal courts. In England the injunction only operates upon the judgment and execution; consequently if a party seeks to stay proceedings at common law before trial, he must make special application on previous notice. The form of a writ of injunction in England always included a provision that the party at law might proceed to judgment and execution. In this country on every application for an injunction, the court has to decide whether the injunction shall issue, and to what extent. In the case at bar, complainants allege they are tenants in fee as tenants in common with the heirs of Stephen Smith, and are in possession of the land; that the defendants have instituted an action at law to eject them from the possession upon a documentary title they allege to be fraudulent for causes of which they can only avail themselves in a court of equity. Now, all these allegations, until denied, must on this motion be considered as true. They certainly constitute a case which entitles the complainants to the equitable interposition of the court.

An injunction must therefore be issued in accordance with the prayer of the bill.

BROWN v. THE PACIFIC MAIL STEAMSHIP COMPANY.

(Circuit Court for New York: 5 Blatchford, 525-537. 1867.)

STATEMENT OF FACTS.—The plaintiffs in this case are subjects of Great Britain. The defendants are the Pacific Mail Steamship Company, the Atlantic Mail Steamship Company, and certain individuals, all of whom, except one Butterfield, were residents of New York. The two companies were incorporated under the laws of New York.

Opinion by BLATCHFORD, J.

This case, except as to the defendant Butterfield, is one where the court clearly has jurisdiction of the parties. The plaintiffs set out that they are the owners of three thousand five hundred shares of the capital stock of the Pacific Mail Steamship Company. This company, it appears, has a capital now of \$20,000,000, divided into two hundred thousand shares of \$100 each. The bill then alleges that the firm of Brown Brothers & Co., of the city of New York, have standing in their names seventy-seven thousand eight hundred and thirty-nine shares of the capital stock of this company. It then sets out the character of the Pacific Mail Company, its progress, and the development of its business, and alleges certain reasons which existed at the time for making a certain contract, which was made in October, 1864, with Brown Brothers & Co. These reasons were, in substance, the creation of a permanent shareholding body, not liable to the changes and fluctuations of the stock market. By this agreement it appears that some ten persons associated themselves together and bought ten thousand shares of stock, which at that time was one-quarter of the entire capital, and that they made Brown Brothers & Co. trustees of that stock.

§ 1314. *An irrevocable power of attorney, given by the owners of stock to trustees, to vote upon such stock, certain privileges being reserved, is not contrary to public policy.*

The written agreement in regard to this stock, which is set out in the bill, shows that the arrangement was to continue in force until the 1st of December, 1868. The provisions of the agreement substantially are, that the parties to it are not to sell their stock without having first offered to sell it to the rest of their associates, at a price not above the then current market value, and, in case of their declining to take it, without next offering it to Brown Brothers & Co.; but any one of the parties is to be at liberty to withdraw on those terms at any time. The agreement also takes the shape of an irrevocable power of attorney to Brown Brothers & Co., to vote upon the stock; and all increase of such shares of stock, by stock dividends, until the 1st of December, 1868, is to come under the same agreement. In this respect the agreement seems to differ very little from a mere power of attorney, or proxy to Brown Brothers & Co., to vote upon these shares, with the addition that the power is irrevocable, and that there are certain privileges reserved to the owners of the stock in regard to the manner of dealing in it, and withdrawing from the arrangement. I am unable to perceive anything in this agreement contrary to public policy, or anywise open to objection; and there is no affidavit produced here, on the part of any one concerned in this arrangement—any one who is a principal of these agents or trustees—complaining of anything wrong in regard to the administration of the trust, or that there is any prejudice by having the stock in the position in which it is placed.

Then there is a second agreement set out, whereby, as the bill alleges, the Atlantic Mail Steamship Company became stockholders in the Pacific Mail Company to a certain amount of stock, and made Brown Brothers & Co. their trustees, under an agreement running for the same length of time, namely, until December 1, 1868, with an irrevocable power of attorney to Brown Brothers & Co. to vote upon such stock, and a provision that the stock was not to be sold unless it was offered to be sold first to the Pacific Mail Company. For all the substantial purposes of this motion, this agreement is, in substance and effect, the same as the first one.

The bill then sets out the further development of the Pacific Mail Company on the Atlantic side, and the extension of its operations by a line to China and Japan, consisting of large steam vessels, and the further increase of its capital stock, in November, 1866, to \$15,000,000, and in January, 1867, to \$20,000,000. It also states, what is quite apparent, that this increase of stock diminished the proportion which the stock standing in the names of Brown Brothers & Co. bore to the entire stock. It then sets out that the number of shares under the first agreement has by the increase of it, through stock dividends, increased to twenty-six thousand six hundred and sixty-six shares, which number of shares is held by Brown Brothers & Co. in trust under that agreement. It also states that the number of shares held by Brown Brothers & Co. under the second agreement is twenty-six thousand six hundred and sixty-six. It then sets out the facts connected with a third lot of shares standing in the name of Brown Brothers & Co., to the number of twenty-four thousand three hundred and fifteen shares, of which twenty-four thousand and seventy-two shares were issued at one time to Leonard W. Jerome, and were by him transferred to Allan McLane, trustee, and by him transferred to Brown Brothers & Co. But I do not perceive that any relief is asked in regard to this third lot of shares.

The bill then sets out that there is an election for directors of the Pacific Mail Company coming on to-day at 12 o'clock; that four of the defendants, Hartson, Joslyn, Green and Butterfield, have been engaged in soliciting proxies for the purpose of voting on shares of stock at such election, based upon statements such as appear in a circular signed by them, of which a copy is annexed to the bill; and that Mr. Hartson has threatened to have the directors of the company changed. It then avers that the defendants Lockwood and Davenport have associated themselves with the defendants Hartson, Green, Joslyn and Butterfield, for the purpose of changing the directors of the company. It then avers specifically that the charges contained in this publication by Hartson, Green, Joslyn and Butterfield are unfounded. Those charges relate generally to breaches of trust and unfaithful administration on the part of the trustees, Brown Brothers & Co. No averment is made by the defendants, in any manner whatever, that these charges are well founded. On the contrary, the allegation in the bill that the charges are unfounded is virtually admitted by not being denied. No averment is made, on the part of the defendants, that the trusts have been improperly discharged by the trustees. The bill then sets out that, at every election that has taken place since the trusts were reposed in Brown Brothers & Co., the election has always been made by votes other than those cast by Brown Brothers & Co. In other words, as I understand, that the elections have always been unanimous, and have not been controlled by the votes cast by Brown Brothers & Co. on the shares held by them in trust. The bill then sets out that Hartson, Joslyn, Green and Charlick, and their associates, have purchased a large number of shares, some thirty thousand to thirty-five thousand, which shares stood, at the close of the books, in their names, or in the names of persons believed to be associated with them in this movement, for the purpose of getting control of the company, and that they have bought, or arranged to control, a large number of proxies, so that, without corresponding beneficial interest in the shares they represent, and without any choice by the persons who are really beneficially interested in the shares so held by them, they seek to control the election, and carry on and control the company. Upon that point an affidavit

is produced, signed by Hartson, Green, Joslyn and Charlick, in which they deny that they have bought proxies, but they do not deny that they have arranged to control them. This affidavit denies nothing in the bill, except the allegation that they do not own the stock which, at the close of the transfer books, stood in their names. It is confined to the one simple point of their still owning the stock which stood in their names at that time.

§ 1315. *Where, to oppose a motion for an injunction, an affidavit is filed on behalf of defendants, wherein but one of the allegations of the bill is denied, every intendment must be taken most strongly against such defendants, as an admission of such allegations as are not controverted by the affidavit.*

The bill then avers that the parties engaged in this transaction will still be in a minority of votes, and that therefore they purpose to do certain things. No allegation or averment is set up by the defendants, by affidavit, that they do not purpose to do the things alleged, and those things, as set out in the bill, are the following: (1) To obtain an *ex parte* injunction from some court or judge forbidding Brown Brothers & Co. from voting upon the shares held by them; (2) To obtain such injunction upon the pretense that Brown Brothers & Co. have improperly acquired, or are about to improperly make use of, the shares held by them, or upon other inaccurate, ill-founded or partial statements; (3) That such pretenses will be erroneous, unjust and wholly unfounded; (4) That the injunction will not be obtained, or, if obtained, will not be served until immediately upon such election; (5) That the effect will be to exclude Brown Brothers & Co. from voting on the fifty-three thousand three hundred and thirty-two shares held by them, whereby a minority of stockholders will succeed in choosing a board of directors, against the wishes of the majority and of the plaintiffs. No one of these averments is denied or controverted. On the contrary, by the making of the affidavit which has been made by four of the defendants upon one point, every intendment must be taken most strongly against the parties as an admission of all the matters stated in the bill which the affidavit does not controvert, although the statement in the bill of these allegations, and the absence of any denial of them, would be sufficient of itself.

The bill then sets out, as a ground of apprehension that these things may be done, that Hartson and his associates did substantially the same things, in reference to an election of directors in another company, quite recently. That is not denied. It then sets out that Hartson is the president of the Atlantic Mail Steamship Company, and that he and Green, Meigs, Joslyn, Butterfield, Seward and Dimock are directors of the Atlantic Mail Steamship Company, and control the same, and hold the great mass of the capital stock thereof. It then avers that the consequences of this meditated transaction will be disastrous to the Pacific Mail Company, and to the common interests of all the shareholders. That is not denied. The bill then points out in what manner it will be so disastrous, with considerable detail and particularity. These averments are not denied. The details are then given in the bill of what Hartson, Green, Joslyn and their associates intend to do to the injury of the plaintiffs and of other stockholders; and this averment is not denied. The bill then sets out that Hartson and his associates are a combination of stock operators and stock speculators, who are designing and intending, in this way, to control a company to whose true prosperity, and to the interests of whose shareholders, their other interests are adverse. This averment is not denied.

§ 1316. *Where there is no adequate and efficient remedy at law, the jurisdiction of equity in the premises cannot be questioned.*

Certainly, if there ever was a case for relief of some kind by injunction, this case is one of that kind, to prevent the commission of so great and admitted a wrong, wholly undefended. It is a case in which there would be no adequate remedy at law; because the law, as settled by the supreme court of the United States, in regard to the jurisdiction in suits in equity of the courts of the United States, in view of the statute, which declares that there shall be no remedy in equity where there is a plain, adequate and complete remedy at law, is, that the remedy at law must be as efficient to the ends of justice, and its complete and prompt administration, as the remedy in equity. Now, in the present case, the election, taking place under these circumstances, which it is thus admitted will be the circumstances of the case, would be perfectly legal, although accomplished in this way by a minority of the votes. There would be no ground, so far as I am able to perceive, for setting aside the election, because an injunction, obtained from a proper court having jurisdiction, had excluded certain persons from voting.

In this case, no want of time to meet the charges of the bill has been set up; no application to postpone the motion has been made; the parties have been represented by able counsel, in a hearing of some six hours, while the allegation in the bill is admitted, that the defendants intend to procure an injunction of the description alleged in the bill, without giving the plaintiffs or Brown Brothers & Co. any opportunity of being heard. As I before remarked, four of the defendants have made an affidavit upon one minor point, and have denied nothing else. They must, therefore, be held to admit everything which they do not deny. Under these circumstances, it certainly would be a reproach to the administration of justice, if these foreigners could have their property invaded in this way, by measures admitted to be wholly without any ground to support them, without any means of relief.

§ 1317. *An injunction will issue to prevent probable irreparable injury to plaintiff, and where no injury can thereby be produced to the defendant.*

As to the character of the injunction asked for, it is laid down, in Judge Redfield's Treatise on the Law of Railways (vol. 2, § 221), that "it has been common to produce a positive effect, through an injunction out of chancery, by means of a prohibitory order," and that a mandatory order is, in courts of equity, seldom denied, unless the remedy at law is perfectly adequate. And this case presents a case eminently of equity jurisdiction — a case of irreparable injury to the plaintiffs, and a case where no such injury can be produced to the defendants. Indeed, under the averment of the bill, that these transactions of the defendants will produce great injury to the interests of all the stockholders, and the admission, or absence of denial, of such averment, it is clear that there can be no injury to the proper interests of such of the defendants as are existing shareholders in the Pacific Mail Company, by granting an injunction; whereas it is manifest from the statements of the bill that there is a clear case of probable irreparable injury to the plaintiffs.

§ 1318. *The statute requiring reasonable previous notice to be given to defendant of an application for an injunction is sufficiently complied with, as regards a defendant corporation, by a notice to it at its office.*

I have, after a careful examination of the five prayers for injunction in the bill, come to the conclusion that the first, second and third must be substan-

tially granted; but as to the fourth and fifth, I do not see any ground for granting an injunction in regard to them. They stand on very different grounds from the first three. As to the first prayer for injunction, I grant it substantially as prayed for, except as to the defendant Butterfield, who is not a citizen of the state of New York. I do not think the court has any jurisdiction whatever of him, under any aspect of the case. Lockwood and Davenport have been served. Hartson and Joslyn are directors of the Atlantic Mail Company, and process was served upon the company at its office. Under the statute, which requires reasonable previous notice of an application for an injunction to be given to the adverse party, I think, so far as any one of the defendants who is a director of the Atlantic Mail Company and has not been served is concerned, that he has had reasonable notice, by the service on the company at its office. Hartson, Joslyn, Green and Charlick, however, come in under another aspect of the case. They have made an affidavit in this suit, which has been used to oppose this motion; and, under the circumstances, I think they are concluded from setting up a want of sufficient notice.

§ 1319. — *such a notice, however, is constructive notice to the directors only of the corporation.*

As to the second prayer for injunction, Butterfield must be excluded from that, of course; and I cannot grant that, as concerns the other shareholders generally of the Pacific Mail Steamship Company; and the words "and all other the shareholders of the Pacific Mail Company," which are in the prayer of the bill, must be stricken out from the injunction. I do not think I can enjoin the other shareholders without notice, or that service upon the Pacific Mail Company is to be considered, for the purpose of this second prayer, as service on such other shareholders.

The third prayer for injunction is, I think, a proper one as to the defendants served, Butterfield being, of course, excepted, if he has been served. It is also proper as to Hartson, Joslyn, Green and Charlick, some of whom have been served, and some of whom, I believe, have not been served. But all four of them come in, under the previous remarks, because of the affidavit which they have made. As to the defendants Meigs and Seward, and any others not before mentioned, so far as they are directors of the Atlantic Mail Company, I think that they have substantially had notice. Therefore, under the third prayer, all the directors of the Atlantic Mail Company may be included in the injunction.

The fourth and fifth prayers do not, I think, fall at all within the principles upon which the first, second and third are granted; and, without expressing at length my views in regard to them, I decline to grant the injunction prayed for in them.

§ 1320. *Where the acts that are sought to be enjoined are about to be performed by a principal through his agent, the latter, being before the court, is to be restrained.*

In regard to so much of the second prayer for injunction as seeks to extend the injunction, to forbid the defendants from voting, as proxies, for such stockholders, who are not parties and are not themselves enjoined, as have given their proxies to some of the defendants who are enjoined, the *gravamen* of the bill is, that the defendants have combined to conduct their intended operations by means of proxies obtained from shareholders; and that averment is not denied. The defendants deny that they have bought proxies, but they do not deny that they have arranged to control such proxies. I think that the

court, having its hand upon Hartson and his associates in these transactions, has a right to restrain them from doing anything in that regard, either individually or as proxies; especially as the bill sets out, and it is admitted, that the means by which he is seeking to carry on this scheme is by procuring proxies. I do not mean to restrain the parties giving the proxies, because they are not parties to the suit, but I think that Hartson and his associates, no matter in what capacity they act, whether individually or as agents or attorneys, must be restrained by the court; otherwise, the whole injunction might be utterly ineffective. By the allegations of the bill, Hartson and his associates are engaged in these transactions, which the court decides are improper ones, and they, therefore, ought to be restrained in every capacity.

§ 1321. *Where the jurisdiction of equity would be ousted by the joinder of certain parties as plaintiffs, they may be made defendants.*

In regard to the petition presented by Wheeler, asking to be made a co-plaintiff in the bill, I think the point is disposed of by the rules in equity prescribed by the supreme court. A case like this one was probably foreseen, and is provided for in the forty-seventh and forty-eighth of the rules of practice for courts of equity. The forty-seventh rule provides that in all cases where it shall appear to the court that persons who might otherwise be deemed necessary or proper parties to the suit cannot be made parties by reason of their being out of the jurisdiction of the court, or incapable otherwise of being made parties, or because their joinder would oust the jurisdiction of the court as to the parties before the court, the court may, in their discretion, proceed in the cause without making such persons parties; and, in such cases, the decree shall be without prejudice to the rights of the absent parties.

§ 1322. *Where the parties to the action are very numerous, the rights of all may be adjudicated by a court of equity, although all have not been brought before it, provided sufficient parties are before it to represent all adverse interests.*

The forty-eighth rule provides that where the parties on either side are very numerous, and cannot, without manifest inconvenience and oppressive delays in the suit, be all brought before it, the court, in its discretion, may dispense with making all of them parties, and may proceed in the suit, having sufficient parties before it to represent all the adverse interests of the plaintiffs and the defendants in the suit who are properly before it, but, in such case, the decree shall be without prejudice to the rights and claims of all the absent parties. These rules have been acted upon ever since they were adopted, in reference to cases of this kind, particularly in regard to corporations where the stockholders are numerous, and reside in various places. But, independently of all that, it is apparent that, in this case, to make Wheeler, who is a citizen of the state of New York, a party plaintiff, would oust the jurisdiction of the court; and, under those circumstances, irrespective of the rules referred to, the rule of equity would be, to make the person a party defendant, and not a party plaintiff. It is not at all necessary, in order to give to Wheeler, as a stockholder in the Pacific Mail Company, the benefit of this suit, that he should be made a co-plaintiff. He may come in and contribute to the expenses of the suit, and avail himself of the benefits of it, by being made a defendant. But the forty-seventh and forty-eighth rules dispose of the whole question, and, upon the statements made in the bill, it would hardly be a proper exercise of discretion for the court to refuse to proceed in the case without making Wheeler a party plaintiff, when to make him such would oust the jurisdiction

of the court in regard to the parties before it, and sufficient parties are before it to represent all the adverse interests of the adverse parties who are properly before it. The forty-eighth rule disposes, also, of the objection taken on the part of the defendants, founded on an affidavit put in by them, that there are shareholders in the Pacific Mail Company who are citizens of the state of New York, and are not made parties defendant.

§ 1323. *An injunction can operate only upon such defendants as have been served, or who are constructively before the court.*

In regard to the objection raised, that an injunction cannot go against parties who have been served with process or notice because some of the defendants have not been served, I do not understand that, according to the usual practice in equity, it is not regular to proceed against the defendants who are served, and are before the court, so far as an injunction is asked against them and may be proper. An injunction is asked against the three inspectors of election, in the first place, and they have been served. The two corporations have been served. An injunction is also asked against certain individuals, some of whom have been served and some have not. In regard to parties who have not been served, the court cannot grant an injunction against them, unless they are persons holding such a position as that they can be considered a single party, for the purpose of restraining them from doing a particular act in which all are concerned—such as being members of a body of trustees or of the board of directors of a corporation. But, so far as parties are concerned, who are sought to be restrained from doing individual acts in individual matters, the court has no power to include them in an injunction without previous notice to them. That, however, is no reason why, in this case, an injunction may not go against the corporations or the inspectors of elections, or any individuals who have been served, if the case is otherwise a proper one for an injunction against them.

APGAR v. CHRISTOPHERS.

(Circuit Court for New Jersey: 10 Federal Reporter, 857-860. 1882.)

Opinion by NIXON, J.

STATEMENT OF FACTS.—The bill of complaint filed in the above case sets forth in substance that in the year 1824 one Mary Vermilya departed this life, seized in fee of certain real estate therein described, situated in the county of Hudson and state of New Jersey; that previous to her death, to wit, on the 2d of September, 1824, she duly executed her last will and testament, in which, *inter alia*, she devised the said real estate to her mother, Sarah Vermilya, her brother, Thomas Vermilya, and her niece, Mary Ann Jarvis, in words following:

“And also I give and devise all my real estate, whatsoever and wheresoever, unto my niece, Mary Ann Jarvis, my mother, Sarah Vermilya, my brother, Thomas Vermilya, all of the said city of New York, to the survivor of them, and to the heirs and assigns of such survivor.”

It further alleges: That the devisee, Sarah Vermilya, died March 13, 1834, leaving the said Thomas and Mary Ann surviving her. That on the 10th of October following the said Thomas, for the consideration of \$100, made a deed of conveyance, without any covenants of warranty, to the said Mary Ann Jarvis, for “all of his estate, right, title and interest whatsoever under

the will of Mary Vermilya, or otherwise," in and to the said real estate,— the said deed containing the following recitals:

"Whereas, Mary Vermilya, late of the city of New York, deceased, was, in her life-time, seized in fee-simple of and in certain lots, pieces or parcels of ground, hereinafter more particularly described; and whereas, the said Mary Vermilya did, in and by her last will and testament, by her duly made and published to pass real estate, and bearing date the 2d day of September, A. D. 1824, give and devise all her real estate, whatsoever and wheresoever, unto her niece, Mary Ann Jarvis, her mother, Sarah Vermilya, and her brother, Thomas Vermilya, all of the city of New York, to the survivor of them, and to the heirs and assigns of such survivor; and whereas, Sarah Vermilya, my mother, is now dead, and the said property is now vested in me, the said Thomas Vermilya, and Mary Ann Jarvis, in fee-simple, and I, the said Thomas Vermilya, being desirous of vesting the whole in my niece, Mary Ann Jarvis, now, therefore, this indenture witnesseth," etc.

That the said Mary Ann Jarvis, in the year 1840, intermarried with one Thomas S. Christophers. That on the 6th of September, 1844, she, together with her husband, being the owners in equity, and believing that she was at law the owner in fee-simple, of the said property, undertook, by their deed, to convey in fee-simple the same to one John Arbuckle, who entered into possession and spent large sums of money in erecting buildings thereon. That the said Mary Ann Christophers departed this life January 29, 1846, leaving the said Thomas Vermilya surviving her, and two children, Thomas V. J. Christophers and James J. V. Christophers. That the complainant now holds the said real estate, under the said John Arbuckle, by virtue of divers mesne conveyances. That the said Thomas Vermilya died in the month of September, 1853, after duly executing his last will and testament, which was admitted to probate before the surrogate of the city and county of New York, in which he devised the whole of his real estate to the two children of his niece, Mary Ann Jarvis (Christophers), and to Thomas S. Christophers, the husband of the said Mary Ann, to be held by them equally, in fee-simple. That the said James J. V. Christophers died October 3, 1865, intestate, and without issue, leaving his brother Thomas his only heir at law. That Thomas S. Christophers departed this life, intestate and unmarried, July 3, 1869, leaving his son Thomas his sole heir at law. That the only heirs at law of Mary Vermilya, at the time of her death, were Thomas Vermilya and Mary Ann Jarvis; and that the said Thomas V. J. Christophers has lately brought into this court an action of ejectment against James Brown, tenant of the complainant, in possession of a portion of the said premises, and the complainant has been admitted to defend the said suit as the landlord of James.

The prayer of the bill is that the defendant, Thomas V. J. Christophers, may be enjoined and restrained by decree (1) from prosecuting the said ejectment suit for the recovery of the complainant's said lands; (2) that the said deed, dated October 10, 1834, may be reformed to effectuate the intention of the parties thereto as therein expressed; (3) that the defendant be compelled to release to the complainant whatever apparent legal interest he may have in said lands, which he claims through either the said Thomas Vermilya or the said Mary Ann Jarvis; and (4) that he may have such other relief as the nature of the case may require.

The foregoing statement of the allegations and prayer of the bill reveals that the complainant has in view some relief in equity which the court of law is not

adequate to give. If it were simply a bill to restrain the suit at law, it would be necessary for the complainant not only to set out some ground of equitable relief, but to admit that he had no defense at law. No such admission is made in this case, because the bill contemplates something more than an injunction. It waives the question of estoppel, which is a legal as well as equitable defense, and asks the court of equity to look upon the deed of October 10, 1834, from Thomas Vermilya to Mary Ann Jarvis, as an executory agreement, which is a mere equitable defense, and to decree that the defendant, Thomas V. J. Christophers, shall carry out the manifest intention of the parties, as appears upon the face of the conveyance.

§ 1324. *Where a party is in possession by an equitable title, a court of equity will restrain by injunction an action of ejectment against him and settle the rights of the parties in equity.*

It is, therefore, a question of proceeding, and in all such questions it is the duty of the court to direct the course which will tend to diminish useless litigation. If the ejectment suit should go on and the plaintiff should succeed at law, the alleged equitable ground for relief would still remain, and must be met by the defendant. It seems better for all parties to meet it at once, in a suit where all defenses can be considered, and where, in a single proceeding, the whole controversy, in all its aspects, may be settled.

This was the view taken by the learned chancellor of New Jersey, in the recent case of *Hannon v. Christophers*, after an able opinion of Vice-Chancellor Van Fleet (see 7 Stew. 459), and its propriety was clearly admitted in the opinion of the lord justices of the court of appeal in chancery, in the case of *Crofts v. Middleton*, 8 De G., M. & G., 192, in which it was held that where there was an equitable title in a defendant to an action of ejectment, the court of chancery, at his suit, would restrain the proceedings in the action, although there might be a question whether he would not be successful at law. Discussing the question of the right of equity to interfere in a case where the suggestion was made that there was a defense at law, and speaking for the court, Brucc, L. J., says (page 209):

“ But the question is raised whether there is jurisdiction here against the Middletons. I assume that there is; for, before the suit, they brought the action of ejectment for the purpose and in the circumstances that I have stated, and I conceive that where a person is in possession of land by a good, equitable right, and the title is so circumstanced as that the legal estate is either in himself or in another, as trustee for the person in possession, and an action of ejectment is brought against the man in possession by the other, claiming as well the equitable as the legal right, and denying the legal as well as the equitable title of the person in possession, he is entitled, in a court of equity, to relief against the other by way of injunction, if not by way of conveyance and injunction,—in whichever of the two the legal estate may be vested,—inasmuch as the plaintiff in ejectment would, recovering in the action, hold merely as trustee for the defendant in it.”

Let an injunction issue restraining the suit at law until further order. The defendant is allowed thirty days to answer the bill of complaint.

TOWN OF MOUNT ZION v. GILLMAN.

(Circuit Court for Illinois: 9 Bissell, 479-481. 1880.)

Opinion by DRUMMOND, J.

STATEMENT OF FACTS.—In this case a question comes up somewhat irregularly, but we will take the allegations of the bill and of the answer, and, on the assumption that the facts are properly stated in the pleadings, dispose of the case.

The facts, then, are that the defendant in this case was the owner of \$15,000 in bonds, some coupons of which had fallen due and were unpaid, and a suit was brought against the town. The suit was contested, and after consideration of the various questions raised in the defense this court rendered a judgment in favor of the plaintiff. Afterwards, four other suits were brought against the town on coupons that fell due, and judgments rendered. These last judgments were rendered by default.

§ 1825. *A bill to prevent multiplicity of suits will not lie on the ground that suits may be brought from year to year on coupons as they respectively fall due.*

The pleadings state that one of the judgments was paid, and the others were in full force. After all this had taken place this bill was filed by the town and some of the tax payers of the town for the purpose of enjoining a judgment obtained in this court, and for quieting the title, as it is called, of the tax payers to their property, because these bonds were claimed as a debt against the town, and the property was liable to be taxed for the payment of the bonds and coupons. So we have to assume that after a controversy against the town, in which judgments were rendered, and after payment of at least one judgment, tax payers filed a bill for the purpose of restraining the defendant from prosecuting suit on the bonds or coupons on the ground that they were illegal. The prayer of the bill is, that as the plaintiffs are without adequate remedy at law, the further prosecution of the suit at law, as well as any others, should be restrained, and the main ground of equity alleged is on account of the multiplicity of suits which may be brought as the coupons fall due from year to year. The bonds were given in 1872, and run twenty years, so they have not matured. Various grounds are set out in the bill to show that the bonds are illegal, but the main question is, whether, under the circumstances of this case, a bill of equity can be sustained; and we think that it cannot.

Of course a bill in equity will lie for the purpose of preventing a multiplicity of suits; but here repeated suits have been brought and judgments have been rendered against the party. There cannot, therefore, be any question as to whether there is an unreasonable and vexatious number of suits being brought, because the court has decided that the suits were properly brought and judgments have been rendered. There is not a single allegation in the bill which contains a true ground of equity, unless it is simply in consequence of threatened multiplicity of suits. There is not an objection stated in the bill to these bonds except what is a valid objection at law, if at all, and, therefore, the only standing the bill can have is to prevent a multiplicity of suits. But here, as has been said, suits have been brought from time to time and judgments rendered, and can it be claimed then that there is threatened a vexatious number of suits against the town and on that account a court of equity has jurisdiction? We think not.

§ 1326. *Quære: Whether tax payers can bring a suit in the interest of a town when it does not appear that it has been derelict in defending suits brought against it.*

Again, we doubt very much whether it is competent, under the circumstances of the case, for these tax payers to come in and ask for an equitable interposition of the court. There is no charge made against the town, no intimation that the town has been derelict in its duty, or has not contested these bonds in every way in which they could be contested, and it seems to be rather a stretch of equitable authority to claim that these tax payers (the suit having been dismissed as to the town) can come in and obtain the relief which they seek. Besides, we may as well say that nearly every objection, and we believe every objection, made in the bill to the issue of these bonds has been repeatedly urged before the court, and as repeatedly held to be invalid, as against suits of any kind brought by *bona fide* holders of the bonds.

If the case, as of course it may, is to go to the supreme court, it is desirable that it should be put in a different form so that the real questions upon which we have decided it should come before the appellate court; and I may as well say that, as there is a copy of the bond given in the bill, it will appear, from the allegations and recitals in the bond there given, that every question raised by the bill has been decided by this court.

The bill will therefore be dismissed.

SEGEE v. THOMAS.

(Circuit Court for Connecticut: 8 Blatchford, 11-25. 1853.)

STATEMENT OF FACTS.—Under the statute law of Connecticut, and by the proceedings of the probate court, the land of Lucy W. Thomas, who was a minor, was sold and a deed made conveying her title to the plaintiff in this suit. Plaintiff took possession of the land under the title so conveyed during the minority of said Lucy W., but with the full knowledge of her guardian, and put valuable improvements on the land. In April, 1850, many years after plaintiff had taken such possession of the land, a suit was commenced by Lucy W. Thomas, then of full age, demanding the surrender of the premises. The plaintiff files this bill praying that the said suit be enjoined, and that the defects in his title growing out of the defective execution of the power of sale under which his title accrued be corrected and his title validated. Further facts appear in the opinion of the court.

Opinion by INGERSOLL, J.

Upon the hearing, several objections were interposed to a decision of the case by the court upon its merits. These objections were not taken either by plea or answer, but were raised for the first time on the hearing.

§ 1327. *A defendant who appears and answers cannot object that the bill did not pray for process.*

It is said that, in the bill, there is no prayer for process. The object of such a prayer is, that process may issue to bring the defendants before the court; and, if parties appear and make themselves defendants, with the consent of the court and that of the other parties, and answer the bill, they cannot afterwards allege that there has been no prayer for process. If the defendants wished to avail themselves of the objection that there was no prayer for process, they should have taken that objection by plea. This they have not done. By appearing and filing their answer and taking proofs, they admit that they

are regularly defendants, and waive the objection that there is no prayer for process and that process has been issued without such a prayer.

§ 1328. *What amounts to a waiver of process; jurisdiction.*

It is said further, that the court has no jurisdiction either of the subject-matter or of the persons of the defendants; that the eleventh section of the judiciary act of September 24, 1789 (1 U. S. Stat. at Large, 78), prohibits a suit from being brought in any other district than that of which a defendant is an inhabitant, or in which he is found; and that, in this case, the defendants were not inhabitants of this district, nor found within the same. By virtue of the section referred to, a citizen of one state may be sued in another state, if the process be served upon him in the latter state. This clause in the act is not a restriction of the jurisdiction of the court, but only a grant of a personal privilege — that of not being served with process out of the district in which the defendant resides or is found. Being only a personal privilege, it may be waived. The defendant is entitled to be served with process in the district where the court is holden. But, if he appears without such service, he waives the right of so being served with process. It has been held that if a defendant, who is served in the state where he resides with equity process from the circuit court of another state, appears, in pursuance of such process, and answers, without objecting to such service, he thereby waives his privilege and the court has jurisdiction. Sergeant's Constitutional Law, 118; Logan v. Patrick, 5 Cranch, 288. And if he is not served anywhere with process of any kind and appears in the suit and submits to the jurisdiction of the court, it is the same as if he had been regularly served with process. The object of process is to get the defendant into court to answer and defend the suit; and his appearing to answer and defend, without process, is as binding upon him as if he appeared in pursuance of process regularly served. In this case the subpoena was served upon the attorney of the defendants in Connecticut. That was the only service, and the defendants, by appearing and answering the bill, waived all other service.

§ 1329. *Under what circumstances service of process upon the attorney of the party is sufficient.*

But if the defendants had not thus appeared and waived the service of process they could not, in any stage of the proceedings, have successfully objected to the service of the process as made. For, where a party residing out of the jurisdiction of the court has obtained a judgment at law, which is sought to be enjoined by a bill in equity filed in the **same court by the defendant** in the judgment, or where a **non-resident has** instituted a suit in equity, and a cross-bill is filed by the defendant, it has been held that the court will order that **service of the subpoena upon the attorney or solicitor of such non-resident party shall be sufficient.** Hitner v. Suckley, 2 Wash., 465; Eckert v. Bauert, 4 id., 370; Ward v. Seabry, 4 id., 426; Reed v. Consequa, 4 id., 174. And the same rule would apply where an action at law is pending and the defendant brings a bill in equity to enjoin the plaintiff from proceeding with the same.

§ 1330. *Who are proper parties.*

It is said further, that there are not the proper parties to this bill. The object of the suit is to enjoin the defendants from further proceeding in the action at law, and to compel them to convey to the plaintiff whatever legal title they may have to the premises in controversy, in right of the defendant Lucy W. Thomas, as heir-at-law of her father. If the plaintiff did not acquire the legal title to the premises in question by virtue of the deed from Hawley,

it still remains in the defendant Lucy W. Thomas; for the adverse possession of the premises by the plaintiff from the month of March, 1827, to the time of the commencement of the action at law, and his using and improving the premises as his own, and holding the same against the rights of all other persons, would not give him any legal title to the same, as when such adverse holding commenced Lucy W. Thomas was a minor, and the action at law was brought within five years after she became of age. No one but the plaintiff has claimed, or can claim, any equitable title to the premises. No one but the defendants can be affected by a decree enjoining them from the further prosecution of the suit at law. No one but the defendants can be affected by a decree compelling them to convey to the plaintiff any legal title which they may have in the premises. It would seem, then, that as no one but the parties before the court can be affected by the decree prayed for, the proper parties, and all the proper parties, are before the court.

§ 1331. *Objection to parties must be taken by plea or answer.*

But, if this were not so, the defendants should not be permitted to urge this objection in this stage of the proceedings. They have not taken it by plea or answer, or specified in any plea or answer the name or description of the parties who should be brought before the court. And it is expressly provided by the fifty-third of the rules in equity prescribed by the supreme court in 1842, that "if a defendant shall, at the hearing of the cause, object that a suit is defective for want of parties, not having, by plea or answer, taken the objection, and therein specified, by name or description, the parties to whom the objection applies, the court (if it shall think fit) shall be at liberty to make a decree, saving the rights of the absent parties." If, then, there were any rights of absent parties in this case, which could be affected by a decree, it would be right, if the facts in the case authorized it, to make a decree reserving the rights of such absent parties. But there are no absent parties whose rights can be affected by the decree.

There is nothing, then, to prevent this case from being decided on its merits. In order to decide it correctly it is necessary to consider four several questions. Those questions are:

1. Has Mrs. Thomas received pay for the land now sought to be recovered in the action of ejectment?
2. If she has, does she now retain that pay without any offer to return it?
3. Was there a valid order of the court of probate for the sale of the land in question? In other words, was there a valid power given by that court to Hawley to sell the land?
4. Was the deed conveying the land defective? In other words, if there was a valid power given by the court of probate to Hawley to sell the land, was that valid power defectively executed?

§ 1332. *The rule as to interested parties being witnesses. State law validating such testimony does not control federal courts in criminal or equity cases.*

In considering the case I lay aside the deposition of Thomas T. Waterman. He joined with Hawley as a grantor in the deed, with covenants of warranty of title and also of quiet enjoyment. He is interested in having the land in question secured to the plaintiff. If it is not so secured he will be responsible to the plaintiff in damages for the breach of such covenants. It is not claimed that he is a competent witness, unless he is made so by the recent statute of Connecticut, which authorizes parties and interested witnesses to testify both

in suits at law and in equity. The question, therefore, is whether the rule of evidence established by that statute for the state courts governs this court in a proceeding in equity? It is claimed that it does by virtue of the thirty-fourth section of the judiciary act of September 24, 1789 (1 U. S. Stat. at Large, 92). That section provides "that the laws of the several states, except where the constitution, treaties or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision, in trials at common law in the courts of the United States, in cases where they apply." This section was intended to furnish a rule to guide the courts of the United States in the formation of their judgments, in trials or litigations in court, in cases at common law. To enable them to form a judgment in such cases, the laws of the several states are to be regarded as rules of decision or rules of evidence. But the section does not apply to cases in equity or to criminal cases. If this were a trial at common law I should hold that Thomas T. Waterman, although interested in the event of the suit, was, by virtue of the Connecticut statute, and of this act of congress, a competent witness. But as this is a proceeding in equity, he is not a competent witness. The rules of evidence in the courts of the United States, in equity cases and in criminal cases, are not affected by any state statute made on the subject.

1. Has Mrs. Thomas received pay for the land now sought to be recovered in the action of ejectment? At the time of the death of her father she was a minor, and did not arrive at full age until about the year 1846 or 1847. Soon after her father's death, her mother, Lucy Waterman, was appointed her guardian, and she, as guardian, on the 31st of October, 1826, petitioned the court of probate for the district of Stratford for liberty to sell the land belonging to the minor, and which descended to her from her father, and which included the land now in controversy. On the 26th of February, 1827, an order was passed by the court of probate empowering Wilson Hawley to sell the land. On the 12th of March, 1827, Hawley executed a deed of the land, and on the 14th of March, 1827, there was paid to the guardian the sum of \$1,129.71, as expressed in the receipt which the guardian gave at the time, "in full of all the right, title and interest which my daughter, Lucy Wolcott Waterman, has, or ought to have, in, unto and upon the estate of said Elijah Waterman, her late father, and in full of her portion in said estate, which sum I do hereby acknowledge to have this day received as mother and guardian to said Lucy Wolcott Waterman, she being a minor under the age of twenty-one years." It is admitted in the answer that, on the same 14th of March, that sum was paid to the guardian, as stated in the receipt, and that the receipt was duly executed by the guardian.

The guardian was the person appointed by law to receive what was due or payable to the minor; and a payment to the guardian was a payment to the minor. For what, then, was this payment made? Was it made for the land in question, or for some other consideration? It is expressed in the receipt to have been for the minor's portion in the estate of the deceased. It was for her portion either in the personal estate or in the real estate. If she had any portion in any personal estate to any amount, then it might be right to infer that it was for such portion in the personal estate. If she had no portion in any personal estate, but had a portion in the real estate, then it would be right to infer that it was for such portion in the real estate. For, if it was for her portion in some estate which came from her father, and which belonged to

her, and there was no personal estate which belonged to her, but there was real estate which belonged to her, then it necessarily follows that the money was paid for some portion of the real estate.

The records of the court of probate show that there was no personal estate belonging to the heirs to be distributed. All that belonged to them was real estate. Mrs. Thomas' share was a little short of \$600, according to the valuation in the inventory. For this share she was paid over \$1,000. It was paid to her guardian, the person appointed by law to receive it. The receipt shows for what it was paid. She was not only paid for it through her guardian, but she has had the benefit of such payment. With it she has been supported and educated. And if anything was left in her guardian's hands after deducting the cost of such support and education, she has received from the estate of her guardian more than sufficient to make up what may have been so left. She has therefore received pay for the land now sought to be recovered in the action of ejectment.

2. The second question is easily answered. It is not claimed by the defendants that they, or either of them, have ever offered to return to the plaintiff anything which Mrs. Thomas received as pay for the land. They deny, or they must deny, that she ever received any such pay. This fact is proved against them, and they are compelled to admit that, if she did receive such pay, it is retained, without any offer to return it.

§ 1333. *Powers of a probate court of Connecticut as a court of record. Its record of a notice conclusive in what cases.*

3. Was there a valid order of the court of probate for the sale of the land in question? In other words, was there a valid power given by the court of probate to Hawley to sell the land? The petition of the guardian for the sale of the land was presented to the court of probate on the 31st of October, 1826. On that day the court of probate passed an order that the 27th of December then next be assigned for the hearing of the petition, and directed notice to be given by advertisement in a newspaper printed in Bridgeport for three weeks successively, at least six weeks before the assigned time. On the 26th of February, 1827, the court of probate passed an order for the sale of the land, and authorized Hawley to sell it. And in passing such order the court found that the notice required by the order of the 31st of October, 1826, had been given. It is claimed by the defendants that the order of the 26th of February, 1827, was a void one; that it conferred no authority on Hawley to sell the land; that it was an invalid power. Two objections are made to it: *First*, that no notice was given in pursuance of the order of the 31st of October, 1826. *Second*, that it does not appear, by any record of the court of probate, that the hearing of the petition was continued from the 27th of December, 1826, to the 26th of February, 1827, the time when the order of sale was made.

As to the *first* objection: Courts of probate are courts of record. Full faith and credit are due to their official acts, when regular on the face of them. As much faith and credit are due to them, so long as they remain unreversed, not appealed from and not set aside, as are due to the official acts of other courts of record.

The order of the court of probate authorizing the sale of the land in question finds that notice in conformity with the order of the 31st of October, 1826, had been given. The record, then, of a competent court, acting within its legitimate powers, has declared that notice in pursuance of the order was

given. That record must be considered as speaking the truth, and as conclusive, if it is not void on its face, until it has been reversed, or in some way set aside or vacated, or appealed from. And there is no claim that it ever was appealed from, or in any way vacated or set aside.

§ 1334. *When and under what circumstances a sale by order of a probate court of Connecticut of a minor's land is valid.*

As to the *second* objection: In the petition for the sale of the land, it was alleged that it was for the interest of the minor that the land should be sold. On that petition, the court of probate, on the same day it was presented, passed the order referred to, and assigned the 27th of December, 1826, to determine the question whether it was for the interest of the minor that the land should be sold. By the statute law of Connecticut then in force (see Statutes of Connecticut, edition of 1821), the several courts of probate were authorized, for just and reasonable cause, to order the sale of the real estate of any minor, on application of the parent or guardian of such minor, and to empower him or some other person to sell or convey the same, upon his giving bond with surety as by the statute is provided. And, by a subsequent part of the same law, it is made the duty of the court of probate, whenever application shall be made for an order to sell the real estate of any minor, to cause notice of such application to be published in some newspaper, near where the real estate lies, three weeks successively, at least six weeks before making the order. The 27th of December, 1826, was the day fixed, not for making the order of sale, but for determining the question whether there was just and reasonable cause to have such order made. It would not follow that an order of sale would be made upon determining the question of just and reasonable cause in the affirmative. That question might be determined in the affirmative, and yet no order of sale be made. Two things were to be done, after such question should be determined in the affirmative, before an order of sale could be made, to wit: first, to obtain some person to consent to execute the power; and, secondly, to receive from such person so consenting a bond, with surety, that the power should be executed in the manner required by law. These two things were to be done before an order of sale could be made. They might be done either at the time fixed for the determination of the question of just and reasonable cause, or at some future time.

Although the bond required by law upon an order authorizing the sale of the minor's land was not given until the 26th of February, 1827, and although the order authorizing the sale was not made until that time, there is nothing in the order inconsistent with the idea that the determination of the question of just and reasonable cause was made on the 27th of December, 1826. And, as everything, particularly after this lapse of time, is to be presumed to have been rightly done, it is fair to infer from the order itself, that the determination of the question of just and reasonable cause was made on that day; that, subsequently thereto, Hawley consented to execute the power; and that, he having, on the 26th of February, 1827, given bond with surety, as by law required, the order of sale was then passed.

The order of sale, therefore, it not having been appealed from, reversed or vacated, must be considered as a good and valid order.

4. Was the deed for the conveyance of the land defective? Was the power given defectively executed? The plaintiff in his bill says that the deed is defective. The defendants in their answer admit that the deed is defective in form, and, as they are advised, defective also in substance. And, as both par-

ties say it is defective, no one can complain if the court treats it as a defective deed.

§ 1335. *A deed defectively executed.*

The deed must, however, be considered as defective irrespective of the admission of the parties. The power given by the court of probate to Hawley to sell the land was defectively executed. The order authorizing the sale was dated February 26, 1827. The only reference to the order of sale in the deed is as follows: "Being thereto authorized by an order of the court of probate for the district of Stratford." The date of it is not given. By the decisions of the state courts this is not sufficient to make the deed a good one. The authority of Hawley does not sufficiently appear on the face of the deed. The reference to the order is not sufficiently distinct. *Watson v. Watson*, 10 Conn., 77.

§ 1336. *A deed defective for want of statement of notice of sale.*

The deed is defective in another particular. The order of sale directed Hawley, before a sale was made, to give notice of the same, by advertisement on the sign-post in Bridgeport and in a newspaper printed at Bridgeport. There is nothing in the deed to show that this direction was complied with; and no evidence is produced to show that any notice was given. The deed, therefore, must be considered defective. And the power given to Hawley was defectively executed.

§ 1337. *Under what circumstances a court of equity will aid the defective execution of a valid power.*

The question, then, is, What should a court of equity do under the circumstances? Whatever may be said against the right of a court of equity to interfere to aid a defective and invalid power, it is very clear that it is always ready to interfere to aid the defective execution of a valid power. Nothing is more common than for a court of equity to interfere to aid such defective execution of a valid power, when there are no opposing equities on the other side. In the deed in question, there is clearly an intention manifested by Hawley to execute the power given him. He made an attempt to execute it, and the execution was defective. A man has power to execute a deed of land. The statute requires that all deeds of land shall be executed in the presence of two witnesses. The deed is executed, by mistake, with only one witness. Equity will relieve. In this case there was no statute regulation to be followed in the execution of the power, by the neglect of which the execution of the deed was defective. But the two defects existed which have been pointed out. And to aid defects of this kind a court of equity will interfere, when there is no opposing countervailing equity. 1 Story's Eq. Juris., §§ 95, 169 to 179; *Smith v. Chapman*, 4 Conn., 344; *Watson v. Wells*, 5 Conn., 468; *Carter v. Champion*, 8 Conn., 549; *Sumner v. Rhodes*, 14 Conn., 135. Is there, then, any opposing equity on the part of the defendants? None can be discovered. Upon the petition of the guardian, the court of probate, after due notice to all concerned, found and adjudged that it was for the advantage of the minor to have the land sold, and that her interest would be promoted thereby. That being so, the court authorized Hawley to sell the land. He bargained with the plaintiff for the sale, and made a defective deed of the land. Upon the execution of such defective deed, all parties supposing it to be good and valid, the plaintiff paid the full value for the land, which full value was paid to the guardian. Thereupon the plaintiff went into possession, using and improving it as his own, and, by his expenditures, greatly adding to its value, no one, until the commence-

ment of the action at law, in April, 1850, contesting his right. Mrs. Thomas received the pay for the land, and now retains it, never having offered to return it; and while so retaining it, seeks to recover the land, with all the improvements, upon the ground that the deed was defective in form. These facts show a strong equity on the part of the plaintiff, and no equity on the part of the defendants.

§ 1338. *There may be no adequate remedy at law, although there are covenants of warranty and seizin in the deed.*

It is claimed, however, on the part of the defendants, that, notwithstanding this is so, the plaintiff has an adequate remedy at law, and therefore no relief should be granted. This remedy, which it is said the plaintiff has, is the right to bring an action at law for damages against Hawley, on the covenants contained in his deed. This is the only remedy at law which the plaintiff has. And, although it is a remedy which he may have at law, it is not an *adequate* remedy at law. How much of a remedy the plaintiff may have upon such covenants does not appear. Whether any one liable upon such covenants would be able to respond in damages for the breach of them has not been made manifest. But, whether any one be able to respond or not, that should not be considered a sufficient reason why the defendants should not be restrained from doing that, the doing of which is inequitable and unjust, or why the defendants should be permitted to violate the equitable rights of the plaintiff. There is no remedy in favor of the plaintiff, by action at law, against the defendants. They are attempting to do that which, in equity and good conscience, they ought not to do. And, even if there was a remedy at law against the defendants, it would not prevent the interference of this court, as a court of equity, unless that remedy at law was a full and adequate remedy. For it has been held that the courts of the United States, as courts of equity, will grant relief to a legatee, against an administrator, although the party plaintiff may have a remedy at law, on an administration bond. Pratt v. Northam, 5 Mason, 95.

The decree of the court therefore is that the defendants be restrained from the further prosecution of their action at law against the plaintiff, and be decreed to release and convey to the plaintiff all right and title to the land sought to be recovered in that action, and that the defendants pay to the plaintiff his costs.

SAWYER v. GILL.

(Circuit Court for Massachusetts: 8 Woodbury & Minot, 97-105. 1847.)

STATEMENT OF FACTS.—In this case the plaintiff, as assignee, under the insolvent laws, of Saxton & Huntington, filed this bill to enjoin a judgment at law in a suit by Gill against Saxton & Huntington on the ground that the assignment to Gill was collusive and made to give this court jurisdiction. Gill not being found, the notice was served on Fuller, his attorney in the suit at law.

§ 1339. *Under what circumstances service of process upon the attorney of the party is sufficient.*

Opinion by WOODBURY, J.

There is no doubt that the practice in modern times is more extensive than formerly, to make services on attorneys of parties in suits, rather than on parties themselves. This is more especially the case in respect to orders and

notices. This is convenient to all concerned, because, in conducting the suit, both parties act through their attorneys; and after their names are on record, and well known, it is less expensive to transact the business of the suit with them, and saves trouble to the parties, who, if notified in person, would be obliged afterwards to travel and consult with their attorneys.

But the principle or hypothesis on which this practice rests would confine it substantially to the suit where the attorney has appeared, and is presumed to be instructed. Hence, in that suit, notices to produce papers, take depositions, file pleas, proceed to trial, etc., etc., can, as a general rule, be properly and effectively served on the attorney of record of either party. 1 Tidd's Pr., 443. See our 4th Rule in Chancery. 1 Browne, 15.

So, a rule to show cause may be served on an attorney. *Hutcheson v. Johnson*, 1 Bin., 59; *Wardell v. Eden*, 2 John. Cas., 121; 4 John. C., 62; *Coleman's Cases*, 137.

So, a rule to enforce the payment of costs. 1 Smith's Ch. Pr., 456; 6 Lewis, 429.

The length of time given him to consult with his client, if living out of the state, or when the subject of the notice required a personal resort to him, is matter of sound discretion, and will be modified so as to prevent any evil in any instance, or any surprise from this mode of service.

But when courts have gone thus far, on the principles before explained, they can proceed no further in respect to other distinct actions, however guarded as to time given to communicate with one's client. As to those actions, he may not be his attorney, or substitute.

If the service relates to a new and independent action, therefore, in which he has not been especially retained, and is not the attorney on record, it becomes a question of power and authority, and not of convenience, how notice to appear and defend in it shall be given; and a court, no more than an individual, possesses a right to treat him as the attorney, in another disconnected suit. He is not the agent of the party in that separate suit—*quoad hoc*. *Hinds*, Ch., 91; 1 Smith, Ch. Pr., 111; *Hoff*, Ch. Pr., 110; 5 Sim., 502.

And how can the court make a person the agent of another for a matter which the principal has never confided to that person? 2 Cox, 389; 3 Bro. C. C., 386; 1 Sch. & Lef., 238; 2 Meriv., 458.

In Louisiana a curator is often appointed for absentees, by the court, and he is served. See Civil Code of Law.

By the statute of many states, where the respondent in an action has his residence out of the state, as here, and property is attached, notice is ordered in the public papers; and if not made in any way personally, the cause, after a certain number of continuances, is allowed to be defaulted, and judgment taken open to review, or new trial, for a certain length of time; and such judgments, without actual notice, usually bind only the property attached. See *Sumner v. Marcy*, 3 Woodb. & M., 105.

But I am not aware of any service being declared good by any statutes, if made on another person, merely because the latter had been a special attorney for the party in some other cause.

Proceedings might be continued in chancery, where not provided for by statute, and a personal service ordered by actual notice on the respondent. After that, judgment *pro confesso* could be rendered if not conflicting with any act of congress, and if no actual appearance is made, somewhat in analogy

to the provisions in the statutes as to legal proceedings connected with foreigners or absentees.

§ 1340. *An injunction may, in a proper case, be granted to stay an execution at law. Fraud, in getting jurisdiction in this court, is such a case.*

But is it necessary to be attempted in that way here? Is this bill a distinct, independent proceeding from the action at law, so that the counsel there ought not to defend here, on a substituted service being made on him? After full inquiry, I think it is not independent. It is true, that, nominally, both the parties are not the same; nor is all the subject-matter the same. But, in reality, the parties are in interest identical, and the point now in controversy was involved in the action at law.

The whole of this bill is to elicit matter bearing on the satisfaction of the judgment in the other action, and connected with the attachment in it as well as the execution of the judgment.

Courts, and especially those sitting in equity, must look through forms to the substance or the heart of transactions.

There, Gill was the plaintiff, who is the defendant here; and there, Saxton & Huntington were the defendants, whose assignee, Sawyer, their privy in law and interest, is the plaintiff here.

For many purposes the assignee stands in the shoes of the debtor, as fully as an administrator does of one deceased. He does so, as to all rights of property, and can even go further, when necessary, to protect the other creditors against frauds and other illegal preferences of particular favorite creditors. See cases in *Leland v. The Medora*, 2 Woodb. & M., 92; *Osborne v. Moss*, 7 John., 161; 10 Paige, 218; 4 John. Ch., 450. How is it, also, as to the subject-matter in controversy?

There, it was not merely a note of hand and its recovery; but it was to sustain a suit on it in the circuit court of the United States, by a *bona fide* owner of it being out of the state, so as to be able to attach property on the writ, and hold it and satisfy the judgment on it; when one not so living or so owning it could not thus attach and satisfy his judgment, provided the debtor before such satisfaction became insolvent and his property was transferred to an assignee.

It is impossible to shut out of sight that this mode of securing and satisfying the note, and not the mere indebtedness on it, was the real matter in contest. When Gill became insolvent, as was anticipated, his other creditors and his assignee were interested to defeat this object and to have the goods discharged, as required by the Massachusetts insolvent system and administered on equally, under her insolvent laws, for the benefit of all. This bill was, therefore, instituted, and judgment and execution in that suit delayed, in order to test this very point—a point vital to the limited jurisdiction of this court—a point indissolubly interwoven in those proceedings as well as these, and the only one really to be contested, either there or here.

Merely changing the mode of trying it from some appropriate motion there, to a bill here; and staying the judgment and execution there, till this bill is acted on, cannot alter the essence—one and indivisible—of the controversy. This bill is in the nature of a prohibition to those proceedings. The counsel there, too, was probably instructed in all which he will need consultation on here. This proceeding, as a mere incident to the other, he would naturally conduct as well as the other, as well as he would conduct a motion connected

with the other, on a proceeding for contempt in the other, or a subsequent writ of error issuing on the other. They are connected parts of one whole.

It is in this view that in a suit as to land,—if in the meantime an injunction is brought to stay waste on that land,—Justice Washington thought the service might properly be on the attorney on record. Conkling, Pr., 90; Hitner v. Suckley, 2 Wash., 465; see, also, 1 Peere Wms., 523, anonymous.

§ 1341. *A substituted service of an injunction may be made on the attorney of the plaintiff in the action at law. Not admissible in cross actions.*

But the injunction must relate to the suit, or the subject-matter of it, and not to a distinct question.

If they are not connected parts of one whole, but are, virtually, cross suits between parties in relation to a controversy between the same parties, one of them, by quitting the country, or residing abroad, is not allowed to evade responsibility. Conkling, Pr., 90.

But the proper mode of service in such case has been controverted. The writ might be well served on his attorney, in the first action, according to early decisions. Mason v. Gardiner, 4 Bro. Ch. C., 478.

The authority of that case, however, is doubted in Waterton v. Croft, 5 Sim., 507, though the practice was in that form and deemed good till 1775. 5 Sim., 505. So in Bond v. Duke of New Castle, 3 Bro. Ch. C., 386, and Anderson v. Lewis, 3 id., 429, and 1 Sch. & Lef., 238, and 4 Wash., 174, 320, 426. So Eden on Inj., 53.

It seems that since 1755, instead of a substituted service on the attorney in case of a cross cause, it is thought better that the proceedings in the first suit should be stayed till the party residing abroad appears and defends the second action.

This reaches the same result in a different way; as in the other form the attorney would not be required to proceed, or the respondent would not be in contempt till the attorney enjoyed a reasonable time to communicate with his client. That could be done here, two or three times a day—at Nashua, the first town in New Hampshire—where Gill resides. So a reasonable time to decide whether to defend the bill or not would be given, and after appearing—should he do so—time to file answers to the interrogatories and charges made in the bill.

But a service of a bill for an injunction on the attorney of a party in the suit at law is still held to be good; it being not so much a cross-suit as an appurtenant or proceeding connected with the suit. 2 Madd. Ch. Pr., 198; Eden on Inj., 53; 8 Pet., 1; Delancy v. Wallis, 3 Bro. Ch. C., 12; and Anderson v. Lewis, id., 429 and note (2); French v. Roe, 13 Ves., 593; and Kenworthy v. Accunor, 3 Madd., 550. But there must be, if required, an affidavit of the truth of the equity claimed in the bill. Bro. Ch. C., 12 and 24, and note. This is to prevent bills for mere delay. Eden on Inj., 53.

In bills for injunctions it seems well settled to be the duty of the attorney of the plaintiff on the record in the suit at law, to inform him of this notice, and if, after such notice, he does not answer in due time, I see no reason why judgment *pro confesso* should not be entered against him on the bill. 8 Pet., 1.

One argument against considering the contest here the same in substance as in the action at law deserves a moment's attention. It is that the decree here would not be, in such a case, to suspend or prevent the judgment there forever. That it *might* not be so is true. But the judgment there was not the sole controverted point. It was rather the true interest in the note, whether being

in Gill or not, and whether the right in him to sue in this court and attach goods and hold them so as to be levied on by an execution on that judgment existed or not. Now the decree here, if against Gill, in the end would probably be to restrain him, not from an execution, but from levying the execution on those particular goods, on the ground that he has been guilty of fraud and has no *bona fide* right to sue and attach here to the injury of other creditors in Massachusetts. In this last view the question relates more to jurisdiction than the amount of the debt.

Whether the whole judgment ought not also to be enjoined against, as obtained here, where rightfully no jurisdiction existed, there having been only a fraudulent assignment or sale to a citizen of another state, is a question open to be settled, when reached, and on which the disclosure in answer to this bill will, when made, probably fling some light.

Though the debt, secured by the note, may be owing and may properly be proved against the insolvent's estate, yet it by no means follows that a judgment on it in this court should be rendered, where its jurisdiction over the note is limited, and it has by fraud, or for sinister purposes, been sued in this court, where the party on the truth of the case had no legal right to sue.

An injunction may issue to stay an execution no less than a trial or judgment. 3 Bro. Ch., 24.

Fraud is one ground for an injunction to stay proceedings at law (Eden on Inj., 19), and fraud is here alleged, and the injunction, when proper, may go to a part or all of the proceedings, as may be found necessary to defeat the fraud; or it may go only against a levy of the execution on the particular goods improperly attached. The service on the attorney in this case is, therefore, under the circumstances, considered sufficient.

ROGERS v. CITY OF CINCINNATI

(Circuit Court for Ohio: 5 McLean, 337-341. 1852.)

Opinion of the Court.

STATEMENT OF FACTS.—This is a bill for an injunction. It represents that the complainants are citizens, one of New York, the other of Pennsylvania; that they have constructed a vessel called the "Floating Palace," designed to be used generally in the navigable waters of the United States, as an amphitheater or circus, for the exhibition of equestrian performances, to which it is now applied; that this vessel has been regularly enrolled at the port of Cincinnati, pursuant to the act of congress, the certificate whereof is dated the 20th May, 1852; that on the same day the vessel was licensed, pursuant to the act of congress, to carry on the coasting trade for one year, for the purpose of the exhibitions aforesaid; that said vessel is moored at the public landing of Cincinnati, and used for the exhibitions aforesaid, but is not within the limits of said city.

And the complainants allege that the city of Cincinnati has commenced a suit against them for making such exhibitions, without any license, contrary to the ordinance, as is alleged, of said city. And praying that the said city may be restrained by injunction from a further prosecution of said suit, until a final hearing in this case. That there is no relief at law, etc.

§ 1342. *Jurisdiction from citizenship. Congress has exclusive power to regulate interstate commerce.*

Jurisdiction in this case may be taken from the citizenship of the parties;

but the relief cannot be given as prayed, unless the facts stated in the bill authorize it. That the exclusive power to regulate commerce among the states is vested in congress, in my judgment, is not now a debatable question. Nor that all acts of any state which obstruct such regulations are void. But the commercial power is not involved, unless the bill makes a case for relief in chancery.

That the courts of the United States, in common with the state courts, will enjoin against any threatened injury, where the law gives no adequate remedy, is undoubted. And this principle is applied to private nuisances. But, in every such case, it must be made clear to the court that the mischief threatened will be irremediable at law.

The ground stated in the bill for an injunction in this case is that a suit has been commenced against the complainants for a violation of a city ordinance, in exhibiting their circus without a license from the city; and that the complainants, having enrolled their vessel and taken out a coasting license under the act of congress, have a right to exhibit their circus without taking a license from the city. If this were admitted, does it follow that the state tribunal should be enjoined?

There are two objections to the mode of proceeding suggested. 1. The circuit court of the United States has no power to enjoin a procedure in a state court. 2. There is a remedy at law.

§ 1343. *Concurrent jurisdiction of federal and state courts.*

The federal and state courts in many cases exercise a concurrent jurisdiction; and in all such cases the pendency of a suit in the state or federal court may be pleaded in abatement to an action brought for the same cause in any other court. In every respect, except where the acts of congress have made special provision, the courts of the state and of the United States are as distinct and independent in the exercise of their powers as the courts of two separate and independent nations.

§ 1344. *Federal cannot supervise state court.*

No supervisory power can be exercised by a federal court over a state court, unless under some special provision. The exceptions are in behalf of citizens of other states, who may remove a suit from the state court to the circuit court of the United States, by application at the first term and giving bail, etc. And also "where is drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision is against their validity; or where is drawn in question the validity of a statute of, or an authority exercised under, any state, on the ground of their being repugnant to the constitution, treaties or laws of the United States, and the decision is in favor of such their validity," etc., as provided in the twenty-fifth section of the judiciary act of 1789. A writ of error lies from a state court to the supreme court of the United States. But this right can only be exercised in the mode prescribed. The question must be made in the state court, and the decision must be against the right set up. This gives no original jurisdiction to the circuit court; it only authorizes a writ of error to reverse a judgment of the highest court in a state under the circumstances stated.

§ 1345. *Federal cannot enjoin state court.*

In no other case is a court of the United States authorized to issue process affecting a judgment or proceeding in a state court. No injunction can be issued by a federal court nor prohibition to a state court. Acting under the state laws, each court may proceed, and its judgments are final, unless the

case is embraced by the twenty-fifth section above stated, or is required to be certified on the ground of the citizenship of the defendant.

If the ordinance of the city be in conflict with any commercial regulation by congress, there is an adequate remedy at law. The question may be made in the mayor's court, and if decided against the complainants an appeal or *certiorari* is given them as a matter of course to a higher court, from which, by a writ of error, the case may be taken to the supreme court of the state, and thence to the supreme court of the United States. An adequate remedy would be to defeat the claim of the city, if it be in violation of the constitution of the United States, or of any act of congress or authority of the United States. There is then a plain and an adequate remedy at law, and consequently relief cannot be given in equity, even if the circuit court of the United States had power to enjoin the proceedings of a state court.

If no suit had been commenced in the state court, but was only threatened, still there would be no sufficient ground for an injunction. The threatening to bring a suit at law, for any purpose, in a matter of this kind, could not be considered a mischief against which an action at law would not afford redress. It is not within the rule on which chancery interposes by injunction.

An injunction may be issued in a patent case, before the right is established at law, where the right appears to be clear. But this is founded upon the nature of such cases. There is no effectual remedy against the violation of a patent, except by injunction.

Damages at law may discourage the piracy and cause an individual to abandon it, but this is a matter resting with the defendant. An injunction affords the only adequate protection.

The prayer for an injunction is overruled.

WESTERN UNION TELEGRAPH COMPANY v. ST. JOSEPH & WESTERN RAILWAY COMPANY.

(Circuit Court for Kansas: 1 McCrary, 565-570. 1890.)

Opinion by MCCRARY, J.

STATEMENT OF FACTS.—This case has been argued and submitted upon demurrer to the bill. The material facts, as they are stated in the bill, are as follows:

1. On the 10th day of August, 1871, the Western Union Telegraph Company, and the St. Joseph & Denver City Railroad Company, entered into a written contract, whereby, upon certain terms and conditions, a line of telegraph was to be constructed, maintained and operated along the line of said railroad. Each company was to contribute, as specified in the contract, certain material and service in the construction, maintenance and operation of the line.
2. The railroad company agreed to give the telegraph company the exclusive right of way, on and along the line of the road, for the construction and use of a telegraph line for public and commercial business.
3. Provisions were made for transacting the telegraph business of the railroad company by the telegraph company.
4. The agreement was to continue in force for the term of twenty-five years from the 10th of August, 1871.
5. In pursuance of the contract, and in full reliance upon its legality, and the good faith of the railroad company in making it, the plaintiff has erected

and maintained, at great cost and expense, a line of telegraph along the line of the railroad, consisting of two wires, one extending from Elwood, in Kansas, and St. Joseph, Missouri, to Hastings, Nebraska, and the other from the same points to Hanover in Kansas.

6. The said railroad company constructed its railroad from a point opposite the city of St. Joseph, Missouri, although the charter was for a railroad from Elwood, Kansas, westwardly to a junction with the Union Pacific Railroad, or any branch thereof; and it was expressly understood and agreed between plaintiff and said railroad company, at the time the contract was entered into, that the plaintiff was to operate, maintain and establish its telegraph along the line of the railroad, from St. Joseph, through Elwood, Kansas, and the line was so erected, and has been so maintained and operated.

7. Certain mortgages executed by the said St. Joseph & Denver City Railroad Company were duly foreclosed, and under decree of foreclosure thereof all the land, property, rights and franchises of said company were duly sold and conveyed to persons representing the holders and owners of the mortgage debts. In 1875 the purchasers, and those for whose benefit they purchased, took possession of the entire line from St. Joseph to Hastings. Afterwards the St. Joseph & Western Railroad Company was organized, and all the property, rights and franchises of the old company were sold and conveyed to it.

8. Since the purchase by said last-named company (defendant herein) it has been using and operating the railroad, and has fully ratified, sanctioned and confirmed the contract made and entered into between the plaintiff and St. Joseph & Denver City Railroad Company, and received and enjoyed all the benefits and advantages of said contract that had been received and enjoyed by the St. Joseph & Denver City Railroad Company down to the time the new corporation, now owning and controlling the same, was formed.

9. The defendants have combined and confederated together for the purpose of defrauding the plaintiff of said line of telegraph, and of the property and wires connected therewith, and did, about the 27th of February, 1880, unlawfully, and with force, seize the telegraph line at a point in Doniphan county, Kansas, etc., and did forcibly deprive plaintiff of all possession, benefit and control, of said telegraph wires and batteries, etc.

The prayer is for an injunction to restrain defendants from preventing plaintiff reconnecting the wires that have been cut and severed as aforesaid, and restoring the connection which has been severed, and from preventing the plaintiff from using the said line and wires, and enjoying all the benefits to which plaintiff is entitled under said contract of August 10, 1871, and from interfering with plaintiff in the use of said telegraph and wires, and from the exercise of rights heretofore claimed and exercised under said contract.

Prior to the removal of this cause from the state court an injunction was granted. The defendants demur, and also move to dissolve the injunction. It will be sufficient, for the present, to consider the case upon the demurrer.

§ 1346. *A court of equity will enjoin the seizure of property, although it may have been acquired under an illegal contract, until the courts can pass upon the titles and the accounts can be settled.*

1. It is said that the charter of the St. Joseph & Denver City Railroad Company expired by law in 1877, and, inasmuch as the contract was to run for twenty-five years, or until 1896, it was beyond the power of the corporation, and void. It is not necessary to determine the question whether such a contract is void *in toto* or only void as to that part of the contract which, by its

terms, is to be performed after the expiration of the charter, because, in so far as it has been executed, the parties are bound, and rights may have accrued that a court of equity will enforce. The contract was entered into; it is not tainted with moral turpitude; under it a line of telegraph has been built and operated, and a valuable business has been created; for about nine years it has been recognized and executed. Under these circumstances it is not the province of either party to declare the contract void, and assume, without process and without a settlement, to seize the lines and property.

§ 1347. *A corporation may, like an individual, ratify contracts by which it would not otherwise be bound.*

2. It is insisted that by the foreclosure sale of 1875, to the new company, they acquired all the rights the old company had in the wires along the line; that the new company took them freed from any claim of plaintiff under the contract, and is not bound by it. This claim is fully met by the allegation in the bill, which is admitted by the demurrer, that the new company, since its purchase, has fully ratified, sanctioned and confirmed the contract, "and that it has received all the benefits and advantages of said contract that had been received and enjoyed" by the old company. If this allegation is true, it must follow that the new company is at least so far bound by the terms of the contract as to be obliged to submit to an accounting and settlement with the plaintiff before it can take possession of the wires and eject the plaintiff therefrom. A corporation, like an individual, may ratify, by its acts, the terms of a contract by which it would not without such ratification be bound.

3. It is also insisted that the plaintiff is not entitled to relief, because of the clause in the contract which gives the plaintiff the exclusive privilege of constructing and operating a line of telegraph along the line of the railroad.

I have little doubt that the clause here referred to is void; and should any telegraph company desire to erect another line along the railroad, I do not think the plaintiff could be heard to object. *Western Union Telegraph Company v. American Union Telegraph Company*, Supreme Court of Georgia, 1880.

But that clause does not vitiate the entire contract, as between the parties; much less does it preclude the plaintiff from seeking the aid of a court of equity to protect rights acquired under it and growing out of its execution in the past.

§ 1348. *Although a specific performance of a continuous contract will not be decreed, equity will enjoin its violation.*

4. It is said that the contract requires the performance of continuous duties, and therefore specific performance will not be decreed. This is true, but a court of equity may, nevertheless, enjoin its violation. *Pomeroy on Specific Performance*, §§ 24, 25, 310, 311 and 312.

5. I am not prepared at present to decide that the defendants may not be able to show that the contract in question ought to be canceled by decree of this court; that is a question which can only be determined upon final hearing. In cases of this character, where the contract requires continuous service for a series of years, and where the parties disagree, even if the contract is not absolutely void, a court of equity may decree a dissolution of the relations between them, upon a full settlement of their accounts and payment of any balances.

What I wish to emphasize in this case, as well as in other similar cases, is that the defendants have no right to take their remedy into their own hands.

If they have the right to seize this property by force, upon the ground that they hold the contract void, according to the same reasoning the plaintiff would have the right to adjudge the contract valid, and by force retake the property. In other words, force and violence would take the place of law, and mobs would be substituted for the process of courts of justice. The strongest litigant, the one commanding the largest force of men and the most money, would succeed.

Such a doctrine, if recognized by the courts as a proper mode of adjusting disputes concerning property rights, would lead at once to anarchy.

If the defendants, after years of acquiescence in the contract in question, after receiving its benefits, and after a property had been built up under it to which others made claim, became suddenly convinced that it was a void contract, it was their duty to apply to the courts for relief, praying a cancellation of the contract, and a full and fair settlement of all accounts growing out of its execution in the past.

Until they seek some such remedy, and until a fair settlement upon full accounting can be had, they will be enjoined from attempting to eject the plaintiff, or to seize the property.

The demurrer to the bill is overruled.

LITCHFIELD v. THE REGISTER AND RECEIVER.

(Circuit Court for Iowa: 1 Woolworth, 299-318. 1868.)

STATEMENT OF FACTS.—Bill for an injunction against the register and receiver of the land office at Fort Dodge, Iowa, to enjoin them from receiving and acting upon applications for the pre-emption of certain lands. The complainant contended that the lands were not public lands, and that he had obtained title to them through grants by the general government to the territory of Iowa.

Opinion by MILLER, J.

When the application was made to me in the vacation for a temporary injunction, I had strong doubts, on reading the bill, whether it presented a case for judicial action. I accordingly appointed a day for hearing the application, sufficiently distant to enable counsel to prepare for the discussion, and expressed my desire that the question involved should be fully argued. But it seems that when the day for hearing had arrived, the defendants had received no authority to employ counsel, and therefore they were not represented.

As the mischiefs which the complainant sought to prevent by the injunction were great and imminent, and as a similar order had a few weeks before been granted in open court, I concluded to allow the temporary writ without hearing an argument from the plaintiff, which could only be *ex parte*. But I appended to the order a statement that it was made subject to the right, at any time, to move before me for its dissolution. I also expressed my readiness to hear such motion at any time, and my doubts as to the plaintiff's right to the injunction.

Being aware of the large amount of property involved in the question, of the number of persons interested in it, and of the public excitement on the subject, I have since given it some thought, and that reflection, and the arguments made here, have tended to strengthen my first impression. I am now

quite satisfied that the bill cannot be sustained for want of any equitable jurisdiction to grant the relief sought.

The grounds of objection to the bill are two:

1. The want of proper parties defendant, to wit, the individuals who it is alleged are asserting their right to enter these lands by pre-emption or otherwise.

2. The parties who are before the court are acting as officers of one of the executive departments of the government, in the discharge of functions which are not ministerial, but which involve the exercise of judgment and discretion.

§ 1349. *An injunction will not lie to restrain the officials of the land office from issuing patents to settlers under the pre-emption and homestead laws, unless the pre-emptors are joined as parties defendant.*

(1) This bill clearly shows upon its face that its purpose is to prevent the assertion of claims to these lands by persons who are not before the court, and whose interests are not represented by those who are. These are persons, some of whom have settled upon the land, and now claim that in virtue of their residence thereon, they have, under the pre-emption and homestead laws of congress, acquired a right in the tracts settled upon by them, and that when they shall have done such things as those laws require, they may perfect this right and receive the legal title; while others seek to enter tracts of the land at private sale, making payment therefor either in land warrants or in money. In regard to the first of these classes of persons, if their claim be just, they already have an inchoate right growing out of their residence and improvements, and this right is entitled to the protection of the courts, while the action here sought would effectually prevent their taking such steps as these laws require in order that this inchoate right may become perfected in a legal title which could be asserted in a court of justice. This is by far the most numerous class of persons sought to be affected by the injunction here asked for; it is against them that it is in effect directed.

The land officers are but nominal defendants in the bill. They have no pecuniary interest, and they assert on their personal behalf no title or claim to the lands which are the subject of controversy. It is matter of entire indifference to them whether these lands belong now to plaintiff or to the government; whether they shall finally vest in the plaintiff, or in the parties claiming pre-emption rights.

It is, therefore, too clear for argument that the bill seeks, by the operation of the injunction upon parties having no interest in the subject-matter of the suit, to destroy or effectually prevent the assertion of the rights of other parties who are not now before the court.

This question of parties has repeatedly received the consideration of the supreme court of the United States. It has uniformly been held that in such cases the court will not proceed. In *Barney v. Baltimore City*, 6 Wall., 280, all the authorities are reviewed, and the relation of parties to suits in chancery are arranged into three classes. One of these classes is thus described: "And there is a third class whose interests in the subject-matter of the suit, and in the relief sought, are so bound up with that of the other parties, that their legal presence as parties to the proceeding is an absolute necessity, without which the court cannot possibly proceed. In such cases the court refuses to entertain the suit when these parties cannot be subjected to its jurisdiction." *Cameron v. M'Roberts*, 3 Wheat., 591; *Mallow v. Hinde*, 12 id., 194; *Shields v. Barrows*, 17 How., 130; *Northern Ind. R. Co. v. Michigan Cent. R. Co.*, 15

How., 233 (§§ 908–12, *supra*); *Barney v. Baltimore City*, 6 Wall., 280 (COURTS, §§ 1221–25).

And in *Shields v. Barrows* this class is described as “persons who not only have an interest in the controversy, but an interest of such a nature that a final decree cannot be made without either affecting that interest or leaving the controversy in such a condition that its final determination may be wholly inconsistent with equity and good conscience.”

The applicability of these principles to the case before us is too obvious to require comment.

In answer to this it is urged, as a sufficient reason for the court proceeding without having these parties before it, that in the nature of things it is impossible for the plaintiff to know who will assert a claim to these lands until they present themselves before the land officers for the purpose, and as they will at once receive from the officers the patent certificates, it will then be too late to enjoin them. The fact alleged, of the impossibility of discovering who these claimants are, or will be, may be admitted, but the inference that therefore the court can, in their absence, proceed to foreclose their rights, is not sound.

It is also urged that the injunction should be permitted to remain until the plaintiff can learn who these claimants are and make them defendants. This would be a mere trifling with justice. There is no reason to suppose that the plaintiff can ever learn all of those who intend to claim the right of locating these lands. In fact, the bill alleges the fact that such parties are too numerous to sue at law as one ground for appealing to the equitable jurisdiction of the court.

In respect of parties the bill is fatally defective, with no capability of amendment; and no offer to amend is made.

§ 1350. *The court will not interfere by injunction with the executive officers of the government in the exercise of judicial or discretionary functions.*

(2) The extent to which the courts will interfere with officers in the executive departments of the government, in the exercise of their ordinary duties, presents a question which has never been fully and clearly answered, although it has more than once received the consideration of the supreme court of the United States.

That the register and receiver of the land office are to be considered, in reference to the matter before us, as the mere agents of the department of the interior, is, I think, very clear. In offering these lands for sale and pre-emption they are acting under positive instructions received from that department. Should they venture to exercise a judgment of their own, in opposition to those instructions, they would probably be removed or suspended from office, and the purpose of the department be carried out by other persons appointed in their places.

The cases in the supreme court in which the question here presented has been most fully considered are those of *Marbury v. Madison*, 1 Cranch, 137; *Kendall v. Stokes*, 12 Pet., 608, and *State of Mississippi v. Johnson*, President, 4 Wall., 475. It is true that the earlier cases are applications for *mandamus*, but in the last case, which was an application for injunction, the chief justice very truly remarks “that this court is unable to perceive that this circumstance takes the case out of the general principles which forbid judicial interference with the exercise of executive discretion.” In the two former cases, the court decided that the head of an executive department could be com-

pelled by a writ of *mandamus* to perform duties which were merely ministerial, and which involved the exercise of no political or discretionary power. In the latter case, it was held that the court would not issue an injunction to such officers, in any case when those officers were exercising political or discretionary power, and, by implication, it is held that only in the case of merely ministerial duties will they be interfered with by injunction or *mandamus*. What are ministerial duties in this connection is thus defined by the court in that case: "A ministerial duty, the performance of which may, in proper cases, be required of the head of a department by judicial process, is one in respect to which nothing is left to discretion. It is a simple, definite duty, arising under conditions admitted or proved to exist, and imposed by law." And he gives the duties required in the case of *Marbury v. Madison*, and *Kendall v. Stokes*, as illustrations; in the first of which, the duty was the mere manual delivery of a commission as justice of the peace to the relator, and in the other, the allowance of a credit of a definite sum on the account of the relator with the treasury department of the United States.

The duties of the register and receiver, in acting upon claims to pre-emption of lands, are not of this character. They have first to determine whether the land which is the subject of the claim belongs to the government, and is not already taken up under some superior claim, and then whether the party claiming has made the requisite improvement, and has shown the required residence on the land. All these questions are to be investigated in a manner which requires the exercise of judicial judgment and discretion, and are the very reverse of ministerial, as defined by the court in the case just cited.

In answer to this view of the subject, it is strongly urged that, in the case before us, the bill shows that the lands in question are not within the control of the land officer, because the government has parted with its title; that they are no longer subjects on which the department has any right to act at all; and that, for that reason, the officers are totally without authority for these proceedings.

I must confess that this argument seems to be entitled to some consideration, and I do not feel sure that it is not a sound one. But on the best consideration that I am now able to give it, I do not think it is.

The lands in question are undoubtedly within the territorial limits over which the jurisdiction of those officers extends. In every case where an application is made for pre-emption, the question must necessarily arise, and be decided by those officers, Is the land claimed by the applicant subject to entry? Has it been already appropriated, by prior valid entry, or in any other mode? And though it is claimed that in the present case the appropriation has been made by act of congress, and this bill shows a *prima facie* title in plaintiff to these lands, I do not see but it is still the duty of the land office to decide that question with the best light it may have, whenever it is raised by a person applying to enter them as unappropriated public lands. If this be so, then, according to the principle supposed to be established by the cases cited, the courts should not interfere with the exercise of that judgment in the matter while it is under their consideration.

Reference has been made in the argument to the cases in which the supreme court has examined into the manner in which these officers have acted, and have decreed that the person to whom they had issued the patent should convey to the person to whom they had refused it.

These cases are numerous, and depend on the principle that by some means, such as fraud, mistake, or want of authority in the land office, one person has obtained a legal title which equitably belonged to another.

But this jurisdiction has only been exercised after the land department had ceased to exercise any authority in the matter, and in no manner sought to restrain or direct them while in the exercise of their proper duties.

Neither are the cases in point in which injunctions have been granted to restrain road commissioners, street commissioners, railroad companies, and similar bodies, from so exercising their powers as to invade, without authority of law, the private rights of individuals.

These bodies belong to no particular department, and exercise no special executive functions. They are the creatures of law; and, when they seek to transcend the limits of their authority, are as much subject to judicial control as private persons are. If we look to the consequences likely to ensue from the establishment of such a precedent as the granting of this injunction, we shall see additional reason for hesitation in doing so.

We are all familiar with the fact that interests of great value are involved in the questions which are every day in contest before the land department, and that these are often supposed to depend upon the ascertainment of the legal rights of the contestants. Now, if the courts can, while these matters are pending before the officers of that department, issue a *mandamus* at the instance of every person asserting a legal right which they refuse to recognize, or enjoin them at the instance of every person who believes they are invading his legal rights, in a manner which leaves him no other remedy, the result of that principle will be that in some mode or other all the contested business arising in the course of the sale of the public lands, and delivery of patents for them, will be drawn from the officers to whom the law has confided these matters into the courts of justice, and these courts will find themselves converted into superintendents of the land offices of the country.

In *Wood v. McIntire*, 7 Cranch, 504, the supreme court decided, in a case the converse of this, that the circuit court of the United States had no authority to issue a writ of *mandamus* to the registers of the land office to compel them to issue certificates of pre-emption, when that officer refused to do so, under the idea that the right was already vested in another; and the decision was based upon the ground that no such authority was vested by law in the circuit courts. This case was affirmed by the same court in *McClung v. Silliman*, 6 Wheat., 598, where it was also held that the state court had no such power over the register. These cases have never been overruled; and if the right to interfere by *mandamus* and by injunction with these executive officers depends on the same general principle as asserted in *Mississippi v. President Johnson*, 4 Wallace, 475, they are directly in the way of the relief here sought.

• The motions to dissolve the injunctions are granted, and the motion to dismiss the bill for want of equity is also granted.

Motions to dissolve injunction, and motion to dismiss the bill against the land officers of the Fort Dodge district for want of equity, sustained. (a)

(a) Affirmed, 9 Wall., 575.

BOARD OF LIQUIDATION v. McCOMB.

(2 Otto, 581-541. 1875.)

APPEAL from U. S. Circuit Court, District of Louisiana.

Opinion by MR. JUSTICE BRADLEY.

STATEMENT OF FACTS.—The decree appealed from in this case was for a perpetual injunction to restrain the board of liquidation of the state of Louisiana from using the bonds known as the consolidated bonds of the state for the liquidation of a certain debt claimed to be due from the state to the Louisiana Levee Company, and from issuing any other state bonds in payment of said pretended debt.

The decree was made upon a bill filed by the appellee, McComb, a citizen of Delaware, in which he alleges that he is a holder of some of these consolidated bonds, and that the employment of the bonds for the purpose proposed, namely, the payment of the claim of the Levee Company, will be a violation of the pledges given by the act creating the bonds, and will greatly depreciate their value. The bill sets out the circumstances of the case, and prays for an injunction. The defendants demurred; and the demurrer being overruled, they declined to answer, and stood upon the supposed defects of the plaintiff's case. Thereupon the decree appealed from was rendered; and the question is whether the injunction ought to have been decreed upon the statements made by the bill.

It appears that by an act of the legislature of Louisiana, passed the 24th of January, 1874, called the Funding Act, the governor of the state and other state officers were created a board of liquidation, with power to issue bonds of the state to an amount not to exceed \$15,000,000, or so much thereof as might be necessary for the purpose of consolidating and reducing the floating and bonded debt of the state, and to be called "consolidated bonds of the state of Louisiana;" which bonds were to bear date the 1st of January, 1874, and to be payable in the year 1914, with interest at seven per cent. per annum. The act provided that these bonds should be exchanged by the board for valid outstanding bonds of the state and valid warrants of the auditor issued prior to the passage of the act (except warrants issued in payment of constitutional officers of the state), at the rate of sixty cents in consolidated bonds for one dollar in outstanding bonds and warrants; and that they should be used for no other purpose. An annual tax of five and a half mills on the dollar of the assessed value of all the property of the state was levied, and directed to be collected, to pay the interest on these bonds, and to purchase and retire them. Other provisions were added, making it penal for the officers to divert the funds thus provided, or to obstruct the execution of the act, or to fail in the performance of any of the official duties required by it; and it was declared that no court or judge should have power to enjoin the payment of the bonds or the collection of the tax provided therefor. The eleventh section further declared that each provision of the act should be a contract between the state and each and every holder of the bonds issued under the act, and section 13 provided that the entire state debt, prior to the year 1914, should never be increased beyond the sum of \$15,000,000 authorized by the act; it being declared to be the intent and object thereof, and of the exchanges to be effected under it, to reduce and restrict the whole indebtedness of the state to a sum not exceeding \$15,000,000, and to agree with the holders of the consolidated bonds that said indebtedness should not be increased beyond that sum during said period. On

the day of passing this act, the general assembly passed another act, proposing to the people of the state an amendment to the constitution of the state, which was adopted at the ensuing election; and provided that the issue of the consolidated bonds authorized by the funding act should create a valid contract between the state and each holder thereof, which the state should not impair; prohibited the issue of any injunction against the payment of the bonds or levy of the tax; directed that the latter should be levied and collected without further legislation; and declared that, whenever the debt of the state should be reduced below \$25,000,000, the constitutional limit should remain at the lowest point reached, until it was reduced to \$15,000,000, beyond which it should not be increased.

The language of this clause is explained by the fact that, in 1870, a constitutional provision had been adopted limiting the state debt to \$25,000,000; and the further fact, stated in the bill, that in 1874, when the funding act was passed, the outstanding bonds and valid warrants fundable under the act equaled this amount; so that, at sixty cents on the dollar, the debt to be funded would require the issue of the whole \$15,000,000 of consolidated bonds. Besides these classes of debts, others to a considerable amount were then outstanding, as will appear further on.

The board of liquidation created by the funding act entered upon the performance of their duties, and, up to the commencement of proceedings in this case, they had issued a little over \$2,000,000 under the act.

On the 2d of March, 1875, the general assembly passed an act authorizing the board to issue a portion of the above mentioned consolidated bonds to the Louisiana Levee Company, in liquidation of a debt claimed to be due it under a contract made with the state in 1871, by which that company was to reconstruct and keep in repair the levees on the Mississippi river and its branches and outlets. The act of 1871, in and by which this contract was made, had provided and set apart certain taxes to be levied and collected throughout the state, to meet the payments which would accrue to the company. But it seems that these taxes had failed to reach their destination, as a committee appointed by the act of 1875, to investigate the subject, reported that there was \$1,700,000 still due the company, which had accrued prior to October, 1873, and which the act authorized the board of liquidation to pay in the said consolidated bonds. This debt was not one of the debts to fund which the consolidated bonds had been created. It was not represented by outstanding bonds of the state nor by valid warrants of the state auditor; and the complainant in this case in his bill insists that it is not a debt of the state at all, being provided for by the special taxes appropriated for its payment. Another objection made to the proposal to fund it is, that it is to be paid in full, whilst the funding act authorized the payment of only sixty cents on the dollar of the debts to be replaced by the issue of the consolidated bonds—the great object of the act being to effect a reduction of the state debt within manageable limits. It is insisted that the act of 1875, authorizing the appropriation of consolidated bonds to the payment of the levee debt, defeats this scheme and impairs the validity of the contract made with those who have accepted the bonds according to the terms of the funding act, and is therefore void. The plaintiff, being a holder of these bonds, filed his bill for an injunction to prevent the consummation of the wrong which he alleges will be committed by carrying out the act of 1875.

§ 1351. *Under what circumstances the holder of new bonds funded under an act of the legislature can enjoin state officers from paying with the bonds other debts than those specified in the funding act.*

The decree of the court below is sought to be sustained on several grounds. In the first place, the appellee contends that; in consequence of the provisions of the funding act, and the constitutional amendment adopted in confirmation of it, the state debt cannot be increased, whereas the assumption of the levee debt (which, it is contended, is not a debt of the state) will directly increase it. As a part of the same proposition, it is contended that the state has deprived itself of the right to issue any bonds at all, except the consolidated bonds created by the funding act, to be exchanged for outstanding debts already existing.

We are not prepared to say that the legislature of a state can bind itself without the aid of a constitutional provision, not to create a further debt, or not to issue any more bonds. Such an engagement could hardly be enforced against an individual; and, when made on the part of a state, it involves, if binding, a surrender of a prerogative which might seriously affect the public safety. The right to procure the necessary means of carrying on the government by taxation and loans is essential to the political independence of every commonwealth. By the internal constitution of a government it is true its legislature may be temporarily restricted in this respect, as we have seen is the case in Louisiana. But how or at whose instance such restriction can be enforced may sometimes be a question of some difficulty. In a clear case, of course, an unconstitutional enactment will be treated as void as against the rights of an individual. But there are many constitutional provisions mandatory upon the legislature which cannot be directly enforced—the duty, for example, when creating a debt, to provide adequate ways and means for its payment. It affects the public generally, but no individual in particular in such manner as to give him a legal remedy. So the state debt may be increased beyond the prescribed limit without admitting of judicial redress. It may arise indirectly in the accomplishment of public works necessary to the general safety and welfare in such a manner as to make it difficult to tell when the line is over-passed, or whose claims arose after it had been over-passed. Executory contracts for the preservation of the public levees may be greatly swollen by work rendered necessary by the occurrence of unprecedented floods. Many such cases, and analogous ones, might be readily supposed in which it would be utterly impossible to observe the prescribed limits of state indebtedness. And as the amount of state debt is a matter of eminently public concern, and the enactment of laws on the subject cannot be controlled by the judiciary, it may admit of doubt whether, in any case, the courts, at the instance of an individual citizen, even a tax payer (who would be most directly interested), would undertake to restrain the state officers in the execution of such laws. At all events the case should be a very clear one to induce them to interpose by injunction or *mandamus*. But where a person is neither a citizen nor a tax payer, but is a citizen of another state, and presents himself simply in the character of a creditor of the state, the courts would hardly be justified in interfering on his behalf to prevent a supposed violation of the state constitution by an increase of the state debt. His interest is too remote to give him a standing in court for any such purpose.

But in the case before us the assumption on which this part of the case is

based does not appear to be well founded. It is not the creation of a new indebtedness which the board of liquidation propose. The amount payable to the Levee Company for its services is none the less a debt, because it is already provided for by a special tax; and, so far as the state is concerned, it is no more of a public burden when chargeable upon one fund than it is when chargeable upon another. If the general assembly, with the company's assent, sees fit to alter the mode of payment, it is difficult to see who else has a right to complain, unless specially injured by the change. The tax formerly appropriated to it will be liberated and made available for other state purposes. The other creditors of the state cannot possibly be injured, if nothing is appropriated to the payment of the claim which has been pledged to them.

The plea of increase of state indebtedness, therefore, cannot avail in this case; and so much of the decree as prohibits the Levee Company from receiving any state bonds whatever in liquidation of its claim is untenable, and must be reversed. The claim itself, for anything that appears in the record to the contrary, is a perfectly valid one against the state. It is not even alleged to have arisen after the state indebtedness had arrived to the constitutional limit of \$25,000,000; nor is it denied that it was founded on a good consideration.

The question, however, remains whether, even supposing the levee debt to be a valid one, it can be lawfully funded in the consolidated bonds, in view of the other stipulations of the funding act.

The principal stipulations of this act, aside from that respecting the increase of the state debt, are: *First*, that the consolidated bonds shall not exceed in amount \$15,000,000, or so much thereof as may be necessary; that is, necessary for the purpose of consolidating and reducing the floating and bonded debt of the state at sixty cents on the dollar; *secondly*, that they shall only be used for exchange for said floating and bonded debt, as designated in the act, which does not embrace the levee debt in question, and that such exchange shall be at the rate of sixty cents in consolidated bonds for one dollar in outstanding bonds and warrants; *thirdly*, that a tax of five and a half mills on the dollar of the assessed value of all the real and personal property of the state shall be annually levied and collected for paying the interest and principal of the bonds, and is set apart and appropriated for that purpose, and no other, any surplus beyond paying interest to be used for the purchase and retirement of the bonds; *fourthly*, that the power of the judiciary, by means of *mandamus*, injunction and criminal procedure, shall be exerted to carry out the provisions of the act.

The precise manner in which these stipulations will be violated by the proposed funding of \$1,700,000 of the levee debt at par, as insisted by the plaintiff, is this: *First*, that the entire issue of bonds will be increased by that amount, thereby diminishing the relative security provided for each bond. *Secondly*, that the Levee Company will receive the full amount of its debt, whilst the complainant and others in like case with him, have accepted sixty cents on the dollar for their old bonds, on the faith that no one should receive any more. *Thirdly*, that the benefits of the scheme propounded by the funding act will be lost by such a violation of it, and all the advantages anticipated by the complainant and others in surrendering their original debts will fail.

In answer to the first of these supposed violations, namely, that the issue of consolidated bonds will be increased by the amount of the levee debt, it may be said that the amount of the consolidated bonds is expressly limited to \$15,000,000; and there is no pretense that the board of liquidation intend to

issue more. The proposed appropriation might have the effect of excluding from the benefit of the funding act some of the outstanding obligations of the state originally intended to be embraced within its provisions. But it will not increase the total amount of the consolidated bonds. The complainant can hardly contend that he has a right to prevent the state from using the bonds for funding its other debts, if those for which they were intended should not be surrendered. It is a question of power. The funding act gives the board of liquidation power to issue \$15,000,000 of these bonds, or so much thereof as may be necessary to fund the outstanding floating and bonded debt; and it is admitted that the amount of that debt is sufficient to absorb the whole \$15,000,000. He cannot say, "I am entitled to the chances of some of the designated creditors not coming in." He cannot be injured, so far as this objection goes, if the amount of bonds ultimately issued does not exceed the limit of \$15,000,000. It may very well be that some of the creditors whose debts were intended to be funded will refuse to come in and accept the terms of the funding act. If that should be so, it might greatly embarrass the financial affairs of the state to have to appropriate the entire tax of five and a half mills to a mere fraction of the debt it was intended to provide for, which was \$15,000,000. To tie the hands of the state under such circumstances would be to give the complainant the advantage of a technicality, to the great injury of the state. It would be adhering to form rather than to substance. The complainant consented, when he took his bonds, that there might be \$15,000,000 of them issued. He cannot justly complain if that amount is not exceeded, even though the debts funded thereby are not precisely those specified in the act, provided the material terms of the act are complied with. In any case, those that are not funded must be provided for in some other way; and, unless some special reason exists why one debt should be funded instead of another, the complainant cannot be injured. He has failed to show any such reason in his bill.

§ 1352. *Where a state settles with its creditors at sixty cents on the dollar, a holder of new funding bonds can, by injunction, prevent the payment to some of the bondholders one hundred cents on the dollar.*

If, therefore, the substitution of one debt for another, in the participation of the benefits of the funding act, were all that is proposed to be done by the defendants, the complainant would have great difficulty in maintaining a bill in equity for the purpose of enjoining the officers of the state from carrying out the law passed in 1875. But this is not all that they propose to do. The proposed funding of the levee debt in the manner provided by that act would break up the whole scheme of the funding act and destroy all the benefits anticipated from it,—benefits on which those who accepted its terms had a right to rely.

It was the special object of that scheme, by providing extraordinary security and sanctions for the payment of the consolidated bonds, to induce the public creditors to reduce their claims forty per cent. and exchange them for these new securities, and thus diminish the aggregate indebtedness of the state \$10,000,000. This result would enhance the general credit of the state, and enable it to meet all its obligations and engagements with more certainty and less liability to failure. The complainant and others who have surrendered their old bonds, and taken sixty per cent. of the amount in the new bonds in full satisfaction, did so on the faith that the scheme should be carried into effect as a whole, and that all others taking the benefit of the act should be

subject to the same condition that they were. It cannot be supposed that they would have made the sacrifice they did, without relying, as they had a right to do, on this essential feature of the scheme being rigidly carried out. The proposal to fund the levee debt at par entirely interferes with its accomplishment, and makes an unjust discrimination between one class of creditors and another.

It is this aspect of the act of 1875, and the proposed proceedings under it, of which the petitioner has special reason to complain, and which furnishes substantial ground for giving him relief.

True, it may be objected even to this view as to the former one, that the bondholders of the state may refuse to come in and make the sacrifice required by the act; and, in such case, the state ought not to be forever precluded from making such other disposition of the unissued consolidated bonds as may be beneficial to it, without being injurious to those who have accepted such bonds. If such a state of things should arise, after due time and opportunity shall have been given to test the practicability of carrying out the scheme, it will, undoubtedly, furnish proper ground for modified legislation, having due regard to the rights already vested. But the act in question was passed within three months after the adoption of the constitutional amendment confirmatory of the funding act, and before its practicability could possibly have been ascertained; and no attempt was made by the act to reinstate the bondholders who had come in, to their former position, or to return to them the forty per cent. of their claims which they had surrendered, or in any manner to obviate the inequality and injustice to which they would be subjected by the change of plan.

In our judgment, therefore, the court below was right in granting the injunction as to the consolidated bonds, if the defendants, occupying the official position they do, are amenable to such a process.

§ 1353. *When mandamus or injunction will lie against state officers.*

On this branch of the subject the numerous and well-considered cases heretofore decided by this court leave little to be said. The objections to proceeding against state officers by *mandamus* or injunction are, first, that it is, in effect, proceeding against the state itself; and, secondly, that it interferes with the official discretion vested in the officers. It is conceded that neither of these things can be done. A state, without its consent, cannot be sued by an individual; and a court cannot substitute its own discretion for that of executive officers in matters belonging to the proper jurisdiction of the latter. But it has been well settled that, when a plain official duty, requiring no exercise of discretion, is to be performed, and performance is refused, any person who will sustain personal injury by such refusal may have a *mandamus* to compel its performance; and when such duty is threatened to be violated by some positive official act, any person who will sustain personal injury thereby, for which adequate compensation cannot be had at law, may have an injunction to prevent it. In such cases, the writs of *mandamus* and injunction are somewhat correlative to each other. In either case, if the officer plead the authority of an unconstitutional law for the non-performance or violation of his duty, it will not prevent the issuing of the writ. An unconstitutional law will be treated by the courts as null and void. *Osborn v. Bank of the United States*, 9 Wheat., 859 (Coursers, §§ 2363-87); *Davis v. Gray*, 16 Wall., 220 (§§ 1354-62, *infra*).

Decree affirmed, so far as it prohibits the funding of the debt due to the

Louisiana Levee Company in the consolidated bonds issued or to be issued under the funding act of January 24, 1874; and reversed as to so much thereof as prohibits the issue of any other bonds to said Louisiana Levee Company in liquidation of said debt.

DAVIS v. GRAY.

(16 Wallace, 208-233. 1872.)

STATEMENT OF FACTS.—In 1856 the legislature of Texas chartered the Memphis, El Paso & Pacific Railroad Company for the purpose of building a railroad within that state. It made the company a grant of alternate sections of land lying within eight miles of the road, and required the company to have the land surveyed, which it did, and it appears it complied with all the conditions precedent which were attached to the grant. There were, however, certain conditions subsequent, to wit, that, by March 1, 1861, the company should grade fifty miles of its road-bed. This also was done. A further condition was that, within two years after the 1st of March, 1861, the company should grade fifty additional miles, which was not done. The secession of Texas and its participation in the civil war prevented any further work on the road until after the expiration of the time limited. In January, 1862, the legislature passed an act excluding the period of the war from any computation of the time required by their charters for the completion of the work of any internal improvement company. The company, in 1867-8, issued a series of "land-grant bonds," to secure which it mortgaged all its land, actual and prospective, and, the bonds not having been paid, a bill was filed in the proper federal court, and a receiver, John A. C. Gray, was appointed and vested with the full powers usually accorded to officers of that description. This was done in July, 1870.

The new constitution of Texas, adopted in 1869, in effect revoked the land grants and declared the lands forfeited. See that constitution, §§ 5 and 6.

In January, 1871, Gray, as receiver, filed a bill against Davis, governor of the state of Texas, and another official, setting forth the facts and stating, moreover, that the property and franchises of the original Memphis, El Paso & Pacific Company had been vested in the Southern Transcontinental Railroad Company. He prayed for an injunction and other appropriate relief. Further facts appear in the opinion of the court.

Opinion by MR. JUSTICE SWAYNE.

This is an appeal in equity from the decree of the circuit court of the United States for the western district of Texas. The appellee was the complainant in the court below. The defendants demurred to the bill. The demurrer was overruled. The defendants stood by it. A decree as prayed for was thereupon rendered *pro confesso* for the complainant. The defendants removed the case to this court by appeal, and it is now before us, as it was before the court below, upon the demurrer to the bill. This brings the whole case as made by the bill under review. The facts averred, so far as they are material, are to be taken as admitted and true. We shall refer to them accordingly. The question presented for our determination is, whether the circuit court erred in overruling the demurrer. The appellants having elected not to answer, the decree for the complainant followed as of course.

At the outset of our examination of the case, we are met by jurisdictional objections as to the parties — both complainant and defendants — which, before

proceeding further, must be disposed of. We will consider first, those which relate to the complainant, and then, those with respect to the defendants.

The complainant was appointed to his office of receiver, in the suit in equity of *Forbes and others v. The Memphis, El Paso & Pacific Railroad Company*, a corporation created by the state of Texas. The suit was in the same court whence this appeal was taken. In that case, on the 6th of July, 1870, it was, among other things, ordered and decreed that the corporation should be enjoined from disposing of any of its effects, and that John A. C. Gray, the complainant in this suit, should be, and he was thereby, "appointed receiver; to take possession of the moneys and assets, real and personal; road-bed, road, and all property whatsoever, of the said Memphis, El Paso & Pacific Railroad Company, wheresoever the same may be found, with power under the special order of the court, from time to time to be made, to manage, control and exercise all the franchises, whatsoever, of said company, and, if need be, under the direction of the court, to sell, transfer and convey the road, road-bed and other property of said company, as an entire thing," etc.

§ 1354. *Receiver authorized to sue in his own name.*

On the 20th of January, 1871, it was further ordered by the court "that the said John A. C. Gray, receiver as aforesaid, be and he is hereby authorized and empowered to defend and continue all suits brought by or against the said Memphis, El Paso & Pacific Railroad Company, whether before or after the appointment of said receiver, and whether in the name of said company or otherwise; defend all suits brought against him as such receiver or affecting his receivership, and to bring such suits in the name of said company, or in the name of said receiver, as he may be advised by counsel to be necessary and proper in the discharge of the duties of his office, and for acquiring, securing and protecting the assets, franchises and rights of the said company and of the said receiver, and for securing and protecting the land grant and land reservation of the said company."

It is to be presumed the receiver filed this bill, as it is framed in accordance with the advice of counsel. *Bank of the United States v. Dandridge*, 12 Wheat., 70 (Corp., §§ 843-54).

The authority given by the decree is ample. Still the question arises whether it was competent for him to proceed in his own name instead of the name of the company whose rights he seeks by this bill to assert. A receiver is appointed upon a principle of justice for the benefit of all concerned. Every kind of property of such a nature that, if legal, it might be taken in execution, may, if equitable, be put into his possession. Hence the appointment has been said to be an equitable execution. He is virtually a representative of the court and of all the parties in interest in the litigation wherein he is appointed. *Jeremy's Eq.*, 249; *Davis v. Duke of Marlborough*, 2 Swanst., 125; *Shakel v. Duke of Marlborough*, 4 Madd., 463. He is required to take possession of property as directed, because it is deemed more for the interests of justice that he should do so than that the property should be in the possession of either of the parties in the litigation. *Wyatt's Practical Register*, 355. He is not appointed for the benefit of either of the parties, but of all concerned. Money or property in his hands is *in custodia legis*. *In re Colvin*, 3 Md. Ch. Dec., 278; *Delany v. Mansfield*, 1 Hogan, 234. He has only such power and authority as are given him by the court, and must not exceed the prescribed limits. *The Chautauque County Bank v. White*, 6 Barb., 589; *Verplanck v. Mercantile Ins. Co. of New York*, 2 Paige, 452. The court will not

allow him to be sued touching the property in his charge, nor for any malfeasance as to the parties, or others, without its consent; nor will it permit his possession to be disturbed by force, nor violence to be offered to his person while in the discharge of his official duties. In such cases the court will vindicate its authority, and, if need be, will punish the offender by fine and imprisonment for contempt. *De Groot v. Jay*, 30 Barb., 483; *Angel v. Smith*, 9 Ves., 335; *Russell v. E. A. R. R. Co.*, 3 Mac. & Gor., 104; *Parker v. Browning*, 8 Paige, 388; *Noe v. Gibson*, 7 Paige, 513; 2 Story's Eq., § 833, A. & B. The same rules are applied to the possession of a sequestrator. 2 Daniell's Ch. Prac., 1433. Where property in the hands of the receiver is claimed by another, the right may be tried by proper issues at law, by a reference to a master or otherwise, as the court in its discretion may see fit to direct. *Empringham v. Short*, 3 Hare, 470. Where property, in the possession of a third person, is claimed by the receiver, the complainant must make such person a party by amending the bill, or the receiver must proceed against him by suit in the ordinary way. 8 Paige, 388; *Noe v. Gibson*, 7 id., 513; 2 Story's Eq., *supra*; 2 J. & W., 176; 2 Daniell's Ch. Prac., 1433. After tenants have attorned to the receiver, he may distrain for rent in arrear in his own name. 2 Daniell's Ch. Prac., 1437. In a suit between partners he may be required to carry on the business in order to preserve the good will of the establishment until a sale can be effected. *Marten v. Van Schaick*, 4 Paige, 479.

Here the property in question is not in the possession of the defendants. The possession of the receiver has not been invaded. He has not been in possession, is not seeking possession; and there is no question in the case relating to that subject. But the order of the court expressly requires the receiver to secure and protect "the assets, franchises and rights," and "the land grant and reservation of said company." He is seeking to perform that duty by enjoining the appellants from doing illegal acts, which the bill alleges, if done, would render the rights and title of the company to the immense property last mentioned, of greatly diminished value, if not wholly worthless.

We think it is competent for him to perform this function in the mode he has adopted. The decree, in the case wherein he was appointed, expressly authorizes him to sue for that purpose in his own name. The order was made by a court of adequate authority in the regular exercise of its jurisdiction. No appeal has been taken, and the order stands unreversed.

This bill is auxiliary to the original suit. *Freeman v. Howe*, 24 How., 451 (COURTS, §§ 255-60); *Jones v. Andrews*, 10 Wall., 327 (COURTS, §§ 883-86). It is analogous to a petition by a receiver to the court to protect his possession from disturbance, or the property in his charge from threatened injury or destruction. No title in the receiver is necessary to warrant such an application or the administration by the court of the proper remedy. There can be no valid objection to the receiver here, in analogy to that proceeding, maintaining this suit. In the progress and growth of equity jurisdiction it has become usual to clothe such officers with much larger powers than were formerly conferred. In some of the states they are by statutes charged with the duty of settling the affairs of certain corporations when insolvent, and are authorized expressly to sue in their own names. It is not unusual for courts of equity to put them in charge of the railroads of companies which have fallen into financial embarrassment, and to require them to operate such roads, until the difficulties are removed, or such arrangements are made that the roads can be sold with the least sacrifice of the interests of those concerned. In all such cases

the receiver is the right arm of the jurisdiction invoked. As regards the statutes, we see no reason why a court of equity, in the exercise of its undoubted authority, may not accomplish all the best results intended to be secured by such legislation without its aid.

§ 1355. *When a state officer may be enjoined. Where the state cannot be made a party, a decree may be entered against its officers. Making a state officer a party does not make the state a party.*

A few remarks will be sufficient to dispose of the jurisdictional objections as to the appellants.

In *Osborn v. The Bank of the United States*, 9 Wheat., 738 (Constr., §§ 2363-87), three things, among others, were decided:

(1) A circuit court of the United States, in a proper case in equity, may enjoin a state officer from executing a state law in conflict with the constitution or a statute of the United States, when such execution will violate the rights of the complainant.

(2) Where the state is concerned the state should be made a party, if it could be done. That it cannot be done is a sufficient reason for the omission to do it, and the court may proceed to decree against the officers of the state in all respects as if the state were a party to the record.

(3) In deciding who are parties to the suit the court will not look beyond the record. Making a state officer a party does not make the state a party, although her law may have prompted his action, and the state may stand behind him as the real party in interest. A state can be made a party only by shaping the bill expressly with that view, as where individuals or corporations are intended to be put in that relation to the case.

Dodge v. Woolsey, 18 How., 331 (Corp., §§ 565-73); *The State Bank of Ohio v. Knoop*, 16 How., 369 (Constr., §§ 2246-53); *The Jefferson Branch Bank v. Skelly*, 1 Black, 436; *Ohio Life and Trust Co. v. Debolt*, 16 How., 432 (Constr., §§ 2254-65); and *The Mechanics' & Traders' Bank v. Debolt*, 18 How., 380, proceeded upon the same principles, and were controlled by that authority, with respect to the jurisdictional question arising in each of those cases as to the defendant.

In *Woodruff v. Trapnall*, 10 How., 190, a writ of *mandamus* was issued to the proper representative of the state of Arkansas to compel him to receive the paper of the Bank of the State of Arkansas in payment of a judgment which the state had recovered against the relator. The bank was wholly owned by the state, and the claim was made under a clause in the charter which had been repealed. Judgment was given against the respondent. The question of jurisdiction does not appear to have been raised. In *Curran v. The State of Arkansas, The Bank of the State of Arkansas, and others*, 15 How., 304 (Corp., §§ 1316-19), it appeared that the bank had become insolvent. A creditor's bill was filed to reach its assets. The objection was taken that the state could not be sued. This court answered that the objection involved a question of local law, and that as the state permitted herself to be sued in her own tribunals, that was conclusive upon the subject. According to the jurisprudence of Texas, suits like this can be maintained against the public officers who appropriately represent her touching the interests involved in the controversy. *Ward v. Townsend*, 2 Tex., 581; *Cohen v. Smith*, 3 id., 51; *Commissioner General Land Office v. Smith*, 5 id., 471; *McLelland v. Shaw*, 15 id., 319; *Stewart v. Crosby*, id., 547. In the application of this principle there is no difference between the governor of a state and officers of a state of

lower grades. In this respect they are upon a footing of equality. *Whitman v. The Governor*, 5 Ohio St., 528; *Houston & Great Northern Railroad Co. v. Kuechler*, Commissioner, Supreme Court of Texas — not yet reported [see 36 Tex., 382].

A party by going into a national court does not lose any right or appropriate remedy of which he might have availed himself in the state courts of the same locality. The wise policy of the constitution gives him a choice of tribunals. In the former he may hope to escape the local influences which sometimes disturb the even flow of justice. And, in the regular course of procedure, if the amount involved be large enough, he may have access to this tribunal as the final arbiter of his rights. *Ex parte McNiel*, 13 Wall., 236. Upon the grounds of the jurisprudence of both the United States and of Texas we hold this bill well brought as regards the defendants.

§ 1356. *Where act of incorporation contains conditions subsequent, the corporation does not cease to exist upon simple failure to perform them.*

It is insisted that the corporation, on behalf of which this suit was instituted, has ceased to exist.

The bill avers that "The Memphis, El Paso & Pacific Railroad Company" . . . is "a corporation created by and existing under certain statutes of the state of Texas hereinafter set forth," and that within the times limited by the charter and extended by other acts the company "did all acts and things necessary to the full and complete vesting, securing and preserving of the franchises, rights and privileges granted thereby." The demurrer admits the truth of these averments unless they are inconsistent with the statutes which bear upon the subject. The corporation was created by an act of the legislature of Texas, approved February 4, 1856. By the first section certain parties are named and created a body politic and corporate, and the general powers inherent in all such bodies are formally given. The second gives the right to construct a railway, commencing on the eastern boundary of the state, between Sulphur Fork and Red River, at the western terminus of the Mississippi, Ouachita & Red River Railroad, or of the Cairo & Fulton Railroad, and running thence westerly to the Rio Grande, opposite to or near the town of El Paso. The twentieth section declares that no rights shall vest under the charter until a certain amount of stock therein named shall have been subscribed, and the percentage prescribed shall have been paid upon it. This requirement is covered by the averment in the bill that the company had done everything necessary to secure the vesting of all the franchises given to it. We do not understand that there is any controversy on this subject. All the other conditions prescribed, involving the existence of the corporation, are clearly subsequent. They are found in the fourteenth section of the charter, in the first section of the act of February 5, 1856, and in the third section of the act of February 10, 1858. To any argument drawn from these provisions there are two conclusive answers:

(1) There has been no judgment of ouster and dissolution. Without this they are inoperative. To make them effectual they must be grasped and wielded by the proper judicial action. See *Angell & Ames on Corp.*, § 777, and the authorities there cited.

§ 1357. *Breach of condition by corporation condoned by act affirming its existence.*

(2) The offenses and punishment denounced have been condoned and waived by the subsequent action of the legislature. The act of March 20, 1861; the

act for the relief of railroad companies, approved January 11, 1862; the act for the relief of companies incorporated for purposes of internal improvement, approved February 18, 1862; and the third section of the "act to incorporate the Transcontinental Railroad Company," of the 27th July, 1870, each and all have that effect. The section last mentioned authorizes the company therein named to "purchase the rights, franchises and property of the Memphis, El Paso & Pacific Railroad Company, heretofore incorporated by this state." This is a clear affirmation, by implication, of the existence of the corporation, and of the possession of the rights, franchises and property conferred by its charter. What is implied is as effectual as what is expressed. *United States v. Babbit*, 1 Black, 57. These considerations are so clearly conclusive, that it is needless to advert more particularly in this connection to the legislation in question, or to pursue the subject further. There is no warrant for the proposition that the corporation had ceased to exist.

§ 1358. *When performance of a condition subsequent is excused.*

The heart of this litigation lies in the immense land grant which is in controversy between the parties. The objections we have considered are only outworks thrown up to prevent the conflict from reaching that point. It is insisted that the rights of the company touching the entire reservation have become forfeited.

The fifteenth section of the charter provides as follows: "All the vacant lands within eight miles on each side of the extension line of said road shall be exempt from location or entry, from and after the time when such line shall be designated by survey, recognition or otherwise. The lands hereby reserved shall be surveyed by said company at their expense, and the alternate or even sections reserved for the use of the state. And it shall be the duty of said company to furnish the district surveyor of each district through which said roadway runs, with a map of the track of said road, together with such field-notes as may be necessary to the proper understanding and designation of the same."

There are other provisions prescribing various details not necessary to be particularly stated or considered.

A proviso in the seventeenth section declares that no title shall be permanently vested in the company or their assigns for land granted for the grading as contemplated by the act, until twenty-five miles of the road shall have been completed and put in running order. The proviso in the twentieth section of the charter, that no rights shall vest under it until the condition therein prescribed is complied with, has already been considered. Conditions of forfeiture of the lands granted are prescribed in this and subsequent acts. They are found in the fourteenth section of this act; in the first and fourth sections of the supplemental act of the same date; and in the third and fourth sections of the act of February 10, 1858. These conditions will be considered hereafter.

The act for the relief of internal improvement companies, of February 18, 1862, declared that the time of the continuance of the war between the Confederate States and the United States should not be computed against any internal improvement company in reckoning the period allowed them for the completion of any work they had contracted to do.

The act of January 11, 1862, for the relief of railroad companies, enacted that the failure of any chartered railroad company of the state to complete any part of its road, as required by existing laws, should not operate as a forfeiture of its charter or of the lands to which the company would be entitled,

under the provisions of the act entitled "An act to encourage the construction of railroads in Texas by donations of land," approved January 30, 1854, and the several acts supplementary thereto, provided the company should complete such portion of its road as would entitle it to donations of land under existing laws within two years from the close of the war.

The act for the benefit of railroad companies, of November 13, 1866, declared that the grant of sixteen sections of land to the mile to railroad companies theretofore, or thereafter, constructing railroads in Texas, should be extended under the same restrictions and limitations theretofore provided by law, for ten years after the passage of the act. These several acts are valid. See the thirty-third section of the constitution of Texas of 1869, and *Texas v. White*, 7 Wall., 700 (Constr., §§ 140-46).

By an act approved July 27, 1870, the Southern Transcontinental Railroad Company was incorporated.

It was declared that the object of the company thus created was to construct and establish a railway line and telegraphic communication from the eastern boundary of the state of Texas, "and thence as near as practicable to the route of the Memphis, El Paso & Pacific Railroad Company, to or near the town of El Paso." It was enacted that "the main line of said road shall follow, as near as may be practicable, the old survey of the Memphis & El Paso road." It was further enacted that "the said company, hereby incorporated, may purchase the rights, franchises and property of the Memphis, El Paso & Pacific Railroad Company, heretofore incorporated by this state," as before mentioned.

The first section of the ordinance of 1869 declared that all heads of families settled on vacant lands lying within the Memphis & El Paso railroad reserve, should be entitled to receive from the state of Texas eighty acres of land, including the place occupied, upon payment of the expenses of survey and patent.

By the second section it was declared that all the vacant land within the reserve was open to sale to settlers and pre-emption settlers, and subject to the location of land certificates. The third section declared that the company had forfeited its right to the land, and that certain certificates having been issued to the company and patents issued thereon, it was made the duty of the attorney-general to institute legal proceedings to have such certificates and patents canceled.

In November, 1869, the present constitution of Texas was adopted. It was subsequently approved by congress.

Sections 5 and 7 of this constitution are as follows:

"SECTION 5. All public lands heretofore reserved for the benefit of railroads or railway companies shall hereafter be subject to location and survey by any genuine land certificates.

"SECTION 7. All lands granted to railway companies which have not been alienated by said companies in conformity with the terms of their charter respectively, and the laws of the state under which the grants were made, are hereby declared forfeited to the state for the benefit of the school fund."

This summary gives a view of the statutory and constitutional provisions necessary to be considered in disposing of the question before us.

On the 20th of June, 1857, the company filed in the land office at Austin surveys showing the line of the road from the eastern boundary of the state to El Paso, which line was officially recognized by the commissioner of the gen-

eral land office of Texas. By the 1st of March, 1860, the company had surveyed, sectionized and numbered all the sections and fractional sections of the vacant lands within the reservation, from the eastern boundary of the state to the crossing of the Brazos, of which due returns were made to the commissioner, and by him accepted. By the 10th of May, 1859, the company had marked and designated the central line of the road from the Brazos to the Colorado, and made proper returns to the office of the commissioner, by whom they were accepted. The lands granted to the company thereby became defined and officially recognized as such along the whole extent of their line.

In doing this work the company surveyed, numbered and mapped each alternate or even section of public lands for two hundred and fifty miles in length and sixteen miles in width, in behalf of the state of Texas. It was of great benefit to her, and is reported to the receiver to have cost the company more than \$100,000.

By consent of parties the bill was amended *nunc pro tunc* in three particulars. The complainant admitted that no land within the reserve had been surveyed, sectionized or numbered west of the Brazos river, and that no work had been done on the road before or since 1861, except as averred in the bill. He averred that he applied to the general land office for the number and names of those who had located certificates other than such as were issued to the company upon lands within the reservation, and that Keuchler, the defendant, answered that the number was very great, amounting to hundreds, and that a list could not be furnished without great time and labor. He averred further that parties were constantly locating certificates and making surveys within the reservation, and that they were allowed a specified time to make their returns, so that it was impossible for him to obtain a full list of such parties.

The company commenced work within one year from the 1st of March, 1856, and before the 1st of March, 1861, had completely graded more than fifty miles of its roadway, beginning at the eastern boundary line of the state and extending west in the direction of El Paso. See section 3 of the act of February 10, 1858.

We do not understand that up to that time there was a breach of any condition touching the existence of the corporation or its right to the lands within the reservation. Before that time the tracts east of the Brazos covered by the grant were definitely fixed by the surveys which the company had made. The title of the company to those west of the Brazos, though the sections were not designated, was equally valid. The good will of a lease which the landlord is in the habit of renewing is property, and rights growing out of it, whether by contract or otherwise, will be protected and enforced by a court of equity. *Phyfe v. Wardell*, 5 Paige, 268; *Amour v. Alexander*, 10 id., 571.

The rights of the company west of the Brazos were of a much more substantial character than those which were the subjects of judicial action in the cases cited.

The real estate of a corporation is a distinct thing from its franchises. But the right to acquire and sell real estate is a franchise, and the right to acquire the particular real estate designated in the charter of this company, and here in question, is within that category. It might, therefore, well be doubted whether this right could be taken from the company without an appropriate proceeding instituted for that purpose and prosecuted to judgment by the state. But the view which we take of the case renders it unnecessary to pursue the subject.

We will recur to the conditions of forfeiture touching the land grant, and consider them irrespective of that point. The provisions to that effect, in the fourteenth section of the charter, are expressly superseded by those in the first section of the supplemental act of February 5, 1856. The fourth section of that act prescribes a further condition. These provisions again are superseded by the third and fourth sections of the amendatory act of February 10, 1858. The conditions prescribed by the last named act are:

(1) To survey the reserve as far as the Brazos river within four years from the 1st of March, 1856.

(2) To run and designate the center line of the reservation from the Brazos to the Colorado within fifteen months from the 10th of February, 1858.

(3) To survey the whole reserve within ten years from February 10, 1858.

(4) To have a connection with some road leading to the Mississippi or Gulf of Mexico within ten years from February 10, 1858.

(5) That the company shall have finished and in running order at least twenty-five miles of their road within one year after it is connected with certain other roads mentioned in the act, and at least fifty miles every two years thereafter until the road is completed.

(6) That the right to acquire lands from the state by donation shall cease at the expiration of fifteen years from February 10, 1858.

The two first conditions were performed within the time prescribed. These points are covered by the averments of the bill. The time limited for the performance of the third and fourth is extended from February 10, 1868, to June 10, 1873, by adding the time of the continuance of the war, according to the act of February 18, 1862, before referred to. When the bill was filed there were no such roads as those mentioned in the fifth condition with which a connection could be formed. The fifteen years limited by the sixth condition expired February 10, 1873. The period that elapsed during the war is to be added. That extends the time so much further.

The title of the company is therefore unaffected by the breach of any condition annexed to the grant.

§ 1359. *A condition subsequent as a defeasance. How treated in equity.*

But suppose there had been such breaches, as is insisted by the counsel for the appellants, the result must still be the same.

Except as to a small portion of the land in question the legal title is yet in the state. Whatever may be the right of the company it is wholly equitable in its character. With a few exceptions, which have no applicability in this case, the same rules apply in equity to equitable estates as are applied at law to legal estates. They are alike descendible, devisable, alienable and barrable. Jickling on the Analogy of Estates, etc., 17; *Croxall v. Shererd*, 5 Wall., 281.

There is wide distinction between a condition precedent, where no title has vested and none is to vest until the condition is performed, and a condition subsequent, operating by way of defeasance. In the former case equity can give no relief. The failure to perform is an inevitable bar. No right can ever vest. The result is very different where the condition is subsequent. There equity will interpose and relieve against the forfeiture upon the principle of compensation, where that principle can be applied, giving damages, if damages should be given, and the proper amount can be ascertained. *Wells v. Smith*, 2 Edw. Ch., 78; see, also, as to the principle of compensation, *Beaty v. Harkey*, 2 Smedes & M., 563. By the common law a freehold estate could not be cre-

ated without livery of seizin, and it could not be determined without some act *in pais* of equal notoriety. Conditions subsequent are not favored in the law (4 Kent, 129), and when they are sought to be enforced in an action at law, there must have been a re-entry, or something equivalent to it, or the suit must fail. The right to sue at law for the breach is not alienable. The action must be brought by the grantor or some one in privity of blood with him. *Nicoll v. New York & Erie R. Co.*, 2 Kern., 121; *Ludlow v. The New York & Harlem R. Co.*, 12 Barb., 440; *Webster v. Cooper*, 14 How., 488. In *Dumpor's Case*, 4 Reports, p. 119, it was decided that a condition not to alien without license is finally determined by the first license given.

Here the controlling consideration is, that the performance of all the conditions not performed was prevented by the state herself. By plunging into the war, and prosecuting it, she confessedly rendered it impossible for the company to fulfill during its continuance. This is alleged in the bill, and admitted by the demurrer.

§ 1360. *Performance of condition subsequent—when required to be made within a reasonable time.*

The rule at law is, that if a condition subsequent be possible at the time of making it, and becomes afterwards impossible to be complied with, by the act of God, or the law, or the grantor, the estate having once vested, is not thereby divested, but becomes absolute. Coke, Litt., 206 a; 208 b; 2 Black. Comm., 156; 4 Kent, *130. The analogy of that rule applied here would blot out these conditions. But this would be harsh and work injustice. Equity will, therefore, not apply the principle to that extent. It will regard the conditions as if no particular time for performance were specified. In such cases the rule is that the performance must be within a reasonable time. *Hayden v. Stoughton*, 5 Pick., 528; 4 Kent, *125, 126; Com. Dig., title "Condition, G. 5." We are clear in our conviction that under the circumstances a reasonable time for performance had not elapsed when this bill was filed. As the state, by the act of July 27, 1870, created the Southern Transcontinental Railroad Company, and authorized that company to "purchase the rights, franchises and property of the Memphis, El Paso & Pacific Railroad Company," it will be but right to allow a reasonable time for that purchase to be made, if such an arrangement can be effected, and for the vendee thereafter to perform all that was incumbent upon the Memphis, El Paso & Pacific Railroad Company by its charter and the supplementary and amendatory acts. If that arrangement cannot be made the latter company will have the right to provide otherwise for the fulfillment of its obligations to the state within such time, and thus consummate its inchoate title to the lands within the reservation. Either will be in accordance with the principles of reason and justice, and within the spirit of well-considered adjudications. *Walker v. Wheeler*, 2 Conn., 299; *Beaty v. Harkey*, 2 Smedes & M., 563; *Moss v. Matthews*, 3 Ves. Jr., 279; 2 Vern., 366; 1 id., 83; 3 Brown's Ch., 256; *Taylor v. Popham*, 1 id., 168; 1 Bac. Ab., 642; 1 Madd. Ch. Prac., 41, 42; *City Bank v. Smith*, 3 Gill & J., 265.

Both parties will thus be put in the same situation, as near as may be, as if the breaches had not occurred. Neither will be subjected to any serious hardship. The state, by her own acts, has lost the benefits of an earlier completion of the work. The company has lost the income which it might have enjoyed, and has doubtless been thrown into embarrassments it would have escaped. The circumstances do not call for a severe application of the rules of law upon either side.

§ 1361. *How breach of condition subsequent may be waived. Contract protected by the constitution.*

Breaches of such conditions may be waived by the grantor expressly or *in pais*. *Dumpor's Case*, 1 Smith's Lead. Cas., 85, American note. Such waiver is expressed in the statutes relating to the subject, to which we have referred, except the act creating the Transcontinental Company, and there it exists by the clearest implication.

That the act of incorporation and the land grant here in question were contracts is too well settled in this court to require discussion. *Fletcher v. Peck*, 6 Cranch, 137 (Const., §§ 1805-12); *New Jersey v. Wilson*, 7 id., 166 (Const., § 2295); *Dartmouth College v. Woodward*, 4 Wheat., 518 (Const., §§ 2099-2117); *State Bank v. Knoop*, 16 How., 369 (Const., §§ 2246-53). As such they were within the protection of that clause of the constitution of the United States which declares that no state shall pass any law impairing the obligation of contracts. The ordinance of 1869, and the constitution adopted in that year, in so far as they concern the question under consideration, are nullities, and may be laid out of view. *Von Hoffman v. The City of Quincy*, 4 Wall., 535 (Const., §§ 1877-82). When a state becomes a party to a contract, as in the case before us, the same rules of law are applied to her as to private persons under like circumstances. When she or her representatives are properly brought into the forum of litigation, neither she nor they can assert any right or immunity as incident to her political sovereignty. *Curran v. The State of Arkansas*, 15 How., 308 (Corp., §§ 1316-29).

A case more imperatively demanding the exercise of jurisdiction in equity could hardly be imagined than that presented in this bill. Should the interposition invoked be refused, doubtless the reservation would speedily be thatched over with adverse claims. A cloud would not only be thrown upon the title of the company, but the time, litigation, labor and expense involved in the vindication of its rights would very greatly lessen the value of the grant and materially delay the progress of the work it was intended to aid. The injury would be irreparable. It is the peculiar function of a court of equity in a case like this to avert such results.

§ 1362. *Where parties holding adverse claims are very numerous they need not be made parties.*

It has been insisted that those holding adverse claims should have been brought into the case as parties. They are too numerous for that to be done. An application was made to one of the defendants for a list of their names, and it was not given. The important questions which have arisen between the appellants and the company can all be properly determined without the presence of other parties than those before us.

The parties referred to are sufficiently represented for the purposes of this litigation by the governor and the commissioner of the general land office. We feel no difficulty in disposing of the case as it is presented in the record.

There are other points, ably maintained by the learned counsel for the appellants, to which we have not adverted. They are sufficiently answered by what has been said. It would extend this opinion unnecessarily, and could serve no useful purpose, specifically to consider them.

The circuit court decided correctly. The decree appealed from is affirmed.

MR. JUSTICE DAVIS dissented (the CHIEF JUSTICE concurring), on the ground that the state was arraigned as a defendant.

GAINES v. THOMPSON.

(7 Wallace, 347-354. 1868.)

APPEAL from the Circuit Court for the District of Columbia.

STATEMENT OF FACTS.—Gaines and others sought to enjoin the secretary of the interior and commissioner of the land office from making a cancellation of an entry under which they claimed an equitable right. The defense relied upon was that the matters set up in the bill were within the discretion and exclusive control of the executive department of the government. The court below dismissed the bill.

§ 1363. *The courts will not, by mandamus or injunction, control the discretionary powers of executive officers of the government.*

Opinion by MR. JUSTICE MILLER.

The extent of the jurisdiction which may lawfully be asserted by the federal courts over the officers of the executive departments of the government has been mooted in this court from the case of *Marbury v. Madison*, 1 Cranch, 137, down to the present time; and while the principles which should govern the action of the courts in that regard have been settled long since, the frequent application of late to this court, and to other federal courts, for the exercise of powers not belonging to them, shows that the question is one not generally understood.

§ 1364. — *authorities reviewed.*

In the case already referred to of *Marbury v. Madison*, the chief justice commented at some length upon the power of the courts over the action of the executive officers of the government, in the course of which he arrived at the conclusion that it is a question which must always depend upon the nature of the act. He then argues that by the constitution the president is invested with certain political powers, in the exercise of which he is to use his own discretion, and for which he is accountable only to his country and his conscience, and that he has officers to aid him in the exercise of these powers, who are directly accountable to him. The acts of such an officer, he says, can never, as an officer, be examinable in a court of justice. He holds, however, that where an officer is required by law to perform an act, not of this political or executive character, which affects the private rights of individuals, he is to that extent amenable to the courts. The duty which it was held in that case could be enforced in the proper court by *mandamus* was the delivery of a commission already signed by the president. The point, as there presented, was new and embarrassing, and it is no reflection on the distinguished jurist who delivered the opinion to say, that the rule which governs the court in its action, in this class of cases, has since been laid down with more precision, without conflicting with the principles there stated.

In the case of *McIntire v. Wood*, 7 Cranch, 504, an application was made to the circuit court for the district of Ohio for a *mandamus* to the register of the land office, to compel him to issue certificates of purchase to plaintiff for lands to which he supposed himself entitled by law. This court was of opinion that no power had been vested by congress in the circuit courts to issue the writ in such cases. The reasoning of the court is not extended, but the case bears a strong analogy to the one under consideration.

But in *Kendall v. United States*, 12 Pet., 524, the majority of the court held that the courts of the District of Columbia had a larger power than the circuit courts, and could issue writs of *mandamus* to federal officers in proper cases.

As this is the first case in which the writ was actually ordered, it is worth while to examine the ground on which it was placed. "The act required to be done by the postmaster-general," says the court, "is simply to credit the relators with the full amount of the award of the solicitor. This is a precise, definite act, purely ministerial, and about which the postmaster-general had no discretion whatever. This was not an official act in any other sense than being a transaction in the department where the books and accounts were kept, and was an official act in the same sense that an entry in the minutes of a court, pursuant to an order of the court, is an official act. There is no room for the exercise of any discretion, official or otherwise."

In this language there is no ambiguity, and in it we find a clear enunciation of the rule which separates the class of cases in which the court will interfere from those in which it will not. In the subsequent case of *Decatur v. Paulding*, 14 Pet., 497, where the writ was refused, the chief justice, who had dissented in the former case, accepts both the doctrine of the right to issue the writ by the court of the District, and of the cases in which it may be issued, as settled by the case of *Kendall v. United States*. "The first question, therefore, to be considered," he says, "is whether the duty imposed upon the secretary of the navy by the resolution in favor of Mrs. Decatur was a mere ministerial act?" The case of Mrs. Decatur arose under an act of congress, and also a joint resolution of that body of the same date, both providing compensation for the services of her deceased husband; but the measure of this compensation (which was to be paid to her by the secretary of the navy) was in the act different from what it was in the resolution. The secretary held that but one of these was intended by congress, and gave her the election. She brought suit to compel him to give her both. It is clear she had no other legal remedy. The United States could not be sued. The secretary could not be sued in any other form of action than *mandamus*. But on the ground that the action of the secretary involved the exercise of judgment and discretion, the order of the circuit court refusing the writ was sustained.

This case is cited and relied on in the case of *The Commissioner of Patents v. Whiteley*, 4 Wall., 522, and some of the observations of Chief Justice Taney, in delivering the opinion in the former, are so pertinent to the case before us, and state so well the relations of the judicial branch of the government to the officers engaged in the executive branch, that they may well be reproduced here.

Speaking of the functions of these officers, he says: "In general, such duties, whether imposed by act of congress or by resolution, are not mere ministerial duties. The head of an executive department of the government, in the administration of the various and important concerns of his office, is continually required to exercise judgment and discretion. He must exercise his judgment in expounding the laws and resolutions of congress under which he is required to act." "If," he says, "a suit should come before this court, which involved the construction of any of those laws, the court certainly would not be bound to adopt the construction given by the head of the department. And if they supposed his decision to be wrong, they would of course so pronounce their judgment. But this judgment, upon the construction of the law, must be given in a case in which they have jurisdiction, and in which it is their duty to interpret the acts of congress, in order to ascertain the rights of the parties before them. The court could not entertain an appeal from the decision of one of the secretaries, nor revise his judgment in any case

where the law authorized him to exercise judgment or discretion. Nor can it by *mandamus* act directly upon the officer, and guide and control his judgment or discretion in the matters committed to his care, in the ordinary exercise of his official duties. . . . The interference of the courts with the performance of the ordinary duties of the executive departments would be productive of nothing but mischief, and we are quite satisfied that such a power was never intended to be given to them." To the same effect are also the cases, *United States v. Seaman*, 17 How., 225; *Same v. Guthrie*, id., 284; *Same v. Commissioner of Land Office*, 5 Wall., 563.

It may, however, be suggested, that the relief sought in all those cases was through the writ of *mandamus*, and that the decisions are based upon the special principles applicable to the use of that writ. This is only true so far as these principles assert the general doctrine that an officer to whom public duties are confided by law is not subject to the control of the courts in the exercise of the judgment and discretion which the law reposes in him as a part of his official functions. Certain powers and duties are confided to those officers, and to them alone, and however the courts may, in ascertaining the rights of parties in suits properly before them, pass upon the legality of their acts, after the matter has once passed beyond their control, there exists no power in the courts, by any of its processes, to act upon the officer so as to interfere with the exercise of that judgment while the matter is properly before him for action. The reason for this is, that the law reposes this discretion in him for that occasion, and not in the courts. The doctrine, therefore, is as applicable to the writ of injunction as it is to the writ of *mandamus*.

In the one case the officer is required to abandon his right to exercise his personal judgment, and to substitute that of the court, by performing the act as it commands. In the other he is forbidden to do the act which his judgment and discretion tell him should be done. There can be no difference in the principle which forbids interference with the duties of these officers, whether it be by writ of *mandamus* or injunction,

Accordingly, in the case of *The State of Mississippi v. Johnson*, 4 Wall., 475, which was an application to this court for the writ of injunction, in the exercise of its original jurisdiction, the court says that it is unable to perceive that the fact that the relief asked is by injunction takes the case out of the general principles which forbid judicial interference with the exercise of executive discretion.

In the same case the chief justice gives us this clear definition of a ministerial duty in the relation in which we have been considering it: "A ministerial duty, the performance of which may in proper cases be required of the head of a department by judicial process, is one in respect to which nothing is left to discretion. It is a simple, definite duty, arising under circumstances admitted or proved to exist and imposed by law."

The action of the officers of the land department, with which we are asked to interfere in this case, is clearly not of this character. The validity of plaintiffs' entry, which is involved in their decision, is a question which requires the careful consideration and construction of more than one act of congress. It has been for a long time before the department, and has received the attention of successive secretaries of the interior, and has been found so difficult as to justify those officers in requiring the opinion of the attorney-general. It is far from being a ministerial act under any definition given by this court.

The numerous cases referred to by counsel in which this court — after the title had passed from the United States, and the matter had ceased to be under the control of the executive department — has sustained the courts of justice in decreeing the equitable title to belong to the person against whom the department had decided, are not in conflict with these views, but furnish an additional reason for refusing to interfere with such cases while they remain under such control.

Decree affirmed.

HILL v. UNITED STATES.

(9 Howard, 386-390. 1849.)

Opinion by MR. JUSTICE DANIEL.

STATEMENT OF FACTS.—This case comes before us from the circuit court for the southern district of Mississippi, upon a certificate of division in opinion between the judges on the following facts and questions certified from that court.

The United States, as the indorsees of the Mississippi & Alabama Railroad Company, instituted an action of *assumpsit* in the court above mentioned, on a promissory note given by William J. Hill, J. S. Rowland, D. M. Porter and W. F. Walker, to the said railroad company, for the sum of \$4,000. At the November term of the court in 1839, the United States, upon a trial at law upon issues joined, first upon the plea of *non assumpsit*, and secondly upon the plea of payment of the note before its indorsement and delivery to the plaintiffs, obtained a verdict and judgment in damages for the sum of \$4,353.32. Upon the suing out of an execution on this judgment, the defendants filed a bill on the equity side of the circuit court, and obtained from the district judge an injunction upon grounds which perhaps might, under the pleadings in the cause, have been as regularly insisted upon at law between the proper parties as they could be in equity; but whether forming a well-founded defense at law, or not, is immaterial in the inquiry now presented. In the bill filed by Hill and others, the United States are made directly parties defendants; process is prayed immediately against them; they are called upon to answer the several allegations in the bill, and a perpetual injunction is prayed for to the judgment obtained by them. To the bill of the complainants, the attorney for the United States filed in their behalf an answer *in extenso*, but afterwards moved the court to dissolve the injunction and dismiss the bill as to the United States for want of jurisdiction as to them, upon which motion the order and certificate now before this court were made in the following terms: "And afterwards, to wit, at the May term of said court, namely, on the 20th day of May, A. D. 1847, this cause came on to be heard before the Hon. Peter V. Daniel and Samuel J. Gholson, upon the motion of the United States of America to dismiss this suit as to them and dissolve the injunction for want of jurisdiction, and was argued by counsel. And the court having taken time to consider, and not being able to agree in opinion what decree should be made in the cause on said motion, one of the judges being of opinion that the said motion should be sustained and the said bill dismissed and injunction dissolved, and the other being of opinion that the said motion should be overruled, it is therefore ordered, at the request of the counsel for both complainants and defendants, that said difference of opinion be certified to the supreme court of the United States for their decision, whether the said motion should be sustained or overruled."

§ 1365. *No court has jurisdiction to entertain a suit against the United States except with their permission accorded by law, nor can a perpetual injunction be awarded against them.*

The question here propounded, without any necessity for recurrence to particular examples, would seem to meet its solution in the regular and best-settled principles of public law. No maxim is thought to be better established or more universally assented to than that which ordains that a sovereign, or a government representing the sovereign, cannot *ex delicto* be amenable to its own creatures or agents employed under its own authority for the fulfillment merely of its own legitimate ends. A departure from this maxim can be sustained only upon the ground of permission on the part of the sovereign or the government expressly declared, and an attempt to overrule or to impair it on a foundation independently of such permission must involve an inconsistency and confusion, both in theory and practice, subversive of regulated order or power. Upon the principle here stated, it has been that in cases of private grievance proceeding from the crown, the petition of right in England has been the nearest approach to an adversary position to the government that has been tolerated; and upon the same principle it is that in our own country, in instances of imperfect land titles, special legislation has been adopted to permit the jurisdiction of the courts upon the rights of the government. Without dilating upon the propriety or necessity of the principle here stated, or seeking to multiply examples of its enforcement, we content ourselves with referring to a single and recent case in this court which appears to cover the one now before us in all its features. We allude to the case of *United States v. McLemore*, in 4 How., 286, where it is broadly laid down as the law, that a circuit court cannot entertain a bill on the equity side of the court praying that the United States may be perpetually enjoined from proceeding upon a judgment obtained by them, as the government is not liable to be sued, except by its own consent given by law. We therefore direct it to be certified to the circuit court for the southern district of Mississippi, that the motion on behalf of the United States in this cause should have been sustained, and that the bill as to the United States should be dismissed, as having been improvidently allowed.

PERRY v. SHARPE.

(Circuit Court for Ohio: 8 Federal Reporter, 15-27. 1881.)

Opinion by MATTHEWS, J.

STATEMENT OF FACTS.—On November 27, 1880, the plaintiffs filed in the court of common pleas for Fairfield county, Ohio, a petition in a civil action, under the Code of Civil Procedure in that state, for the recovery of money only.

It alleged, in substance, that the plaintiffs are citizens of the state of Massachusetts, and partners in trade; that the defendants are citizens of Ohio; that on October 20, 1879, the defendants applied to the plaintiffs to grant a line of credit to the defendant Pierce, who was without means or responsibility, but familiar with the dry goods business, to sell him dry goods such as he might desire, to establish and conduct a retail dry goods store at Lancaster, in Fairfield county, Ohio; that, as an inducement thereto, the defendants represented and stated that the defendant Sharpe owned a large and magnificent farm of seven hundred and twenty acres of land three and a half miles from

Hartford City, in Blackford county, Indiana; that the same was in a high state of cultivation, and one of the best farms in the county; that the defendant Sharpe had, within the few years that he had owned it, expended \$9,000 in permanent improvements on it; that it was worth \$25,000 and upwards, and would be fine security for \$15,000, and the defendant Sharpe proposed to plaintiffs that he would convey said farm to the defendant Pierce in fee and allow him to execute to plaintiffs a mortgage thereon for \$15,000 as security for a line of credit to that amount with plaintiffs, stating that he had not sold and would not sell said farm to Pierce at any price, but would loan it to him as a basis of credit to help him into business, and that he (said Sharpe) would never claim anything from said Pierce in respect to said farm as long as he (said Pierce) desired to hold it; that thereupon the plaintiffs, relying upon said statements and representations of the defendants, and believing them to be true, agreed to extend to defendant Pierce the line of credit aforesaid upon said land being conveyed to him as aforesaid, and upon his mortgaging the same to the plaintiffs, and the same was accordingly done on the same day, October 20, 1879, and the plaintiffs thereupon, in pursuance of said scheme, sold and delivered to said Pierce goods at the dates and of the value therein stated, viz., from October 27, 1879, to November 3, 1880, amounting in all to \$30,902.50, on account of which they acknowledge to have received payments from Pierce for which he is entitled to credit amounting to \$12,449.47, leaving an unpaid balance of \$20,455.03, for which Pierce is indebted to them; that the representations and statements so made by the defendants were false and fraudulent when made, and well known by each of them to be so false and fraudulent, and that they were made with intent to deceive and cheat the plaintiffs out of the value of all goods which they might sell the defendant Pierce, less the net value of the farm aforesaid; that in truth and fact, said farm was then chiefly a marsh, little better than a frog pond, being for a large part of the year under water; that there was very little of it under cultivation, and very little of it capable of cultivation, and that it is one of the poorest farms in the county; that it lies six miles by road from Hartford City; that said Sharpe had not in fact spent over \$1,500 in improvements on it, and that principally in constructing a ditch, which is wholly inadequate and almost useless in draining said farm; that it was then worth, and is not now and never was worth more than \$7,000, and is not good security for more than \$5,000, all of which the defendants then well knew, but concealed from the plaintiffs and falsely represented as aforesaid; that in fact Sharpe had, on October 1, 1879, already made a fictitious sale of said farm to Pierce for \$25,000, for which Pierce had agreed to give Sharpe his judgment notes, payable within one year, at eight per cent. interest, whenever Sharpe should ask for them, all which was fraudulently concealed from the plaintiffs; that as soon as said Pierce had executed to the plaintiffs his mortgage for \$15,000, on October 20, 1879, he also immediately executed and delivered to Sharpe five judgment notes for \$5,000 each, due respectively in three, six, seven, eight and nine months, with eight per cent. interest, as he had previously agreed, all which was fraudulently concealed from plaintiffs and not known to them until said Sharpe, on November 15, 1880, caused five judgments to be entered upon said notes by confession in the superior court of Montgomery county, and executions aggregating about \$27,000 to be levied upon the stock of goods of Pierce at Lancaster, Ohio; that said stock is not in value exceeding the amount of said executions, and the chief portions thereof

consist of goods bought by said Pierce of the plaintiffs under the false representations aforesaid; that as soon as they learned of the fraud aforesaid, viz., on November 24, 1880, they notified the defendant Pierce that the contract of sale and credit in respect to said goods was rescinded, tendered to him the note and mortgage on said farm for cancellation, and offered to cancel and discharge the same, and demanded the return of said goods so sold, or payment for the same, which was refused. Wherefore they demand damages for said deceit in the sum of \$20,455.03, with interest, and for all other proper relief.

This petition was duly verified by the oath of one of the plaintiffs, who also filed his affidavit for an order of attachment, setting out in substance the allegations of the petition, and stating that "the said defendants fraudulently and criminally contracted the debt, and fraudulently and criminally incurred the obligation, for which the said action has been brought;" and also that "the said defendants are about to dispose of the property of the said defendant, George W. Pierce, with the intent to defraud the creditors of him, the said George W. Pierce;" and also "that the said George W. Pierce has disposed of a part of his property with intent to defraud his creditors."

Writs of summons were issued,—one against Pierce, directed to the sheriff of Fairfield county; the other against Sharpe, to the sheriff of Montgomery county,—and both were returned served.

Orders of attachment were also issued,—one against each defendant. That against Sharpe was issued to the sheriff of Montgomery county; was levied by him upon personal property of Sharpe, valued at \$20,505.63, which was released to him on the execution and delivery of a forthcoming bond. The order of attachment against Pierce was directed to the sheriff of Fairfield county, and was by him levied upon goods and personal property of Pierce, which were already in his hands, under executions levied thereon upon the judgments entered against him by confession in the superior court of Montgomery county, in favor of his co-defendant, Sharpe.

On December 14, 1880, the plaintiffs filed their petition for a removal of said cause to this court, and tendered a bond, conditioned as required by law, which petition was granted, and the cause removed and certified into this court accordingly.

On November 27, 1880, the same day on which the civil action at law was begun, as above recited, the plaintiffs filed in the same court of common pleas for Fairfield county, Ohio, a petition against the same defendants in a suit praying for an injunction and equitable relief.

This petition recites, in substance, the allegations in that in the action at law, setting out in addition that the defendant Sharpe had for many years been a retail dealer in dry goods at Dayton, Ohio, and elsewhere, and that the defendant Pierce had been in his employment as managing clerk, and that they had sustained relations of the closest confidence, intimacy and friendship; that Pierce was entirely irresponsible, and known to be so by Sharpe; that on October 1, 1879, they entered into a collusive agreement for the sale by Sharpe to Pierce of the Blackford county farm for \$25,000, which it is alleged was worth not more than \$5,000 cash, which agreement was in writing, and a copy of which is exhibited with the petition. This agreement provides for the sale of the farm at \$25,000 —

"The said Pierce issuing for the payment of same notes falling due within one year, at intervals, at such time as the said Sharpe may prescribe — the said

Pierce to pay eight per cent. interest annually; and the said Sharpe further agrees to not push the payment of said notes at any time unless the said George W. Pierce at any time should be sued; or if at any time suits should be threatened against the said Pierce, then the said Sharpe will be free to act in any manner he may choose for the recovery of his notes or money. The said Pierce agrees to give the said Sharpe judgment notes authorizing any attorney at law to confess judgment in favor of the said Sharpe, whenever the said Sharpe deems it his interest so to do."

It is alleged in this petition that, for the purpose of evading the provision in this agreement providing that Sharpe would not push the payment of said notes unless Pierce should be sued, Sharpe caused and procured the firm of H. B. Claffin & Co., of New York, to whom he was largely indebted, to sue Pierce upon a claim for \$1,100, which would not become due for nearly three months thereafter, and then Sharpe caused judgment to be entered by confession against Pierce on said notes, and executions to issue thereon, and to be levied upon the entire stock of goods of said Pierce at Lancaster, which he is about to sell for the satisfaction of the same, being not more than enough therefor, and the said Pierce being insolvent and having no other property or means of payment. The petition then sets out the bringing of the action at law for the recovery of damages for the deceit, and the issue and levy on the same stock of goods; of the order of attachment against Pierce, but that the same will be of no avail unless Sharpe's levy should be postponed, as in equity and good conscience it ought, to the levy by complainants of their order of attachment. The plaintiffs, therefore, pray that the claim of Sharpe against Pierce, and the levy of the executions on said judgments upon said stock of goods, be adjudged fraudulent and void as against the plaintiffs, and be postponed in payment to the attachment of the plaintiffs, and that the defendant Sharpe be enjoined from making any sale of said property under said executions, and praying for a receiver to sell said property and bring the proceeds into court to abide the judgment in the cause, and praying also for general relief.

On the day of filing this petition a restraining order was granted by a judge of the court of common pleas, as prayed for, and the summons and restraining order were served upon the defendants, as in the other case in Montgomery and Fairfield counties, respectively.

On December 8, 1880, Augustus Sharpe filed in this suit his motion, in writing, to vacate and dissolve the injunction and restraining order theretofore allowed for reasons specified therein. On December 16, 1880, this cause also, on petition of plaintiffs, was removed into this court.

A motion on the part of the plaintiffs for the appointment of a receiver to take possession of and sell the goods of Pierce levied on was heard by Hon. John Baxter, circuit judge, on January 29, 1881, and was denied; whereupon, by consent of counsel (the defendant Sharpe not thereby entering his appearance therein, but reserving all rights to object to the jurisdiction of this court), it was further ordered that the restraining order theretofore allowed be so far modified as to permit the sheriff of Fairfield county to sell the goods held by him upon executions in favor of Sharpe against Pierce, but the proceeds of the sale to be held and retained in his possession until the further order of the court in the premises. In pursuance of this agreement, as the sheriff reports, the goods were sold February 28, 1881, to Augustus Sharpe, for \$20,000.

On June 9, 1881, the defendant Sharpe, for reasons annexed, moved to dis-

miss the attachment against him and his property, and also the attachment against Pierce, so far as it interferes with his executions; and on the same day Pierce also moved to dismiss the attachment against him.

[The court considered and overruled the motions to dismiss the attachments, and proceeded as follows:]

§ 1366. *An injunction granted in a state court before removal is to be continued in the federal court as if granted by it.*

2. *As to the injunction.* (1) It is claimed that the granting of the motion to dissolve is imperatively required by section 720, R. S., which enacts that — “The writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a state, except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy.”

This is the same provision originally contained in section 5, ch. 22, act of March 2, 1793 (1 St., 334). It has been held to prohibit the issue of an injunction by a court of the United States to restrain the sale of property under an execution issued out of a state court, although the application is made by a third party whose property is taken. *Watson v. Bendurant*, 30 La. An., 1; *Daly v. Sheriff*, 1 Woods, 175. *Per contra*, *Cropper v. Coburn*, 2 Curt., 465.

And in the early case of *Diggs v. Wolcott*, 4 Cranch, 179, it was decided that although a suit to enjoin proceedings in a state court is removed from the state court into the circuit court, yet the latter cannot grant the relief prayed for. And in that case the removal was effected by the defendants to the bill in chancery, against whom the relief was asked.

But by section 646, R. S., it is now provided that — “any injunction granted before the removal of the cause *against the defendant applying for its removal* shall continue in force until modified or dissolved by the United States court into which the cause is removed.”

And by section 640, R. S. (Act of March 3, 1875, ch. 137, § 4; 18 St., 571), it is provided, in reference to all cases removed from a state court, that — “All injunctions, orders and other proceedings had in such suit prior to its removal shall remain in full force and effect until dissolved or modified by the court to which such suit shall be removed.”

It is clear, then, that by virtue of this last-mentioned provision the injunction in the present case is continued in force until otherwise ordered by this court, and does not cease to operate by the peremptory effect of the prohibition contained in section 720. And the inference from sections 640 and 646 is equally cogent to my mind, that in the cases provided for it is the intention of the law to authorize and require that the question of dissolving, continuing or perpetuating the injunction originally granted by the state court shall be dealt with by the courts of the United States, into which the cause shall have been lawfully removed, without in anywise being affected by section 720, and that it shall be disposed of by the courts upon its merits, precisely as it ought to have been disposed of by the state tribunals if the cause had not been removed. This construction of these several provisions of the law is necessary, that they may each have some effect, and restrains the interpretation of section 720 to cases where the jurisdiction of the courts of the United States is originally invoked for the very purpose of staying proceedings in state courts.

§ 1367. *Circumstances under which, for want of a complete remedy at law, an injunction is permissible.*

(2) The question, then, seems, whether this injunction ought originally to have been granted, and whether it ought now, upon general principles of equity jurisprudence, to be permitted to stand. Upon this point it is urged by counsel, in support of the motion to dissolve, that it is not a case for equitable interference, for the reason that the party has a complete and adequate remedy at law.

It seems, in the present condition of the case, hardly necessary to enter upon the discussion of that question. The whole scope of the injunction, as originally prayed for and allowed, was simply to restrain the sale of the stock of goods held by the sheriff of Fairfield county, under the execution of Sharpe and the complainants' order of attachment, until the validity and priority of the former, brought into question by the allegations of the bill, could be determined on final hearing. By consent of parties the injunction was modified after the removal of the cause into this court, so far as to permit the sheriff of Fairfield county to sell the goods held by him under said levies, with the proviso that the sheriff should hold and retain the proceeds of such sale in his possession until the further order of this court.

It is true that this consent was given by Sharpe with the qualification that he did not thereby enter his appearance in the suit, and reserving all rights to object to the jurisdiction; but that could only have reference to the question of jurisdiction over his person, which we have already decided. What is left is simply a question as to the appropriation of the fund in the hands of the sheriff. The injunction granted by the court has spent its force, and there is no longer a question as to staying by injunction proceedings in the state court. The parties themselves have agreed that the fund shall remain in its present custody, to abide the order of this court.

It is nevertheless still true that if the complainants have no equity to detain the fund for final disposition, the order should now be made authorizing the sheriff to pay it to Sharpe; and in this view it is material to determine whether such an equity exists.

So far as the objection now under consideration is concerned, that there is open to the complainants an adequate remedy at law, the case of *Wood v. Stanberry*, 25 Ohio St., 150, seems conclusive. It was there adjudged that "where a sheriff has in his possession goods and chattels by virtue of a levy under an execution issued upon a *void* judgment, and afterwards levies, subject to his former levy, an order of attachment in favor of the creditors of the judgment debtor upon the same property and proceeds, or threatens to proceed, under the direction of the plaintiff in execution, to sell the same for the purpose of applying the proceeds upon the execution, the plaintiffs in attachment may restrain the sale by injunction."

In meeting the objection urged here the court say, p. 150:

"The remedy which an injunction affords them is complete, and no other process or proceeding is adequate to the preservation of their rights or their just compensation for injuries, if the sale under the execution is permitted. They cannot appear in the case of *Stanberry v. Purviance* and ask the court to recall the execution, for the reason that they are not parties therein; and for the same reason they cannot, upon the return of the execution, ask the court to control the proceeds of the sale for their benefit; nor can they, by proceedings in error, stay the execution or reverse the judgment upon which it was

issued. They cannot recover the possession of the property attached from the sheriff—the possession is rightfully in him,—nor can they maintain trespass against him, for the reason that the execution, being regular on its face, is his justification. If the property be sold under the execution and delivered to purchasers, an order of sale under their attachment will be fruitless; an action against the purchaser, if insolvent, will afford no redress, and if solvent will impose burdens and expenses upon them for which no compensation can be made. In short, there is no adequate remedy, and therefore the case is a proper one for an injunction.”

It is true in that case the execution was declared to be *void*, while here it is only *voidable*. But that only furnishes an additional ground for independent equitable interference, as the equity asserted by the complainants, while it is sufficient, if maintained, to avoid the levy of the execution as against their claim, could not be established and vindicated in any other mode than by a bill in chancery. The grounds, therefore, for maintaining the injunction in the present case are stronger than in the case just cited.

In the case of *Watson v. Sutherland*, 5 Wall., 74 (§§ 1300, 1301, *supra*), the supreme court of the United States, speaking by Mr. Justice Davis, sustained an injunction to prevent a sale under an execution of goods levied on as the property of the judgment debtor, at the suit of a third person claiming title to them by virtue of a prior purchase from the judgment debtor, which sale the plaintiff in the execution charged to be fraudulent and void, the court deciding the question of fraud in favor of the complainant in equity, holding that the recovery of damages in an action at law was not an adequate remedy for the loss arising from the destruction of his business. It does not appear in the report of that case whether an action of replevin for the recovery of the possession of the goods themselves would lie. But in either view the rule laid down is certainly broad enough to cover the present case.

(3) This brings us to a consideration of the complainant's equity which is denied. Its existence depends entirely upon whether upon final hearing he will be able to establish by proof the fraud of which he complains. If it be true that by the fraudulent misrepresentations alleged the complainants were induced to sell to Pierce goods on credit, then the arrangement between Sharpe and Pierce—by which the former procured \$25,000 of notes falling due at short intervals, with warrant of attorney attached, authorizing judgments by confession, and the subsequent entry of judgments, and issue and levy of executions thereon, seizing and selling the stock of goods, a large part of which consisted of merchandise sold by the complainants to Pierce—is undoubtedly an injurious fraud upon the complainants, for which they are entitled to redress, or, so far as not consummated, to prevent. Permitting the proceeds of the sale of the goods to be paid to Sharpe on his executions is simply to permit the consummation of that fraud if one has been contemplated.

Into the inquiry as to the merits of the two sides of that controversy it is not appropriate to enter now. Its adjudication must be postponed until the final hearing. As I have already said, in reference to the motion to dismiss the attachments, there is, in my opinion, reasonable ground shown in the affidavits for permitting the controversy to proceed to final determination, without prejudice from these preliminary proceedings.

The motion to dismiss the attachments, and that to dissolve the injunction or modify the previous order of the court in respect to the fund in the hands of the sheriff, are overruled.

§ 1868. In general.—The awarding of an injunction is the exercise of a very delicate and highly responsible power, which ought not to be exerted where there is reasonable doubt as to any fact upon which the application is founded. If there appears, from the affidavits of the parties or witnesses, such a repugnancy in point of fact as makes it necessary to decide on the relative truth of the conflicting statements, or the credibility of the affirmants, the judge ought not to undertake so dangerous an inquiry at the first stage of the cause. *Cooper v. Matthews*,* 8 Law Rep., 413.

§ 1869. An injunction will not be granted where there will be as much probability of doing irreparable mischief by granting it as by refusing it. *North v. Kershaw*, 4 Blatch., 70.

§ 1870. An injunction depends upon the discretion of the court, and is granted or denied according to the justice and equity of each particular case. *Tucker v. Carpenter*,* Hemp., 440.

§ 1871. A preliminary injunction should not be granted in a doubtful case. *Shoemaker v. Nat. Mech. Bank*, 1 Hughes, 101 (BANKS, NAT., §§ 188-85).

§ 1872. A court of equity will grant an injunction to prevent an evil under circumstances which will not, after the interests of third parties have become involved, justify it in remedying. *Woodhull v. Beaver County*, 8 Wall. Jr., 274.

§ 1873. The object of all injunctions is to prevent anticipated mischief. They are not intended as a remedy for past evils or grievances. *Brammer v. Jones*, 2 Bond, 100.

§ 1874. An injunction will not be granted nor a receiver appointed unless it is reasonably probable that the complainants will be successful. *Wilkinson v. Dobbie*,* 12 Blatch., 298.

§ 1875. A court of equity will grant an injunction against a threatened wrong, for which, if done, the law could give no adequate redress. *Foot v. Linck*,* 5 McL., 616.

§ 1876. Upon a bill for an injunction, when the damage or injury threatened is of a character which cannot be easily remedied if the injunction is refused, and there is no denial that the act charged is contemplated, a temporary injunction should be issued, unless the case made by the bill is satisfactorily refuted by the defendant. *United States v. Duluth*, 1 Dill., 469.

§ 1877. A temporary injunction is proper though the answer sets up title in the defendant and denies mistake or fraud, where the mischief in proceeding and disallowing the injunction is otherwise irremediable and incurable. *Platt v. McClure*, 8 Woodb. & M., 151 (Conv., §§ 1180-81).

§ 1878. An injunction will issue in a proper case without a previous establishment of the plaintiff's right at law. *Spooner v. McConnell*, 1 McL., 337 (CONST., §§ 8140-62).

§ 1879. The granting of a preliminary injunction is within the discretion of the court, and in exercising this discretion it will look at the consequences which will ensue on the one hand by granting it, and on the other by withholding it. *North Carolina Railroad Co. v. Drew*,* 3 Woods, 674.

§ 1880. A preliminary injunction should issue whenever the complaint is the proper subject of equitable cognizance, the plaintiff's right involved and the defendant's violation of it are clear, and the case exhibits no special facts which would render the issue of the process unjust; and it should not issue under any other circumstances. The propriety in granting it rests in the sound discretion of the court. *Scribner v. Stoddart*,* 19 Am. L. Reg. (N. S.), 483.

§ 1881. An injunction ought never to be granted without a full conviction on the part of the court of its urgent necessity. *Potter v. Schenck*, 1 Biss., 515.

§ 1882. An order for an injunction or a receiver will not be made in an improper case, even with the consent of both parties, more especially where the rights of third persons may be concerned. *Whelpley v. Erie R'y Co.*,* 6 Blatch., 274.

§ 1883. The power of a court of equity to grant an injunction should never be exercised except in cases of great injury, where courts of law cannot afford an adequate or commensurate remedy in damages. The right must be clear, the injury impending or threatened, so as to be averted only by the protective, preventive process of injunction. It will not be awarded in doubtful cases or in new ones not coming within well established principles. *Bonaparte v. Camden & Amboy R. Co.*, 1 Bald., 205.

§ 1884. Where an injunction has been dissolved and it afterwards appears from the proof taken that the injunction ought to be continued, a court, in the exercise of a sound discretion, will reinstate it. *Tucker v. Carpenter*,* Hemp., 440.

§ 1885. It is a rule which governs in applications for preliminary injunctions, that, when the danger or injury threatened is of a character which cannot be easily remedied if the injunction is refused, and there is no denial that the act charged is contemplated, the temporary injunction should be granted, unless the case made by the bill is satisfactorily refuted by the defendant. *United States v. Duluth*, 1 Dill., 469.

§ 1886. The decision of a judge upon a motion for a temporary injunction is not controlling authority. *Lothrop v. Stedman*, 13 Blatch., 134 (CORP., §§ 1802-11).

§ 1887. The granting or refusing of an injunction is a matter resting in the sound discretion of a court of equity. The exercise of this power ought to be guarded with extreme caution, and

the remedy applied only in very clear cases. *Shoemaker v. National Mechanics' Bank*, 2 Abb., 416.

§ 1888. **Affecting third parties.**—An injunction will not be granted when it would seriously affect the interests of one not made a party to the suit. *Northern Indiana Railroad Co. v. Michigan Central Railroad*, 5 McL., 444.

§ 1889. A suggestion of possible indirect injury to the trade of third persons constitutes no reason for refusing an injunction to one entitled to it. *Rumford Chemical Works v. Vice*, 14 Blatch., 179.

§ 1890. **Against corporations.**—Courts of equity have jurisdiction over corporations, at the instance of one or more of their members, to restrain those who administer them from doing acts which would amount to a violation of charter, or to prevent any misapplication of their capital or profits which might result in lessening the dividends of stockholders, or the value of their shares, if the intended acts create a breach of trust. *Shoemaker v. Nat. Mech. Bank*, 1 Hughes, 101 (BANKS, NAT., §§ 183-85).

§ 1891. A court of equity has jurisdiction, at the instance of stockholders, to restrain a corporation, or those engaged in the control and management of its affairs, from acts tending to the destruction of its franchises, or violations of its charter, and from misuse or misappropriation of the corporate powers or property, or other acts prejudicial to the stockholders, amounting to a breach of trust on the part of the managers. That the stockholders allege that the board of directors against whom the relief is prayed are not the legal board, and that those who constitute the legal board refuse to bring the suit, does not affect the jurisdiction. *Pond v. Vermont Valley R. Co.*, 12 Blatch., 280.

§ 1892. Where it appeared in a suit in equity that a corporation defendant, which had made an attempt to procure its own dissolution, might be liable to respond to the plaintiff in the suit, it was restrained from taking any proceedings for its own dissolution, or for the appointment of a receiver of its effects, or for the distribution thereof among its stockholders, or any other persons, and from making any distribution or transfer of any of its effects. *Fisk v. Union Pacific R. Co.*, 10 Blatch., 518.

§ 1893. A stockholder in a railroad company is entitled to an injunction to prevent the consolidation of the company with another company, where such consolidation cannot lawfully be consummated without his consent. *Mowrey v. Indianapolis & Cincinnati R. Co.*, 4 Biss., 78 (CORP., §§ 1565-78).

§ 1894. On a bill filed by a stockholder of the defendant bank to restrain its president and directors from pursuing a course which he alleged was in violation of their charter and would waste the assets, the court held they had authority to issue an injunction upon a proper case being made out, but refused to do it in this instance. It seems that the waste should amount to a breach of trust. *Shoemaker v. Nat. Mech. Bank*, 2 Abb., 416.

§ 1895. **Right to use of water—Diversion.**—Whether, upon a bill filed by the first appropriator of a stream of water for mining purposes on the public lands of the United States in the Pacific states and territories, asserting that his prior rights have been invaded by a diminution in quantity or deterioration in quality of the water of the stream, caused by subsequent appropriators, a court of equity will interfere to restrain the acts of the parties complained of, will depend upon the character and extent of the injury alleged, whether it be irremediable in its nature, whether an action at law would afford adequate remedy, whether the parties are able to respond for the damages resulting from the injury, and other considerations which ordinarily govern a court of equity in the exercise of its preventive process of injunction. Thus where the injury was only to a limited extent attributable to the mining of the defendants, and, if at all, was hardly appreciable in comparison with the damage which would result to the defendants from the indefinite suspension of work on their mining claims, and the defendants were also responsible persons and capable of answering in damages, the injunction was refused. *Atchison v. Peterson*, 20 Wall., 507.

§ 1896. Where the plaintiff brought an action for damages for the diversion of water, asking for a decree of title and a perpetual injunction, and alleged that the defendants threatened to continue the diversion, which would cause irreparable injury to the plaintiff, and were unable to respond in damages, and the jury found the title in the plaintiff, it was held that an injunction was rightly awarded; the allegations as to the act of diversion and the irreparable injury, and the threatened continuance of the acts, and the inability of the defendants to respond in damages, not being denied in the answer. *Harris v. Shontz*,* 1 Mont. T'y, 212.

§ 1897. If the diversion of certain water is in violation of the right of the plaintiff, and may permanently injure that right, and become by lapse of time the foundation of an adverse right in the defendant, equity may interpose by way of injunction to restrain such diversion, although it occasions no other injury. *Webb v. Portland Manuf'g Co.*, 3 Sumn., 189.

§ 1898. Where the plaintiff, in working a mining claim upon the public lands of the United States, tunneled into a mountain and struck a vein of water which it appropriated and used

for mining purposes, and the defendants afterwards ran a tunnel into another part of the mountain which intercepted the plaintiff's water, and appropriated it to their own use, the plaintiff was held entitled to a temporary injunction restraining the diversion of the water by the defendants, even though it should be necessary for them to fill up, or build a water-tight barrier across the tunnel to accomplish the end. *Cole Silver Mining Co. v. Virginia & Gold Hill Water Co.*, 1 Saw., 470.

§ 1399. On a bill by one riparian owner who had first diverted the water of a stream for mill purposes to enjoin another riparian proprietor who had afterwards diverted the water for similar purposes by a race above the head of the plaintiff's race, on the ground that the water of the stream was not sufficient to run the plaintiff's mill after part of it had been diverted by defendant and not returned to the stream above the head of the plaintiff's race, the court refused to grant the injunction, it appearing possible that the water might be used to operate both mills by flowing the water from the defendant's mill by a tail-race into the race of the plaintiff, and in view of the fact that the granting of the injunction would deny to the defendant any use of the water. It was considered that any damage to the plaintiff's right to use the water as before it was diverted by the defendant could be better redressed in an action at law, and that equity might afterwards be called on for relief against any persistent violation of the rights of the parties as determined at law. *Mason v. Cotton*, 2 McC., 82.

§ 1400. In order to justify an injunction to prevent the diversion of water from its natural course, there must be shown serious damage, either incurred or impending. Where no such damage is alleged, the complainant will be left to his remedy at law. *Pierson v. Elgar*, 4 Cr. C. C., 454.

§ 1401. A bill alleged that the plaintiff had the title to an ancient mill, together with the pond and waters flowing into it, and had had a long and uninterrupted possession thereof, and that the defendants were about to divert therefrom waters which were essential to use of their mill, and was held to state a good cause for an injunction. But as it appeared that for more than twenty years the defendants had diverted waters which would otherwise have flowed into the pond, by means of an aqueduct which they had no intention of abandoning, but which, for lack of means, fell into disrepair and disuse for about three years, but that they were about to rebuild it, the court held that as the injury would be trifling, and the defendants had at law a good title to their easement by reason of lapse of time and the acquiescence of the mill owners, equity would refuse to enjoin the repair of the aqueduct, but would leave the plaintiff to his remedy at law, if any. *Haight v. Proprietors of Morris Aqueduct*,* 4 Wash., 601.

§ 1402. Enjoining erection of bridges and dams.—Where citizens of New York, owning wharves in the city of Newark, New Jersey, but not navigators, or pilots, or anything of that sort, filed their bills in the circuit court for the latter state to restrain the construction of two bridges over the Passaic at that point, the bridges being authorized by the laws of New Jersey, it was held that the court would not interfere by injunction at the instance of the wharf owners, on the suggestion that the erection of the bridges would cause a depreciation in the value of their property. *The Passaic Bridges*, 8 Wall., 782.

§ 1403. An injunction restraining the erection of a bridge over a river will not be granted on the ground that it will obstruct navigation, where the testimony of experts on this point is so nearly balanced on each side as to produce no very decided effect on the mind. *Works v. Junction Railroad*, 5 McL., 425.

§ 1404. On an application by a person engaged in the navigation of the Hudson river, for a provisional injunction restraining the construction of a bridge across the river under authority of an act of the legislature of New York, on the ground that it would, if constructed according to the directions in the act, seriously obstruct the navigation of the river, the right of the plaintiff to the free and unobstructed navigation of the river being clear, the defense being based upon the ground that the bridge would not obstruct this right, and the court being doubtful as to the latter question, an injunction was issued until the final hearing. *Silliman v. Hudson River Bridge Co.*, 4 Blatch., 74.

§ 1405. The mere abstract right to navigate a river, secured to every citizen of the United States, is too remote and contingent, as a ground for a private person's invoking the interference of a court of equity to restrain the erection of dams in the river which so far obstruct its navigation as to amount to a public nuisance. *Spooner v. McConnell*, 1 McL., 387 (CONST., §§ 3140-62).

§ 1406. One seeking to restrain the construction of dams in a navigable river on the ground that they will constitute a public nuisance, and destroy the value of his property, must show how his property will be irreparably injured. The special injury to himself must be shown. *Ibid.*

§ 1407. The owner of a tannery, store, mills, warehouses, real estate, and a wharf on a navigable river upon which shipments are made of articles from his tannery and mills, may

bring a suit in equity to enjoin the construction of a bridge across the river which will materially obstruct its commerce, since the injury to the complainant individually is irreparable, permanent, its extent not capable of ascertainment, and the remedy at law is inadequate. To establish this wrong it need not be measured in dollars and cents. It must be shown to exist; it must be material; but the particular amount of damage cannot and need not be shown. *Works v. Junction Railroad*, 5 McL., 425.

§ 1408. The construction of a bridge over the Ohio river at Wheeling being, by mathematical demonstration, and according to the report of a commissioner, such an obstruction to the commerce of the river as to amount to a public nuisance, and being a special injury to the interests of the state of Pennsylvania as the proprietor of lines of transportation, and the injury being of a character for which an action at law could not afford adequate redress, as it would require daily prosecutions for the daily occurrence of the wrong, and the compensation in damages being incapable of ascertainment, it is held that the state of Pennsylvania may restrain by injunction the erection or continuance of such a bridge. *State of Pennsylvania v. Wheeling, etc., Bridge Co.*, 18 How., 518.

§ 1409. The right of the plaintiff and the serious character of the injury ought to be clearly established by a trial at law or otherwise before a court of the United States should grant an injunction to restrain the construction of a bridge authorized by an act of the legislature of the state in which it is proposed to be erected. *Silliman v. Hudson River Bridge Co.*, 4 Blatch., 395.

§ 1410. The erection of a railroad bridge across the Connecticut river, between Saybrook and Lyme, may be enjoined by the federal courts, although authorized by the state legislature. But the erection of such bridge being subsequently legalized by congress, the injunction was dissolved. *Baird v. Shore Line R'y Co.*, * 6 Blatch., 276; 461.

§ 1411. Patent cases.—Where the patent sued on has not been established on trial, either at law or in equity, nor the exclusive rights which it purports to grant been acquiesced in by the public, a preliminary injunction will not be granted unless the right of the plaintiff is clear and free from doubt, and the violation of that right on the part of the defendant is equally clear. *North v. Kershaw*, 4 Blatch., 70. See PATENTS.

§ 1412. It is no objection to the granting of a preliminary injunction restraining the infringement of a patent, that since the commencement of the suit the defendants have ceased to continue the injury and declare their intention not to renew the same. *Potter v. Crowell*, 1 Abb., 80.

§ 1413. If a patent expires during the pendency of a suit for infringement, there can only be a decree for an account. No injunction can issue. *Jordan v. Dobson*, 2 Abb., 398.

§ 1414. On a motion for an injunction to restrain the infringement of a patent, the novelty of the invention being denied, and it being admitted that large quantities of the article, in packages marked as imported from Paris, were sold by the patentee before obtaining his patent, this was held to be an implication against him as the original inventor, and an injunction was refused until he should establish his right at law. *Booth v. Garely*, 1 Blatch., 247.

§ 1415. In a suit in the United States circuit court in New York, for the infringement of letters patent, embracing four claims against two defendants, a decree was rendered that the defendants had infringed the fourth claim, and should account and be enjoined. Subsequently the plaintiff brought a suit in equity in New Jersey, on the same patent, against one of the defendants alone, reciting that the suit in New York was brought before the passage of the patent act of July 8, 1870, and praying that the damages sustained by the plaintiff by the infringement since the granting of the patent might be adjudged to the plaintiff, and also for damages sustained by a new infringement by the defendant since the decree in the New York suit. Proofs were taken and concluded in the New Jersey suit. Suit for the infringement of the same patent, against other persons for selling the articles bought of the defendants in the former suits, were brought in South Carolina and Georgia, and the proofs concluded in one of these cases. The defendants in the New York case then applied to the court in that state for an injunction restraining the plaintiff from further prosecuting the suits in New Jersey, South Carolina and Georgia, and from commencing other suits against purchasers, on the ground that the articles sold by the defendants in those suits were purchased from the defendants in the New York suit, who had already been called upon to account for the making and selling of the articles. The court held that it had no jurisdiction or right to assume to regulate the conduct of the plaintiff by injunction or stay or repression, except in regard to the proceedings in the New York suit. *Rumford Chemical Works v. Hecker*, 11 Blatch., 552.

§ 1416. Case removed to federal court.—Upon a bill in equity in a state court an injunction was granted restraining the sale of mortgaged property. The suit was removed into the United States circuit court, to be entered at the next term. Taking advantage of this, the defendant proceeded to sell the property. On an application to the federal court to restrain him, and notice given, the federal court granted the injunction. *Bowen v. Kendall*, * 23 Law Rep., 538.

§ 1417. One having obtained a decree in a state court, sent a transcript of the decree into the state of the defendant's residence, and sued him on it there. Two days before the transcript was sued on the defendant made the requisite affidavits for the removal of the original suit into the circuit court of the United States under the act of congress, and the case was subsequently removed. The defendant then filed a bill in the court to which the case had been removed for the purpose of obtaining, and did obtain, an injunction restraining the plaintiff from proceeding in the suit on the transcript. *Held*, that the court had authority to grant the injunction staying the proceedings until its final determination of the case, and that on its annulling the decree in the state court, and dismissing the bill on which it was founded, the injunction was correctly made perpetual. *French v. Hay*, 22 Wall., 250.

§ 1418. Unconstitutional law—Enjoining state officers.—The legislature of Louisiana having incorporated the Louisiana State Lottery Company and authorized it to deal in lotteries, afterwards repealed its charter, made the business authorized by the incorporating act unlawful, and declared that any one who should deal in lotteries should be guilty of a misdemeanor. Holding that the repealing act was unconstitutional as impairing the obligation of contracts, the court, regarding the injury which would result to the property of the company, granted an injunction restraining the officers of the state from ordering or allowing any prosecution against the officers or agents of the lottery company for performing the acts authorized by the charter, or from interfering with them in such acts, by prosecution or otherwise. *State Lottery Co. v. Fitzpatrick*, 8 Woods, 222.

§ 1419. A court of equity may restrain by injunction an officer of a state from acting under a law which is void, as impairing the obligation of a contract of the state. *Bancroft v. Thayer*, 5 Saw., 502.

§ 1420. Enjoining payment of money out of United States treasury.—The commissions of a supercargo of a cargo which has been sequestered by a foreign government, being a charge upon the indemnity granted under a treaty with the sequestering government, he is entitled to an injunction to prevent the same from being paid out of the treasury of the United States to the assignee of the insolvent owner of the brig and cargo. *Stewart v. Callaghan*, 4 Cr. C. C., 594.

§ 1421. It seems that a fund may be enjoined and stayed in the treasury of the United States where the United States are mere trustees or stakeholders, and the tribunals of the country have jurisdiction to determine to whom the fund belongs. *Ridgway v. Hays*, 5 Cr. C. C., 28.

§ 1422. Against state officers.—The mere fact that a state officer is the party sought to be enjoined in an equitable proceeding, whatever may be his grade, does not defeat the equity jurisdiction of the United States circuit court, although the state may be the real party in interest, and cannot as such be brought before the court. In this case the right asserted by the state was not a right in her sovereign character, but that of a creditor and lien-holder. *Murdock v. Woodson*, 2 Dill., 188.

§ 1423. Against executive officers.—Injunctions will not be granted by the federal courts against executive officers in the discharge of their duties, unless those duties are of a character purely ministerial, and involving no exercise of judgment or discretion. *Litchfield v. Register and Receiver*, 9 Wall., 577. See §§ 1849-50.

§ 1424. Officers of land department.—A court of equity will not interfere to restrain the officers of the department of public lands from entertaining and acting upon pre-emption claims on lands claimed by the complainants as belonging to them. *Ibid*.

§ 1425. The president of the United States cannot be restrained by injunction from carrying into effect an act of congress alleged to be unconstitutional, and the supreme court of the United States will not allow a bill to be filed for that purpose. *Mississippi v. Johnson*, 4 Wall., 498.

§ 1426. Against the government.—The circuit court of the United States cannot grant an injunction to compel the government, through its executive officers, to account with a master in chancery for whatever balance, on the auditing of his accounts, may be found, at any time, to be due to a contractor or other employee of the government; or to attach in the hands of the government whatever may at any time, on striking a balance, be due to such employee or contractor. *Injunction Against Postoffice Department*,* 8 Op. Att'y Gen'l, 667.

§ 1427. Although the courts cannot grant an injunction restraining the president or congress, yet when congress makes an appropriation to improve a harbor, and commits the direction of the work to the war department, which employs its agents to carry forward the work, neither the war department nor its agents will be exempt from the restraining power of the court, if either seek to execute the law in an unconstitutional manner, by taking private property against the consent of the owner, without compensation. *Avery v. Fox*, 1 Abb., 246.

§ 1428. A court should be extremely cautious in enjoining an important public work, and should require a clear case on the facts as well as on the law. The injury should be apparent, and in a case of apprehended injury, resting largely in opinions on the one side and denials

of the injury on the other, the question of damage should be put beyond mere probabilities and reach something like demonstration. *Ibid.*

§ 1429. While it may be the duty of a court to restrain the execution of a law of congress which imposes an unreasonable condition as a prerequisite to the pursuit of a lawful business, yet an injunction cannot be granted where the party asks that the officers of the government be prohibited from carrying out the provisions of the law, because it interferes with a business which he proposes to undertake. He must be pursuing his lawful business, and that business must be interfered with, or the prosecution of it threatened with some act of the government, before an injunction can issue. *Mason v. Rollins*, 2 Biss., 99.

§ 1430. Property in custody of state court.—No injunction can be granted by a court of the United States, to interfere with the possession, control or disposition of property, which is in the hands of a state court of co-ordinate jurisdiction. Where property of a corporation is in the possession of a receiver of a state court, a federal court cannot, for fear that the state court will order the receiver to deliver the property to an assignee of the corporation, enjoin the assignee from accepting the property, or order the property to be turned over to any other person. *Hutchinson v. Green*, 2 McC., 471.

§ 1431. To control officer in use of process.—A bill in equity will lie to enjoin a marshal from using legal process from the same court to inflict an injury not warranted by his writ, and one which could not be compensated in damages, though both the complainant and the marshal reside in the same district. *Gibbs v. Usher*,* 1 Holmes, 848.

§ 1432. Restraining process of another court.—A court of equity should require very clear and satisfactory evidence that the attorney-general has mistaken either the facts or the law of the case before interposing by injunction to prevent the due execution of the final process of another court, issued in behalf of an honest creditor, to enforce his adjudicated and admitted rights, upon the mere ground that the execution of such process would probably prevent the government from taking legal or other proceedings to enforce a claim which the attorney-general has deliberately declared to be unfounded. *United States v. Collins*, 4 Blatch., 143.

§ 1433. The circuit court of a county in a territory has no power to stay the process or proceedings of the superior court, or to enjoin or restrain its acts by any interlocutory or final decree. *Roswell v. Maxwell*, Hemp., 25.

§ 1434. Federal courts will not stay actions pending in state courts, nor will state courts interfere with actions in federal courts. *The City Bank of New York v. Skelton*,* 2 Blatch., 28.

§ 1435. The execution of an order of a court of concurrent jurisdiction cannot be enjoined, and especially a circuit court of the United States cannot enjoin the execution of an order of a state court. *Watson v. Jones*, 13 Wall., 721.

§ 1436. An injunction issued by a state court is inoperative to control, or in any manner to affect, process or proceedings in the federal courts. *United States v. Council of Keokuk*, 6 Wall., 520.

§ 1437. Enjoining proceedings at law.—Where a defendant, pending a suit against him for the recovery of the possession of real estate, purchases a paramount title to that of the defendant, which title, under the local law, he cannot avail himself of as a defense to the suit, and on which he cannot maintain an action to regain possession after recovery, he is entitled to relief in equity by way of injunction against proceeding with the action. But no relief in equity is required where he may regain possession on his newly-acquired title after recovery. *Bright v. Boyd*, 1 Story, 478.

§ 1438. An injunction to stay proceedings in a suit at law will not be granted on the application of one not a party to, or interested in the decision of, the suit at law. *New York v. Connecticut*,* 4 Dall., 1.

§ 1439. A defendant against whom an action at law is pending for damages for breach of a covenant to convey land by warranty deed is not entitled to an injunction restraining the proceedings at law upon tender of a deed so defective as to render it inoperative as a legal conveyance. *Watts v. Waddle*, 1 McL., 200.

§ 1440. An injunction to stay a proceeding at law will not be allowed until the matter in equity shall be investigated. Where an ejectment suit is sought to be stayed, the court will require a judgment to be entered in the ejectment as a condition to the allowance of an injunction. *Turner v. American Baptist Missionary Union*, 5 McL., 344.

§ 1441. A bill in equity was brought against a *feme sole* for an injunction to a suit brought by her to recover certain land of which a deed had been executed by herself and her husband in his life-time, on a sale thereof to the plaintiff. The acknowledgment had not been taken in the form prescribed by statute, and was for that reason incompetent to bind her. The answer denied all equity, and asserted that the defendant had never made any contract of sale or received any part of the purchase money, and that the acknowledgment was involuntary on her part, being induced by the influence of her husband. Under these circumstances,

standing uncontradicted, it was decided that there could be no decree for an injunction or other relief. *Town of Providence v. Manchester*, 5 Mason, 59 (Conv., § 88).

§ 1442. After the defendant is taken upon a *ca. sa.*, an injunction restraining the proceeding at law must be refused; because, the judgment being executed, it has nothing to operate on, and because, if it should operate as a discharge of the defendant from the execution, the plaintiff could not have another. *Foyles v. Law*, 8 Cr. C. C., 118.

§ 1443. If any circumstances exist which make it improper or inequitable to carry on a proceeding in equity in the circuit court, it should be brought to the notice of the court by motion or petition in the suit or by plea in abatement. An original bill for an injunction to stay the proceeding is unnecessary, and will be dismissed. *Fuentes v. Gaines*, 1 Woods, 112.

§ 1444. It seems that an injunction will lie to restrain proceedings in an attachment suit, where the attachment has been discharged by an assignment under the state insolvent laws. *Towne v. Smith*, 1 Woodb. & M., 115 (DR. AND CR., §§ 484-88).

§ 1445. Pending an action at law, the court will not, on a bill filed for that purpose by the defendant, restrain by injunction the proceedings at law, unless the defendant will confess judgment in the action at law. *Mathews v. Douglass*, * 1 Cooke (Tenn.), 186.

§ 1446. Enjoining proceedings in state courts.—Section 720 of the Revised Statutes, which prohibits the courts of the United States from staying by injunction proceedings in the state courts, applies only to such proceedings commenced before the jurisdiction of the federal court attaches. *State Lottery Co. v. Fitzpatrick*, 3 Woods, 222; *Fisk v. Union Pac. R. Co.*, 10 Blatch., 518.

§ 1447. A federal court has no power to issue an injunction to stop proceedings in the state courts. *Live Stock, etc., Association v. Crescent City, etc., Co.*, 1 Abb., 404; *Slaughter House Cases*, 10 Wall., 297 (APPEALS, §§ 1484-92); *Diggs v. Wolcott*, 4 Cr., 179.

§ 1448. The federal courts can enjoin proceedings in a state court only in cases provided in the bankrupt act. *Dial v. Reynolds*, * 6 Otto, 840; *Haines v. Carpenter*, * 1 Otto, 254.

§ 1449. The act of March 2, 1793, forbids the federal courts to issue injunctions to restrain proceedings in the state courts. The bankrupt act does not confer such authority, and no injunction can issue either to the court or the parties litigating therein. *In re Campbell*, * 6 Int. Rev. Rec., 174.

§ 1450. The United States district court has no authority, nor does the bankrupt law give authority, to enjoin proceedings in a state court, the jurisdiction thereof having attached and judgment therein rendered before the bankrupt law went into operation. *Campbell's Case*, * 1 Abb., 185.

§ 1451. Where a state court has jurisdiction of a foreclosure suit prior to proceedings in bankruptcy, the assignee of the bankrupt, the mortgagor, takes the property and effects of said bankrupt *pendente lite* and subject to the suit in the state court. So it was held that the assignee could not enjoin the proceedings in the state court and set them aside on the ground of usury, or that the assignee was not made a party, or that proceedings were carried on after the bankruptcy. *Cutter v. Dingee*, * 8 Ben., 469.

§ 1452. The circuit court of the United States cannot enjoin the sale of property under an execution issuing out of a state court, although the case is otherwise a proper one for the exercise of this equitable remedy. *Daly v. The Sheriff*, * 1 Woods, 175.

§ 1453. The federal courts will not enjoin proceedings in a state court against a corporation upon the suit of one of the stockholders who was aware of the suit in the state court, and allowed the question sought to be litigated to be there determined. *Chaffin v. St. Louis*, * 4 Dill., 19.

§ 1454. A United States court has jurisdiction to restrain a sheriff of a state court from taking, under process against one partner, property belonging to the partnership, when the partner against whom the process issued has no equitable interest whatever after payment of creditors, and no attachable interest in the partnership effects at the suit of a personal creditor, by the law of the state wherein the process issued. The act of March 2, 1793, providing that "nor shall a writ of injunction be granted to stay proceedings in any court of a state," is not applicable to the facts of this case. *Cropper v. Coburn*, * 2 Curt., 465.

§ 1455. An act of the legislature of Louisiana forbidding all persons, except a certain corporation, from slaughtering animals within the city of New Orleans, being held to be unconstitutional as contrary to the fourteenth amendment, it was further held that, although a federal court could not enjoin proceedings in the state courts, it could enjoin the defendants from commencing any further suits in the state courts, under the unconstitutional law, against the plaintiffs, or in any manner interfering with them in prosecuting the business of slaughtering animals. *Live Stock, etc., Association v. Crescent City, etc., Co.*, 1 Abb., 388.

§ 1456. Mandamus — Injunction from state court.—A *mandamus* from a federal court, in which a judgment has been rendered on municipal bonds, compelling the levy of a tax re-

quired by law for their payment, cannot be affected by a contrary injunction from a state court. *Amy v. Supervisors*, 11 Wall., 186 (Courts, §§ 261-62); *The Mayor v. Lord*, 9 Wall., 409; *Supervisors v. Durant*, 9 Wall., 415.

§ 1457. Where a judgment has been rendered in a federal court upon county bonds, and a *mandamus* issued to compel the officers of the county to levy and collect the tax required by law for the payment of the bonds, an injunction from a state court, issued in a proceeding to which the bondholders were not parties, restraining the officers from levying and collecting such tax, can afford them no protection for their refusal to obey the mandate of the federal court. *Lansing v. County Treasurer*, 1 Dill., 522. In this case the relator was not a party to the injunction proceedings, but the court considered that fact immaterial. *The Mayor v. Lord*, 9 Wall., 409. It is also immaterial whether the injunction was issued before or after the judgment was obtained. *Supervisors v. Durant*, 9 Wall., 415; *Riggs v. Johnson County*, 6 Wall., 166; *United States v. Council of Keokuk*, 6 Wall., 514; *Smith v. Commissioners of Tallapoosa County*, 2 Woods, 596.

§ 1458. *Trespass*.—The distinction between trespass technically called waste, and the ordinary trespass between parties who are strangers or claiming adversely to one another, has been discarded by courts of equity. Whenever trespass is attended with irreparable mischief, or multiplicity of suits, or vexatious litigation, the remedy by injunction will be applied the same as if it were a technical waste. *Chapman v. Toy Long*, 4 Saw., 28.

§ 1459. An injunction is now allowed in all cases of trespass upon mines, upon the ground that the acts complained of are, or may be, an irreparable damage to this particular species of property. And this doctrine is particularly applicable to the case of a continued trespass upon a placer gold mine—the value of which consists wholly of auriferous deposits, that may be worked out and removed without leaving any evidence of their quantity or value upon which to base an estimate or account. *Ibid*.

§ 1460. Where the title to real estate is in dispute, a court of equity will not restrain an alleged trespass threatened, where the only injury resulting will be the erection of buildings on the premises, which will not impair the value of the property, at least to such an extent that an adequate remedy cannot be obtained in the ordinary course of the law. Where the title is in dispute, the trespass threatened must be one going to the destruction of the substance of the estate, such as the extracting of ores, the cutting down of timber, the digging of coals, and the like. The jurisdiction of the court in these cases is asserted for the preservation of the property pending proceedings at law for the determination of the title of the parties. *Le Roy v. Wright*, 4 Saw., 530.

§ 1461. An injunction will be granted against a single trespass, if in its nature it is irreparable at law. *Woolsey v. Dodge*,* 6 McL., 142.

§ 1462. A fugitive, temporary trespass, by diverting or withdrawing the water of a stream, for a short period, without damage, and without any pretense of right, though without redress at law, is no ground for the interposition of a court of equity by injunction. *Webb v. Portland Manuf'g Co.*, 3 Sumn., 189.

§ 1463. To compel observance of contract.—Where, on a bill brought to compel the defendant to observe the terms of a contract, he was perpetually enjoined from any proceeding whatever not in accordance with said contract, the court will order him to desist from prosecuting a suit in another court to set aside the contract, though he has joined parties which the court in the first case held not to be material, and though he has appealed from the first decree and a sufficient bond has been given. *French v. Shoemaker*, 12 Wall., 100.

§ 1464. Enjoining acts rendering one incapable of performing his contract.—If, in a proceeding to enforce the specific performance of a contract, it appears, before the hearing upon the merits, that the defendant is about to do acts which will render him incapable of performing the contract, and the case is such as to entitle the plaintiff to a decree of specific performance, the defendant may be restrained from doing such acts. But there is no ground for an injunction if the case does not entitle the plaintiff to specific performance. It was so held in a case where the obligation sought to be specifically enforced was that of a railroad company to deliver to a contractor, in payment for work, stock of the company and bonds of the company secured by a mortgage on its road, and the act sought to be restrained was the issuing of mortgage bonds to new contractors employed for the performance of the same work. *Ross v. Union Pacific R'y Co.*, 1 Woolw., 26 (CONTRACTS, §§ 1471-81).

§ 1465. Where a corporation owning certain patented inventions made a contract with the complainant, by which the complainant was to be the exclusive agent for the sale of the machines, and the corporation to furnish them to the complainant at certain rates, the object of the contract being to secure a market for the machines and bring them into notice; and, after a market had been established by the complainant's exertions, the corporation refused to deliver any more machines, and began measures to procure its dissolution, and conveyed the patents to a third person, it was held, on a bill praying for specific performance and an injunc-

tion, that the complainant was entitled to an injunction restraining the defendant from any conduct which would put it out of its power to fulfill the contract until the law and fact could be ascertained. And this, although a specific performance could not be enforced on account of the impossibility of superintending the details of making the machines. *Singer Company v. Union Company*, 1 Holmes, 253.

§ 1466. Breach of covenant—Other party not enjoined from violation.—Where a mutual and reciprocal covenant has been broken by one party, he cannot obtain the aid of a court of equity to restrain the other covenantor from its violation; though it is otherwise if the covenants are independent. Thus, where the proprietors of a patent covenanted not to convey or sell any right to use the invention without the consent of both the proprietors, and one, through a misapprehension of his rights under the agreement, broke the agreement, he was held not entitled to an injunction restraining the other from a similar violation. *Clum v. Brewer*, * 21 Law Rep., 890.

§ 1467. Equity may enjoin acts in violation of a contract, where one party has the sole right to terminate it, provided the stipulation giving the party seeking to enforce it the right to terminate it is not so unreasonable as to make the whole contract inequitable. *Singer Company v. Union Company*, 1 Holmes, 253.

§ 1468. A court of equity will often interfere by injunction to restrain acts in violation of a contract, when it cannot decree a specific performance. If the case is one in which the negative remedy of injunction will do substantial justice between the parties, by obliging the defendant either to carry out his contract or lose all benefit of the breach, and the remedy at law is inadequate, and there can be no reason or policy against it, the court will interfere to restrain conduct which is contrary to the contract, although it may be unable to enforce a specific performance of it. *Ibid.*

§ 1469. Refusal to take steps to renew a lease.—Lessees obtained a lease for ten years with a right to periodical renewals for five hundred years, the rental to be ascertained by assessors in the manner provided in the lease. The lessees entered into possession, and on the faith of the covenant to renew made costly improvements. At the end of ten years the lessors fraudulently refused to execute the provisions of the lease for the fixing of the valuation by arbitrators in order to prevent a renewal. The lessees still remaining in possession, the lessors brought an action for use and occupation for the whole premises, not excepting the improvements. The lessees thereupon filed a bill in equity to enjoin the proceeding for use and occupation, until the appointment of assessors for a valuation was concurred in by the lessors and a renewal executed. *Held*, that a demurrer to the bill must be disallowed, and the prayer granted. *Tscheider v. Biddle*, 4 Dill., 55.

§ 1470. Sale under trust deed—Staying surplus in hands of trustee.—The purchaser at a sale under a deed of trust cannot, by suit in equity, enjoin or stay in the hands of the trustee the surplus arising from the sale after satisfying the debt, to answer damages sustained by the purchaser for breach of an agreement by the debtor to deliver up possession, which damages he may recover in a pending action at law, unless the defendant is insolvent. *Connolly v. Belt*, 5 Cr. C. C., 405.

§ 1471. Restraining sale under power in mortgage.—Where one purchased an equity of redemption in ignorance of the fact that the mortgage, which was not recorded, contained a power of sale, such a power being unusual in that state, he was allowed a temporary injunction restraining the sale of the premises in pursuance of the power until he could return to his home in another state and obtain the mortgage money. *Platt v. McClure*, 3 Woodb. & M., 151 (Conv., §§ 1180-81).

§ 1472. Mortgage—Removal of building.—Where a mortgagee obtained an injunction restraining one who had erected a building on the mortgaged premises, under an agreement with the owner, from removing the same, it having already been moved some distance, it was held, on the subsequent destruction of the building by wind, that the injunction did not in law charge the plaintiff with the value of the building as it then stood, nor impose upon him the obligation to assume the possession of it and replace it upon the premises. *Patterson v. Kingsland*, 3 Blatch., 278.

§ 1473. Bill by second mortgagee to enjoin sale.—Property was sold under a first mortgage, and the purchasers having failed to pay the purchase money, the holders of the first mortgage filed a bill to compel payment and set up the equity of the vendor's lien for a resale of the property. A decree was had and an execution issued for this purpose. It was held that the holder of a second mortgage who was not a party to the suit could not enjoin the sale. *Searles v. Jacksonville, Pensacola & Mobile R. Co.*, * 2 Woods, 621.

§ 1474. Sale of land under deed of trust—Set-off.—Equity will not enjoin a sale of realty to be made upon a decree under a deed of trust to secure a debt, the only ground for the injunction being an alleged set-off of an independent debt unconnected with the deed of trust. *Dade v. Irwin*, 2 How., 383 (§§ 98-100).

§ 1475. *Levy against wrong person.*—The stock of goods and lease of a merchant doing a profitable business were seized on execution as the property of the defendant in a suit between other persons. He demanded and received of the plaintiff in the execution a bond of indemnity. It was held that he might maintain a bill to enjoin a sale under this execution, as neither trespass against the sheriff nor a suit on the indemnity bond would afford him an adequate and complete remedy for having his lease and goods sold and his business broken up. *Daly v. The Sheriff*,* 1 Woods, 175.

§ 1476. *Waste.*—The working of a mine is such waste and irreparable injury as will be enjoined under a proper case. *United States v. Parrott*,* 1 McAL., 271.

§ 1477. Where the working of a valuable mine is enjoined the court may also enjoin the removal of ores which have been already extracted and remain on the premises. *Ibid.*

§ 1478. Injunction can be maintained, to stay waste of a mine, till the title is ascertained, when the mischief complained of is irreparable and imminent, and fraud, forgery, and antedating of defendant's documentary title is charged, and defendant denies on mere information and belief. *Ibid.*

§ 1479. *Nuisance.*—In this case the court refused to enjoin the converting of a wooden warehouse into a baking house, on the ground that it would be a nuisance, since it might be so secured against fire as to be used for that purpose without constituting a nuisance. *Ramsey v. Riddle*, 1 Cr. C. C., 899. See I, 4, *supra*; TORTS.

§ 1480. Where a wharf extends into a river so far as to reach the navigable water, the owner may maintain an injunction to restrain the authorities of a city from unlawfully removing it, having, without authority, declared it to be a nuisance. *Yates v. Milwaukee*, 10 Wall., 497.

§ 1481. The remedy by injunction is a specific one, or *quasi in rem*, and a nuisance sought to be enjoined must be proceeded against in the state where it exists, and there alone, and by the laws existing there. *Stillman v. White Rock Manuf'g Co.*, 8 Woodb. & M., 538.

§ 1482. The circuit court of the United States may interfere, in a proper case, by injunction, for the protection of rights secured to our citizens by the constitution and laws of the United States, to abate as a nuisance a bridge which obstructs commerce upon a navigable river. *Silliman v. Hudson River Bridge Co.*, 4 Blatch., 895.

§ 1483. *Enjoining issue of bonds.*—Equity will not, at the suit of an individual tax payer, restrain public officers from issuing bonds which he, in common with all other tax payers, will be obliged to pay, even though it is alleged that such bonds have been authorized contrary to the provisions of the state constitution. *Morgan v. Graham*,* 1 Woods, 124.

§ 1484. The issue of county bonds to be paid by taxation will be enjoined at the instance of a tax payer, where the statute authorizing the issue has not been in substance complied with. An injunction was granted where the statute required such bonds to be made payable in ten years, and the proposed bonds were to run twenty years. *Union Pacific R. Co. v. Lincoln County*, 8 Dill., 800.

§ 1485. *Payment of municipal bonds.*—In pursuance of a law requiring it to be done, a municipal corporation had levied a tax for a series of years to pay interest on its bonds. The interest on the bonds had been paid in full from year to year, but a portion of the tax for these years remained unpaid. It was held that the bondholders were not entitled to an injunction restraining the city from receiving payment for these uncollected taxes in city scrip, it appearing that they could not be collected in any other manner. *Ranger v. City of New Orleans*, 3 Woods, 128.

§ 1486. Where the holders of municipal bonds had a right to restrain the city from issuing any other bonds without providing a means for their payment, but did not exercise that right, it was held that after the later bonds had reached the hands of *bona fide* holders, the holders of the first bonds could not, by injunction, restrain the city officers from payment of the later bonds before payment of their own. *Ibid.*

§ 1487. Equity will not entertain a bill to compel a board of levee commissioners to levy a tax to pay bonds. *Heine v. The Levee Commissioners*,* 1 Woods, 249.

§ 1488. *Enjoining act of railroad tending to depreciate bonds.*—Where a railroad company had threatened that, unless the holders of its bonds should submit to certain oppressive terms, it would build a road parallel to so much of its road as lay between certain points, and turn the business of the road thereon, and thus depreciate the security of the bondholders, a temporary injunction was granted restraining such action, such an attempt being unjust and inequitable, and no harm being possible to the company by the injunction. *Pullan v. Cincinnati & Chicago R. Co.*, 4 Biss., 35 (Conv., §§ 1208-11).

§ 1489. *Diverting a tax to payment of bonds.*—A court of the United States will not, at the instance of the holders of the bonds of a state, compel, by mandatory injunction, the officers of the state to execute the contracts of the state by estimating, levying, collecting and

applying to the payment of the bonds a tax originally provided by law for their payment. *McCauley v. Kellogg*, 2 Woods, 18.

§ 1490. Tax collected for payment of bonds — Misappropriation enjoined.— Where a city has collected by taxation and set apart, as required by a law under which its bonds were issued, a fund to pay interest on such bonds, it may be enjoined from appropriating the fund to any other purpose, without the consent of the bondholders, if there is any danger of such misappropriation. *Maenhaut v. City of New Orleans*, 2 Woods, 108; *Ranger v. City of New Orleans*, 2 Woods, 128.

§ 1491. The circuit court of the United States may, on a bill filed by citizens of a foreign country holding the bonds of a state, grant an injunction, *pendente lite*, to prevent the officers of the state from diverting a fund collected and set apart in pursuance of a statute for the payment of such bonds, to the end that the fund may be preserved intact until the rights of the parties and the interests of the state may be determined. *Chaffraix v. Board of Liquidation*, 11 Fed. R., 638 (COURTS, §§ 694-97).

§ 1492. Declaring a law invalid.— It should be a very clear case to justify a court in deciding that an act of the legislature is invalid, upon a motion for a provisional injunction — a proceeding which addresses itself peculiarly to judicial discretion. *Lothrop v. Stedman*, 18 Blatch., 134 (CORP., §§ 1302-11).

§ 1493. Publication injurious to plaintiff's business.— No action in equity can be maintained to restrain the publication of circulars injurious to the plaintiff's business, unless it is established that the publication is malicious and for the purpose of injuring the plaintiff. *Celuloid Manufacturing Co. v. Goodyear Dental Vulcanite Co.*, 13 Blatch., 375.

§ 1494. National banks.— The United States circuit court will entertain a bill by a stockholder of a national bank to restrain the president and directors from pursuing a course in violation of the requirements of the charter, by which they are wasting the assets to the loss and injury of the complainant. *Shoemaker v. National Mechanics' Bank*, 2 Abb., 416.

§ 1495. Wrongful use of corporate name.— A court of equity will not refuse to enjoin the wrongful appropriation of a corporate name until the right of the complainant corporation to the name has been established by the verdict of a jury in an action at law. *Newby v. Oregon Central R. Co.*, Deady, 609.

§ 1496. Sale of railroad — Adjustment of rights of bondholders.— Trustees of numerous and widely scattered bondholders, holding the legal title to a railroad mortgaged to secure those bonds, have a right, as representing the bondholders, to institute a bill in equity to settle the rights of the parties before an attempted sale of the road is made, when such sale is alleged to be illegal, and the effect will be to seriously depreciate the value of the bonds. *Murdock v. Woodson*, 2 Dill., 188.

§ 1497. Against unauthorized acts of city.— A bill seeking a perpetual injunction against a city on the allegation of facts showing that the city is intending, by acts and proceedings unauthorized by law, to inflict irreparable injury on the land of the complainant, states a case for relief within the jurisdiction of a court of equity, and a general demurrer to such a bill ought to be dismissed. *Griffing v. Gibb*, 2 Black, 519.

§ 1498. In bankruptcy.— The circuit court of the United States, in the exercise of its equitable jurisdiction, may declare void any transfer of property of a bankrupt which is fraudulent under the bankruptcy act, and may, by writ of injunction, restrain any party to such fraud from attempting in any manner to carry out the fraudulent transaction. *Little v. Alexander*, 1 Hughes, 177.

§ 1499. Enjoining change of gauge of railroad.— Where two railroad companies agreed to build roads of the same gauge to meet at a certain point, and to run their freight cars through the entire route, the meeting of the passenger cars and the charges for transportation to be regulated by both companies, an injunction was granted preventing one of the companies from changing its gauge, the contemplated change having been already begun. *Columbus, Piqua, etc., R. Co. v. Indianapolis, etc., R. Co.*, 5 McL., 450.

§ 1500. Use of label.— A court of chancery will not interfere to enjoin a party from using a certain label, where the right to the exclusive use of the label is contested between the parties. The matter of right must first be determined by an action at law or otherwise. *Coffeen v. Brunton*, 5, McL., 256.

§ 1501. Enjoining sale under judgment.— The complainants had purchased the property of a testator at a probate sale. Under the law of Louisiana, under which the sale was had, property thus sold cannot be levied on and sold by a judgment creditor as the property of the testator, although the sale was fraudulent. The respondent, a creditor of the testator, having recovered a judgment against the executor, levied on the property so purchased by the complainant. On a bill by the latter to enjoin the levy and sale, it was decided that an answer by

the respondent relying on the fact that the sale was fraudulent was insufficient. *Ford v. Douglass*, 5 How., 143.

§ 1502. **Protecting mines on public land.**—The digging of lead ore from the lead mines upon the public lands of the United States is such a waste as entitles the United States to an injunction to restrain it. *United States v. Gear*, 3 How., 120.

§ 1503. **Enjoining erection of building.**—Where permission was obtained from the proper officer to erect a building of a certain description in the city of Washington, it was held that a court of equity would not arrest the owner midway in the construction of the building and require him to take it down, except upon a clear case of departure from the permit, or of danger to public interests, made by the other side. *Dainese v. Cooke*, 1 Otto, 580.

§ 1504. **Enjoining assertion of title.**—A person ought not to be restrained in equity from the assertion of a title in the ordinary course of judicial proceedings in a doubtful case. But if the case be a clear one, the interposition of a court of equity is allowable. *Alexander v. Pen-dleton*, 8 Cr. 462.

§ 1505. **Ejectment—Staying writ of possession.**—The circuit court of the United States will not, on the rendition of a judgment for plaintiff in ejectment, stay the writ of possession until a suit in equity in a state court between the parties, involving the question of the title to disputed premises, is determined, where the court itself has jurisdiction of the matter in equity pending before the state court. *Doe v. Johnston*, 2 McL., 323.

§ 1506. **Protection of mining claims.**—Where parties seek the aid of a court of equity for protection of their interests in mining claims—even if the alleged trespassers sought to be enjoined are Chinamen, and not expressly authorized to enter or occupy mining lands—they must bring themselves within the law authorizing the location, and show a substantial compliance with its terms. Where it is apparent that the land located includes more than one claim to each locator and complainant, while the local law allows a person to locate only one claim, except where one is a creek and the other a bank claim, the complaint must show that the premises comprise an equal number of such claims, otherwise the injunction will be denied. *Chapman v. Toy Long*, 4 Saw., 28.

§ 1507. **Execution against bail.**—An injunction will not be granted to stay an execution against bail, because a writ of error to the judgment taken out by the principal is pending, where it has been sued out too late to act as a *supersedeas*. *Foyles v. Law*, 3 Cr. C. C., 118.

§ 1508. **Not granted pending plea to jurisdiction.**—A court of equity will not grant an injunction or appoint a receiver pending a plea to the jurisdiction of the court. *Ewing v. Blight*, 8 Wall. Jr., 189.

§ 1509. **Enjoining removal of a colored person.**—An injunction to prevent the defendant from taking away the plaintiff, a colored woman, from the county, until he appeared and answered in a suit at law to try the right of freedom, was refused, the plaintiff merely stating her apprehension. *Jenny v. Crase*, 1 Cr. C. C., 443.

§ 1510. **Where slaves sued for their freedom, and judgment was given for the defendant on the ground that they were not then entitled to their freedom, being only entitled to it at a future day, the court refused to continue an injunction which had been served on the marshal restraining him from delivering the plaintiffs to the defendant pending the suit.** *Negro Lee v. Preuss*, 3 Cr. C. C., 112.

§ 1511. **Supplementary suit—Jurisdiction.**—A bill for an injunction against garnishment proceedings in the same court against the property of the complainant, for the delivery up of the notes of the complainant sought to be seized, and for the establishment of a set-off against the creditor, is not an original but a defensive or supplementary suit; and the jurisdiction depends on the jurisdiction of the original suit, and not on the citizenship of the parties. *Jones v. Andrews*, 10 Wall., 327 (COURTS, §§ 883-86).

§ 1512. **To enforce payment of money.**—The remedy by injunction is neither necessary nor proper to enforce the payment of money. The granting or refusing of it rests in the sound discretion of the court, and it should be used only for protection or prevention. *Sanders v. Logan*,* 9 Am. L. Reg., 475.

§ 1513. **Bill by United States to protect improvements.**—The United States may bring a bill for an injunction in the circuit court to restrain improvements under state authority which interfere with and injure the improvements which the United States are making in the navigable waters. *United States v. Duluth*, 1 Dill., 469.

§ 1514. **Wrongful acts of trustees.**—It is one of the settled principles of courts of equity that a trustee shall not take advantage of his situation to obtain any personal benefit to himself at the expense of the *cestui que trust*. Where the management of a mercantile enterprise was committed to three trustees, and two of the trustees, without the assent of the other, made a contract between themselves, as trustees, on the one part, and themselves and other individuals on the other part, from which they derived a great profit, to the prejudice of one of their *cestuis que trust*, the court granted an injunction restraining them from the con-

tinuance of such acts without the concurrence or assent of all the trustees. *Sloo v. Law*, 8 Blatch., 459.

§ 1515. One of three trustees, to whom the management of a mercantile enterprise is committed, may be restrained from withholding the books and papers of the trustees from his co-trustees. *Ibid.*

§ 1516. Subsequent grantee with notice of unregistered deed.—A court of equity will not permit a subsequent grantee, by a registered deed, to hold an estate conveyed by a prior unregistered deed, of which he had notice at the time of his purchase, and will restrain an action based upon the registered deed against the grantee in the prior deed. *Lonsdale Company v. Moies*,* 21 Law Rep., 658.

§ 1517. Defendant beyond reach of process.—An injunction will not be granted where the defendant is beyond the process of injunction, and the issuing of it would be useless and inoperative. It was so held in a case where the infringement of a patent was sought to be enjoined, and it appeared that the defendants were residents of another state, and were there carrying on the business claimed to be in violation of the patent. *Goodyear v. Chaffee*,* 8 Blatch., 268.

§ 1518. Against licensee of patent.—An injunction will not be granted restraining a licensee of a patent from using the patented article, on account of a violation of a restriction in the license, where the licensee violated the restriction under a misapprehension of his rights, and has discontinued the acts of violation. *Wilson v. Sherman*, 1 Blatch., 537.

§ 1519. Bill against bankrupt and assignees.—Where a petition in bankruptcy had been filed against a debtor by his creditors, and an injunction bill was filed against him and certain persons to whom his property had been assigned, to prevent the debtor from collecting the debts due him and applying them to his own use, and to restrain the assignees from selling the property in their hands, it was held that the defendants could not test the sufficiency of the petition in bankruptcy by reciting the same and concluding in demurrer. It was further held that the injunction could not be granted, because the bill, in simply averring that the assignees were selling the property, did not show any such threatened or imminent danger to the property as justified an injunction for its protection; because the bill did not allege that the debtor was insolvent and bankrupt, and incapable of responding for the amount collected; and because the bill contained no other description of the property sought to be protected than that on a certain day the debtor had transferred a large amount of his personal property to the other defendants. *Blackburn v. Stannard*,* 5 Law Rep., 250.

§ 1520. Property in manuscript.—An injunction will lie to protect the common-law right of an author to his manuscript, and to restrain the publication of it by others. *Bartlett v. Crittenden*, 5 McL., 32.

§ 1521. As a supersedeas.—At common law an injunction does not operate as a *supersedeas*, although it may furnish a proper ground to the court of law in which the judgment is rendered to interfere by summary order to quash or stay the proceedings on the execution. *Boyle v. Zacharie*, 6 Pet., 658.

§ 1522. Injury to political rights.—In order that an injunction may be properly issued by the federal courts a wrong or injury must be threatened to the rights or property of the complainant, and not merely to political rights. In the latter case no injunction can be issued. *State of Georgia v. Stanton*, 6 Wall., 75.

§ 1523. Vexatious litigation.—The granting of a writ of injunction is in the sound discretion of the court. It is always refused where the remedy at law is adequate. It will be granted to prevent a multiplicity of suits and vexatious litigation, where the right has been established at law; and, where the right is plain and the remedy at law is not adequate, it will oftentimes be granted without even a trial at law. *Cutting v. Gilbert*, 5 Blatch., 259.

§ 1524. Partnership.—A court of equity will interfere by injunction to restrain one partner from violating the rights of his copartner, even when a dissolution of the partnership is not necessarily contemplated. *Marble Company v. Ripley*, 10 Wall., 351.

§ 1525. Sale of goods—Fraud.—A. averred that B. obtained goods from him by fraud, and sold them to C. by a sham sale, with notice of the fraud. An injunction was granted restraining B. and C. from parting with, or interfering with, the goods; but the goods being in the custody of the collector, not wrongfully, an injunction against him was refused. *Rateau v. Bernard*,* 8 Blatch., 248.

§ 1526. Regulating carriers.—A mandatory order requiring a common carrier to concede the exercise and enjoyment of certain alleged rights will not be issued preliminarily, but only on final hearing. *Camblos v. Phil. & Reading R. Co.*,* 4 Brewster, 563.

§ 1527. If a corporation assumes the exercise of any franchise not conferred by its charter, a private party is not authorized to call it to account. *Ibid.*

§ 1528. Against elections.—An injunction will not lie to restrain officers of a municipality from registering voters and holding an election, on the ground that the law under which they

are proceeding is unconstitutional, and that the complainants apprehend disorder and violence. *Holmes v. Oldham*,* 1 Hughes, 76.

§ 1529. If a proposed election is unconstitutional, or there are two contending bodies of officers, causing fear of disorder and confusion, the remedy is by *quo warranto*. *Ibid*.

§ 1530. To restrain construction of railroad through plaintiff's land.—The circumstance that the defendant is acting under color of a law, or as the agent of a corporation for making a road, canal or other improvement, is not of itself a good ground for refusing an injunction. One through whose land a railroad is about to be constructed may in a proper case restrain the agents of the company. Where there is a reasonable doubt whether the law set up as a justification authorizes the act done, the injunction will not be granted. The court cannot control the defendants in matters of discretion, and as long as the agents keep within their authority the injunction cannot issue. *Bonaparte v. Camden & Amboy R. Co.*, 1 Bald., 205.

§ 1531. Where a complainant asking for an injunction was the owner of land on which a railroad was intended to be constructed, and which he had improved with trees, parks, walks, etc., for purposes of enjoyment and seclusion and not for purposes of profit; and the injury complained of as impending over his property was its permanent appropriation to public use; and the railroad company, by reason of a non-compliance with the provisions of their charter, were mere trespassers, when entering upon his land for any other purpose than locating the road; and there was a moral certainty that the complainant would be expelled from his land without lawful authority unless an injunction issued, the court enjoined the further construction of the road over the complainant's land, until the provisions of the charter were complied with by the company. *Ibid*.

§ 1532. Enjoining governor of state from selling railroad.—The complainant, the only party equitably interested in the principal part of the stock of the Florida Central Railroad Company, brought a bill to enjoin the governor of Florida from seizing the road, and to have declared null and void certain bonds purporting to be the bonds of the company, for the non-payment of the interest on which the governor threatened to seize and sell the road. The bill further prayed that the state treasurer, who had possession of the bonds, might be decreed to surrender them to the company, and that certain persons made defendants might be enjoined from harassing the company on account of said bonds. The governor having advertised the road for sale, a preliminary injunction was applied for to prevent the sale, and to prevent the treasurer from parting with the bonds pending suit. The owners of these bonds claimed that they were not void but were in equity good against the company for the benefit of the holders of certain state bonds which were issued to the company in exchange for the company bonds and which had proved to be void, thus giving to those who had purchased them in good faith a right to resort to the bonds in question. The complainant had so acquiesced in the management of the affairs of the company by certain persons as the apparent stockholders and officers thereof, and in the issue of the very bonds involved in the suit, their exchange for state bonds, and the disposal and sale of the latter, that it could claim no rights as against innocent purchasers of these bonds except such as the company itself could claim in view of the acts of its apparent officers and stockholders. The question, therefore, was whether the parties at whose instance and in whose behalf the governor proposed to sell the road were *bona fide* purchasers of state bonds issued in exchange for the bonds of the corporation. The court had grave doubts upon this question, and as the sale of the road as proposed would occasion a serious, if not irreparable, injury to the complainant, if it had the rights claimed by the bill, while, if it should turn out that the complainant had no such rights, a temporary suspension of the sale could not materially injure the bondholders, the preliminary injunction was granted. *North Carolina Railroad Co. v. Drew*,* 8 Woods, 674.

§ 1533. By what judges or courts.—The judges of the circuit court of the United States have power to grant writs of injunction only in cases where they may be granted by the circuit court. If the case is one in which the injunction may be granted only by the supreme court, the application must be made to that court or to a judge thereof. *Murray v. Overstolz*,* 1 McC., 606.

§ 1534. Conflict of jurisdiction.—The complainant having purchased a number of barrels of apples for shipment, they were taken from him by a writ of replevin issued out of a state court in favor of McCoy and Gould, who claimed them as prior purchasers, and delivered to said claimants. The complainant thereupon sued out a writ of replevin from this court for the said apples against said claimants, and they were taken by the marshal and were in his possession when one claiming by assignment of the delivery order given by the sheriff to McCoy and Gould obtained a writ of replevin from a state court, and, with the aid of the sheriff and a posse, forcibly prevented the marshal from delivering the apples to the complainant. In view of the fact that a collision had already occurred between the sheriff and the marshal, and that further violence was anticipated, and in view of the perishable nature of the property and the protracted litigation necessary for the settlement of the rights of the parties at law, this court,

at the instance of the complainant, granted an injunction and appointed a receiver, notwithstanding its power as a court of law to enforce its process and protect its officers. On motion to dissolve the injunction and rescind the order for the appointment of the receiver, it was held that the jurisdiction was rightly exercised. *Crane v. McCoy*,* 1 Bond, 422.

§ 1585. *Ferry right*.—An injunction will lie to restrain an infringement of an exclusive ferry right. *Conway v. Taylor*, 1 Black, 603.

§ 1586. Where one seeks to enjoin another from the infringement of what he claims to be his statutory right, his right must be clear and without doubt, his possession actual, and his legal title not in doubt. Thus, where the complainant sought to enjoin the defendant from operating a ferry between Oakland and San Francisco, on the ground that it was an infringement of an exclusive right in the complainant to maintain a ferry between those two points, which exclusive right was granted to him by the city of Oakland, and it appeared, in any possible view of the case, doubtful whether the city of Oakland had power to grant him such an exclusive right, the injunction was refused. *Minturn v. Larue*,* 1 McAl., 370.

§ 1587. *Lease of right to take oil*—*Doubtful case*.—The complainants, owners of a piece of land on "Oil creek" in Pennsylvania, immediately below and adjoining a tract owned by the defendants, at a time when the oil was gathered from the surface of the stream by blankets, leased from the defendants for the term of ninety-nine years all the oil on the said land of the defendants, with the privilege of going on it and taking therefrom at any time as much oil as they pleased. Subsequently, on the discovery of getting oil by digging wells, the defendants made wells and began to procure oil from the premises in that manner. The complainants then brought a bill for a discovery and an account of the oil obtained by the defendants by means of wells, and for an injunction. It being doubtful whether the lease conveyed anything more than a license to take the oil which flowed from the land on the surface of the creek, there being no evidence that the use of the wells prevented the flow of the oil on the water, the oil taken by the defendants not having compensated them for their expense in digging the wells, and the effect of the injunction sought being to compel the defendants to cease business and discharge a large number of hands, the court refused to grant a preliminary injunction, and reserved the final decision of the question until the final hearing, in view of the fact that the injunction would be an injury to the defendants, while the benefit to the complainants would be uncertain, and in view of the fact that the new wells would be a benefit to the complainants and not an irreparable injury if they recovered. *French v. Brewer*,* 8 Wall. Jr., 846.

§ 1588. *Dedication to pious uses*—*Bill against heirs*.—Upon the original plan of an addition to Georgetown, D. C., made in 1769, a lot was marked "for the Lutheran church," which soon after was taken possession of by a voluntary association of the members of that sect, and a building was erected thereon, which for many years was used as a church and school-house. The land was inclosed and the fences renewed from time to time, and a part of the lot was used as a cemetery by members of the sect and some others. The property was managed by a committee or trustees elected by the members of the church, and all their acts were with the full acquiescence of the original owner of the ground. The heirs of the original owner, after his death, and after the land had been for fifty years under the control of the church, attempted to assume control of the property, but a bill in equity was filed by the managing committee or trustees of the church for an injunction against the heirs, and it was held that under the statutes of Maryland the dedication of the land made by the plat was to pious or religious uses, and was valid; that the only adequate remedy of the church was in equity, and that the committee of the church had the right to maintain the suit as members of a voluntary association whose rights were improperly interfered with, whether there was any valid evidence of their election as such committee or not. *Beatty v. Kurtz*,* 2 Pet., 566.

1589. *To enjoin pleading of statute of limitations*.—Importers claimed to have just and legal claims to be repaid certain alleged excessive charges on goods imported by them. They contemplated bringing actions to recover such excesses, and, just before the statute of limitations would expire, were informed by an officer in the custom-house that, by the rules and practice of the treasury department, the presentation of their claims to the refunding clerk at the custom-house prevented the running of the statute of limitations, and that if so presented, and suit brought, the statute would not, and could not, be set up as a defense. The collector who had made the alleged illegal exactions, being then no longer in office, disclaimed any control of the matter, but expressed his confidence in the knowledge and experience of the officer giving the information, and concurred in the opinions he expressed. The importers presented their claims, and relying upon the recognition of similar claims by the secretary of the treasury, and statements and opinions of the secretary concurred in by the ex-collector, allowed the period of limitation to elapse before bringing their actions against the ex-collector to recover the alleged excesses. The defendant set up the statute of limitations, and more than seven years afterwards a bill in equity was filed to enjoin him from relying on the statute

of limitations in the actions. *Held*, that the relief must be refused, both because of the lapse of time, and because otherwise the bill presented no equities. *Andrae v. Redfield*,* 12 Blatch., 407.

§ 1540. A court of equity will not enjoin a defendant in an action at law from setting up the statute of limitations in bar of the action, upon the ground that the cause of action on which the action was brought was originally a good and valid one. *Ibid*.

§ 1541. **Remedy at law.**—A bill was brought to enjoin proceedings at law upon municipal bonds, upon the ground that they were issued without authority and in fraudulent violation of the duty of those having the subject in charge, and that the holder took with notice of these facts, and paid no consideration. *Held*, that there was an adequate remedy at law, and that therefore equity had no jurisdiction. *Grand Chute v. Winegar*,* 15 Wall., 373.

§ 1542. A receiver of the funds of an estate will be enjoined from applying funds in his hands to the payment of a claim pending the decision of the court upon the question of the existence of a claim which, if established, would be superior to it. *Green v. Hanberry*,* 2 Marsh., 403.

§ 1543. In case of a threatened invasion of the plaintiff's rights in his realty, a court of equity will in general send the plaintiff to a court of law to establish his title and decree an injunction in the meantime; but where it appears that the plaintiff has no title at all, it will not do a vain thing by sending him to a court of law, and will refuse an injunction. *Haight v. Proprietors of Morris Aqueduct*,* 4 Wash., 601.

§ 1544. **Taking property for public use.**—Equity will enjoin an attempt to take permanent possession for public use of private property, without the consent of the owners, express or implied, when there has been no payment or tender of damages in advance. This is an irreparable injury without adequate remedy at law. *Northern Pacific R. Co. v. Burlington & Missouri R. Co.*,* 2 McC., 203; 4 Fed. R., 298.

§ 1545. **Enjoining collection of wharfage.**—Where a city ordinance fixes the rate of wharfage to be charged vessels for the use of its wharves, the court will not enjoin the collection of wharfage in any particular case, unless the bill, affidavits and exhibits show, as a matter of fact, that a greater charge is made against the particular vessels of the complainant than is a just wharfage. *Ouachita, etc., Packet Co. v. Aiken*,* 11 Fed. R., 662.

§ 1546. **Enjoining act authorized by law.**—If application is made to restrain, by injunction, one who is about to commit an irreparable injury upon the property of the complainant, and it is clear that the injury will be committed unless restrained by the court, the injunction will be granted, although the act is under color of a statute of a state authorizing it, if the act is unconstitutional. *Bonaparte v. Camden & Amboy R. Co.*, Bald., 217.

§ 1547. In proceeding under the act of May 15, 1820, against defaulting treasury officials, the district judge of Louisiana has power to issue an injunction. *United States v. Cox*, 11 Pet., 165.

§ 1548. **Defective execution of a power.**—Although courts of equity may relieve against the defective execution of a power created by a party, yet they cannot relieve against the defective execution of a power created by law, or dispense with any of the formalities required thereby for its due execution. The defendant in an ejectment suit, against whom judgment was rendered, claimed under an administration sale made for the payment of the debts of the deceased, and the plaintiff claimed under the will of the same decedent. The plaintiff recovered because the defendant's title was defective, for the reason that the administration bond had not been approved by the court of probate before the sale. *Held*, that the omission was not remediable in equity, and that the judgment in ejectment would not be enjoined. *Bright v. Boyd*, 1 Story, 478 (§§ 54-57).

§ 1549. **Taxes—Enjoining collection, etc.**—Injunctions against the collection of taxes may be granted in proper cases. *Moore v. Holliday*, 4 Dill., 53. See **REVENUE**.

§ 1550. The circuit court of the United States, as a court of equity, may, by injunction, restrain the collection of a tax which is unwarranted by act of congress. *Georgia v. Atkins*, 1 Abb., 23; 35 Ga., 316.

§ 1551. Equity will not interfere by injunction to restrain the collection of a tax upon the mere ground that the tax is illegal. The enforcement of the tax must lead to a multiplicity of suits or irreparable injury, or throw a cloud upon the title to real estate. *Alexander v. Dennison*,* 2 MacArth., 562.

§ 1552. A court of equity will not restrain a sale of property for the payment of taxes, for mere irregularities in the assessment, where it does not appear that the complainant was in any manner damaged or injured by the irregularities. *Frost v. Flick*,* 1 Dak. T'y, 131.

§ 1553. The levy and collection of taxes are legal proceedings for the purpose of enforcing a recognized obligation due the public, and can no more be regulated or interfered with by courts of equity than can proceedings at law on private claims. *Ibid*.

§ 1554. Equity will not interfere by injunction to restrain proceedings for the enforcement

of a tax, on the ground of irregularities or errors in the assessment, or in the execution of the power conferred on the taxing officers, the remedy at law being deemed sufficient in such cases. The jurisdiction exercised in these matters is confined almost exclusively to cases where the tax is illegal or unauthorized, or where the property is not subject to the tax, or where fraud has been practiced by the taxing officers. The injury resulting from the enforcement must also be irreparable, and this must appear in the bill. *Ibid.*

§ 1555. The illegality of a tax and the threatened sale of the property for its payment do not of themselves constitute any ground for the interposition of a court of equity by injunction. There must be some special circumstances attending the threatened injury, distinguishing it from common trespass, and bringing the case under some recognized head of equity jurisdiction. It must appear that the enforcement of the tax would lead to a multiplicity of suits, or produce irreparable injury, or, where the property is real estate, throw a cloud upon the title of the complainant. *Dows v. City of Chicago*, 11 Wall., 108.

§ 1556. It is the general rule of the courts not to interfere by injunction to prevent the collection of taxes excessive in amount, or irregularly or illegally exacted. But if the exaction of the tax is unconstitutional and the citizen assessed has no other remedy, or if it appears that the enforcement of payment of the tax will occasion irremediable oppression, the clouding of titles, or a multiplicity of suits, the injunction will issue. *Louisville & Nash. R. Co. v. Gaines*, 2 Flip., 639.

§ 1557. Courts of equity will not restrain the collection of an illegal tax, by injunction, unless the enforcement of the tax would lead to a multiplicity of suits, or produce irreparable injury, or throw a cloud on the title of real estate. If the tax is void upon its face, it cannot constitute such a cloud. *Harkness v. Board of Public Works*,* 1 MacArth., 126.

§ 1558. An injunction bill to restrain the collection of a tax, on the sole ground of the illegality of the tax, cannot be maintained. There must be an allegation of fraud; that it creates a cloud upon title; that there is apprehension of multiplicity of suits, or some cause presenting a case of equity jurisdiction. There exists no cloud upon title which justifies the interference of a court of equity, where the proceedings are void upon their face. *Hannewinkle v. Georgetown*, 15 Wall., 547.

§ 1559. As to the extent and nature of the jurisdiction of a court of equity to enjoin the collection of taxes, different considerations should apply in cases where the enforcement of municipal taxes is sought to be enjoined, and in cases where relief is asked against the enforcement of state taxes. *Parmley v. Railroad Companies*, 3 Dill., 25.

§ 1560. Courts of equity should not hesitate to protect the citizen against the action of the state, by injunction restraining the collection of taxes, where an injury will be inflicted by the enforcement of the taxes, for which the citizen has no other adequate remedy. *Parmley v. Railroad Companies*, 3 Dill., 18.

§ 1561. In a proper case relief may be given in a court of equity to declare void an illegal assessment of taxes and to restrain a conveyance in pursuance of a sale under such an assessment, the ground of equity being to prevent a cloud upon title, or to remove a cloud upon title, to prevent a multiplicity of suits, or to prevent an injurious act by a public officer for which the law might give no redress. *Carroll v. Safford*, 8 How., 441.

§ 1562. Where a bill to enjoin the collection of a tax for alleged errors in the assessment does not show that errors complained of are of such a character as to produce great mischief should the land be sold for taxes, the bill is demurrable. *Astrom v. Hammond*, 3 McL., 107.

§ 1563. The act of congress of July 2, 1864, which gave alternate sections of public land to the Burlington & Missouri River Railroad Company, provided that, before any land should be conveyed to the company, there should be first paid into the treasury of the United States "the costs of surveying, selecting and conveying the same by said company." A stockholder of the company, for himself and others, filed a bill to restrain the collection of a tax on the lands so granted, on the ground that the costs of selecting, surveying and conveying the lands had not been paid at the time of their assessment. The court being uncertain as to what was the latest period at which the right to assess the lands could be exercised for any given year, and being also uncertain as to what were the costs of selecting and conveying them, and all dues to the United States as to these lands having been paid before the final action of the state board of equalization, and the United States having no interest in them which would forbid their taxation, the injunction was refused. *Hunnnewell v. Cass County*, 22 Wall., 464.

§ 1564. The legislature of Ohio, for the purpose of expelling the Bank of the United States from the state, imposed upon it a tax of \$100,000. It made it the duty of the auditor to collect the tax by making out his warrant under his seal of office and levying it, in case of non-payment, on the money or goods of the bank. It being certain that the auditor would execute the law (assumed to be unconstitutional), and also that the effect would be the expulsion of the bank from the state, it was held that a court of equity would grant an injunction restraining him; and the money and notes of the bank being actually taken by the auditor, placed on

deposit with the treasurer, that they would be restrained from using or paying away the money and notes, and proceeding under the act. *Osborn v. United States Bank*, 9 Wheat., 738 (Constr., §§ 2368-87).

§ 1565. Where a bill, brought by certain railroad companies to restrain the collection of certain taxes, charged that the state board of equalization, actuated by passion and prejudice, and with a design to discriminate against railroads, and without evidence, had assessed their property not only higher than it was valued by the companies, on oath, but higher than it was valued by the county courts, and much higher than it was valued upon evidence by committees of their own body, so that the result was an excessive valuation of at least one-third more than other property of equal value, thereby compelling the railroads to pay more than their share of the public burdens, the judge was of opinion that, if these facts could be established, equity ought to intervene—not, however, to annul the whole assessment, but to reduce the inequality. The application for a preliminary injunction having been made at chambers, the judge granted it until the final hearing by the court. *Parmley v. Railroad Companies*, 3 Dill., 18.

§ 1566. Where taxes sought to be restrained as illegal, as being levied by a state upon the capital stock of a national bank invested in United States securities, were for the state of Nebraska, and the county treasurer was by the revenue law required to pay the same into the state treasury when collected, and no provision was made by law for an execution or other proceeding for the recovery of them back if illegally exacted, and, therefore, the plaintiff had no adequate remedy at law, it was decided that equity had jurisdiction to grant the injunction. The county treasurer having one warrant by which he was commanded to enforce payment of both state and county taxes, which were for the same reason illegal, and equity having jurisdiction to restrain the enforcement of the state taxes, it was decided that the court might proceed to determine the validity of the county taxes, as well, and restrain them also. *Bank of Omaha v. Douglass County*, 3 Dill., 298.

§ 1567. In this case the district court of the United States for the northern district of Georgia, exercising circuit court powers, on a bill filed by the state of Georgia, enjoined the collection of a federal tax upon the profits of a railroad, on the ground that the tax was illegal, the railroad being the property of the state and not made subject to taxation. *State of Georgia v. Atkins*,* 35 Ga., 315.

§ 1568. Where, on account of a dispute between two counties as to their boundaries, certain property of a railroad company was assessed in both counties, each claiming a right to tax it, an injunction was granted restraining the collection of the tax assessed by one of the counties, such tax being illegal, and the complainant alleging in its bill a willingness to pay either of the assessments which was found to be the legal one. *Union Pacific R. Co. v. Carr*,* 1 Wyo. T'y, 96.

§ 1569. The complainant, seeking to evade the payment of taxes on his bank deposit under a law requiring personal property to be listed on the 1st day of March in each year, withdrew his deposit from the bank on the last day of February, converted it into United States notes (not subject to state and municipal taxes), and deposited these in a sealed packet in the bank. On March 3d he withdrew the packet and deposited the notes to his credit. On a discovery of the facts by the taxing officers, the money on deposit was assessed. On the complainant's bill to restrain the collection of the tax, it was decided that, although the notes were not subject to taxation, a court of equity would not lend its aid to the complainant in escaping, in this manner, his proportionate share of the burdens of taxation. *Mitchell v. Board of Commissioners*, etc., 1 Otto, 206.

§ 1570. A court of equity, to prevent a multiplicity of suits, has jurisdiction, at the suit of an owner of real property within the limits of a municipal corporation, to restrain the imposition and collection of a tax thereon by the corporation, under an ordinance providing for a levy and collection of taxes, once a year, for twenty years, to pay interest coupons issued to the bonds of a railroad company as they fall due, provided such ordinance is illegal; and especially is this so when it is presumed that the coupons when issued will be negotiable. *Coulson v. City of Portland*, Deady, 481.

§ 1571. A court of equity will not restrain a sale of personalty for payment of a tax which imposes upon the complainant no more than his just proportion of the public burdens, and which, under the law (had it been complied with by the complainant and the public officers), the county is entitled to collect. *Railroad Company v. County Treasurer*, 2 Dill., 279.

§ 1572. A court of equity will not restrain the sale of personal property for an illegal tax, where it is not shown that there is no adequate remedy at law. *Ibid*.

§ 1573. A federal court cannot, under the statutes of the United States, enjoin suits actually pending in the state courts to enforce the collection of taxes. *Moore v. Holliday*, 4 Dill., 53.

§ 1574. Equity will not, at the suit of a property-holder who has voluntarily paid a tax under a void ordinance of a municipal corporation, restrain any appropriation of the tax so collected. *Coulson v. City of Portland*, Deady, 481.

§ 1575. A court of equity will not restrain the threatened imposition of an illegal tax, in order to prevent a multiplicity of suits, where the remedy in equity will involve a litigation almost as onerous and vexatious as suits at law, and each tax payer will have to file a bill in order to obtain relief. *Cutting v. Gilbert*, 5 Blatch., 259.

§ 1576. When certain property is exempted by state law from taxation, the United States circuit court will, by injunction, protect the property from taxation, and the state cannot, by subsequent legislation, prohibit the United States court from issuing such injunction. *Louisville & Nash. R. Co. v. Gaines*, 2 Flip., 688.

§ 1577. Under the second section of the act of March 2, 1883, known as the Force Act, as well as on general principles of equity jurisprudence, the circuit court of the United States may prevent, by injunction, the threatened imposition of an illegal tax. *Cutting v. Gilbert*, 5 Blatch., 259.

§ 1578. Where a stockholder in a banking corporation had applied to the officers requesting them to take measures, by suit or otherwise, to prevent the collection of a tax upon the bank which he considered to be illegal, and the officers had refused, at the same time declaring that they considered the tax illegal and not binding on the bank, it was held that this action of the board of directors was a breach of duty rather than an error of judgment, and that, therefore, equity would entertain a bill by the stockholder against the bank and its officers and the collector, to enjoin the collection and payment of the alleged illegal tax. *Dodge v. Woolsey*, 18 How., 831 (CORP., §§ 565-73); *Woolsey v. Dodge*,* 6 McL., 142; *Foot v. Linck*,* 5 McL., 616.

§ 1579. Although a suit in equity will not lie to restrain the collection of a tax *solely* on the ground that it is illegal, yet the fact that the complainant is a bank seeking to prevent a tax upon its capital stock, and if the tax is paid to the collector it will subject the bank to a multiplicity of suits by its shareholders to recover the dividends so appropriated, and that the state law not only undertakes to make its officers liable for the amount, but the collector threatens to sell the shares to make the taxes therefrom, is sufficient to sustain the jurisdiction. *Union Nat. Bank v. City of Chicago*, 3 Biss., 82.

§ 1580. Section 10 of the act of March 2, 1867, amending section 19 of the act of July 13, 1866, and declaring that "no suit for the purpose of restraining the assessment or collection of a tax shall be maintained in any court," includes all assessments having the form and color of a tax, upon articles liable to tax, and by a person in office clothed with authority over the subject-matter. *Howland v. Soule*, Deady, 418. The law applies to taxes on income, gains or profits. *Robbins v. Freeland*,* 14 Int. Rev. Rec., 28.

§ 1581. Under section 19 of the act of July 13, 1866, as amended in 1867, providing "that no suit to restrain the assessment or collection of a tax shall be maintained in any court," no court, either state or national, has any authority to grant an injunction restraining the collection of a federal tax assessed by an officer having jurisdiction of the subject, be it never so irregular or erroneous. *Pullan v. Kinsinger*, 2 Abb., 94; 9 Am. L. Reg. (N. S.), 557.

§ 1582. The rights accruing to the United States under the revenue laws are strict legal rights, and courts of equity cannot interfere to prevent the enforcement of these laws in cases where penalties and forfeitures have been incurred thereunder by persons innocent of any intention to evade them or defraud the revenue. *Powell v. Redfield*, 4 Blatch., 45.

§ 1583. In this case the court adopted and applied the rule that whenever a party comes into court to enjoin the collection of a tax or a part of a tax, if there is any part which he admits to be due, or which the court can see upon the statement in the bill ought to be paid, there must be an allegation in the bill conforming to the fact that he has paid it, or that he has tendered it; and that it is not a sufficient allegation that he is willing to pay or that he will pay it into court, because the state is not to be stayed in its revenue, which is admitted to be due, in that way; and a party claiming that he will pay his tax, or any portion of it, cannot screen himself during the course of a long litigation from paying that which it is admitted must be paid, by setting up a contest over that which is doubtful, and which may or may not eventually be necessary to be paid. *Parmley v. Railroad Companies*, 3 Dill., 25.

§ 1584. In these cases a temporary injunction was granted against the collection of a tax upon the property of a railroad, until a decision of a full bench could be obtained on the question whether the property was exempt from the tax. *Bailey v. Atlantic & Pacific R. Co.*, 3 Dill., 22; *Paul v. Missouri Pacific R. Co.*, 3 Dill., 25.

§ 1585. Interference by courts of equity to restrain the collection of a tax on account of the action of the state board of equalization in fixing the assessment cannot be justified for reasons merely formal or technical, or for facts which do no substantial injury, or where the wrong could have been avoided or prevented by measures open to the party at the time. Mistakes of judgment on the part of such a body in honestly overvaluing property cannot ordinarily, if ever, be corrected by bill in equity. *Parmley v. Railroad Companies*, 3 Dill., 18.

§ 1586. Where a tax for special improvements has been levied without authority of law,

and certificates of indebtedness for the tax have been negotiated and the amount received by the District of Columbia, and the costs of the improvement have been collected from the government of the United States, equity will enjoin a sale of the property for the payment of the certificates, on the ground that the sale would cast a cloud upon the title of the complainant for which he would have no adequate remedy at law. (CARTTER, C. J., dissenting.) *Alexander v. Dennison*,* 2 MacArth., 562.

§ 1587. A sale of real estate for taxes will not be enjoined where the deed will cast no cloud upon the complainant's title. *Minturn v. Smith*, 3 Saw., 142.

§ 1588. An injunction lies to restrain the sale of a railroad for taxes, where the assessment is void, and the sale would cast a cloud upon the title. *Huntington v. Central Pacific R. Co.*, 2 Saw., 503.

§ 1589. Miscellaneous.—After the act of Georgia confiscating certain debts due British subjects, an action was brought in the circuit court for Georgia on a bond which the state claimed came within the confiscation act. The state of Georgia applied for leave to defend the action, which was denied. Judgment was rendered and the money collected. *Held*, on a bill setting up the facts and alleging collusion between the parties to deprive the state of the benefit of the debt under the act of confiscation, that the supreme court would stay the money in the hands of the marshal until it was legally adjudged to whom the money belonged. *State of Georgia v. Brailsford*,* 2 Dal., 402.

§ 1590. A bill was filed against the administrator of A., to enjoin the collection of a judgment recovered by him against the complainant for the purchase money of certain land which the complainant purchased of A. in his life-time, on the ground that he was ready to pay the money but could not receive a conveyance from A.'s heirs because they were minors. The heirs were not made parties, and it appeared that the money was due a year before A.'s death, and that he had repeatedly demanded its payment. *Held*, that the injunction must be refused, because the difficulty in obtaining a conveyance was caused by the complainant's own default, though a temporary injunction would have been allowed had the heirs been made parties, as, if they had been brought in, the court could have directed a conveyance, but it would have been at the complainant's cost. *Prout v. Gibson*,* 1 Cr. C. C., 889.

§ 1591. The complainant, the representative of the Texas Association, having established a valid and binding contract with the republic of Texas, made by its president, Samuel Houston, with Mercer, which contract created by its operation an express trust devolving upon the state of Texas, in favor of Mercer and his associates, of all the unlocated lands lying within certain limits, thus making the state a holder of the legal title as trustee for the association, as the owner of the equitable title, it was held that a court of equity had jurisdiction to prevent by injunction the waste, alienation or destruction of the trust estate. The court, therefore, granted an order restraining the commissioner of the general land office from granting any certificates or patents for any of the land lying within the limits of the Mercer Colony to any other persons than the complainant or the Texas Association, or those claiming under them; and also restraining him from hindering and obstructing the complainant in the execution and performance of the Mercer contract, and in obtaining the certificates and patents to which the complainant and the association were entitled under the contract. A further prayer that the commissioner might be restrained from issuing patents to other vacant lands in the state until the complainant's demands under the contracts were satisfied was denied, as calling for relief not authorized by the contract. *Preston v. Walsh*,* 10 Fed. R., 815.

2. Injunction Bond.

SUMMARY—*Court not authorized to adopt local law as to liability of parties*, §§ 1592, 1598.—*Counsel fees*, § 1594.—*Amount of recovery*, § 1595.—*Sureties cannot go behind decree in suit in which bond was given*, § 1596.—*Release by one obligee*, § 1597.

§ 1592. Rule 8, authorizing the circuit court, both judges concurring, to modify the process and practice in their respective districts, does not authorize the adoption of the local law of Louisiana defining the rights and obligations of parties to an injunction bond. *Bein v. Heath*, §§ 1598-1601.

§ 1593. Where an injunction is applied for in the circuit court of the United States sitting in Louisiana, the court grant it or not according to the established principles of equity, and not according to the laws and practice of a state in which there is no court of chancery, as distinguished from the common law. Thus where the circuit court, in granting an injunction to stay execution upon an order for the sale and seizure of mortgaged property, ordered the complainants to give a bond, with certain sureties, to answer all damages which the defendant in the suit might sustain in consequence of said injunction, should the same be thereafter dis-

solved, but instead of making the proper condition, as the court had directed, the complainants adopted the form used in the state courts in Louisiana, binding the complainants to pay all such damages as might be recovered against them, if it should be decided that the injunction was wrongfully obtained (the law of Louisiana being that, where the party who obtains the injunction fails to support it, judgment is given against him and his sureties for the debt, interest and damages), it was held that there was manifest error in subjecting the parties to such a bond; that in proceeding on an injunction bond the court could not apply to it the legislative provisions of the state; that the condition of the bond, as worded in this case, was not broken, and consequently no action could be maintained thereon until judgment was given against the obligors for the debt or damages; and that a court of equity cannot give a judgment against the obligors upon an injunction bond when it dissolves the injunction. *Ibid.*

§ 1594. Counsel fees are not recoverable as damages on injunction bonds. *Oelrichs v. Spain*, §§ 1602-7.

§ 1595. A bill to restrain the receipt of a certain fund alleged that the defendant was a trustee of the fund for another. An injunction bond was given by the complainant to the defendant as obligee. *Held*, that the defendant could recover upon the bond at law to the full amount of the damages touching the entire fund, and that, as the bond was sued on in equity, equity would follow the law as regards the liability of the obligor, and, having the fund in hand, would distribute it in the proceeding. *Ibid.*

§ 1596. In a proceeding to enforce an injunction bond, the sureties thereon cannot go behind the decree in the case in which it was given and raise a question which has been settled by the decree. *Ibid.*

§ 1597. A release by one of several obligees in an injunction bond cannot in equity affect the several and separate rights of the other obligees. *Ibid.*

[NOTES.— See §§ 1606-1616.]

BEIN v. HEATH.

(12 Howard, 168-180. 1851.)

Opinion by TANEY, C. J.

STATEMENT OF FACTS.— This is an action on an injunction bond given by Mary Bein, one of the plaintiffs in error in a suit in equity in the circuit court of the United States for the eastern district of Louisiana, in which Bein and wife were complainants, and Mary Heath, the present defendant in error, the respondent.

It appears that Mary Bein executed certain promissory notes for the payment of a large sum of money, and mortgaged her separate and individual property to secure the debt. These notes and the mortgage became the property of Mary Heath, as the legal representative of Sherman Heath, who loaned the money for which they were given, and who died before any proceedings were instituted to recover it. The notes not being paid, Mary Heath obtained a writ for the seizure and sale of the mortgaged premises according to the laws of Louisiana. And Bein and wife thereupon filed their bill in the circuit court of the United States, setting forth that the separate property of Mary Bein, which had been seized, was not legally or equitably chargeable with the payment of this debt, and praying an injunction to stay the sale. It is unnecessary to state the grounds on which the complainants asked relief, as the merits of that controversy are not involved in the present suit. The court passed the order directing the injunction to issue, as prayed, upon the complainants giving a bond, with certain sureties named in the order, to answer all damages which the defendant in that suit might sustain in consequence of said injunction being granted, should the same be thereafter dissolved.

The bond was given in the penalty, and with the sureties, mentioned in the order. But instead of making the condition such as the court had directed, which was the proper one, according to established chancery practice, the complainants adopted, we presume, the form used in the state courts of Loui-

siana, in cases where the law requires an injunction bond to stay execution on a judgment or order of seizure and sale. The condition is as follows:

"Now, the condition of the above obligation is, that we, the above bounden Mary Bein, and Gilbert S. Hawkins (and) James McMasters, sureties, will well and truly pay to the said Mary Heath, the defendant in said injunction, and plaintiff in said case of seizure and sale, all such damages as she may recover against us, in case it should be decided that the said injunction was wrongfully obtained."

The injunction, however, was issued by the clerk upon the filing of this bond. And the suit proceeded to final hearing, when the court passed the following decree: "This cause came on for trial on the 29th day of May, 1844, and was argued by counsel; wherefore, in consideration of the law and the evidence, and the rules and principles of equity being in favor of the respondent, Mary Heath, it is ordered, adjudged and decreed that the complainant be dismissed with costs. And it is further ordered, adjudged and decreed that the injunction granted in this case be dissolved, and the respondent be allowed to proceed with the writ of seizure and sale granted, in accordance with the prayer of her original petition."

The complainants appealed to this court, and, after argument by counsel, the decree of the circuit court was affirmed, with costs. And thereupon the present defendant in error brought the suit which is now before us, upon the injunction bond hereinbefore stated, to recover certain damages stated in her petition, for which she alleges the obligors in that bond are liable. The suit is by petition, in the usual form of Louisiana practice, and the judgment of the circuit court being in favor of the plaintiff in that suit, the plaintiffs in error, who were defendants in the court below, have brought the case before this court.

§ 1598. *The conditions of an injunction bond, "to pay all such damages as the obligee may recover against us in case it should be decided that said injunction was wrongfully obtained," under the code of Louisiana, are not broken until a judgment has been had.*

It appears, from the exceptions, and the judgment in the case, that the circuit court regarded this bond as the same in principle with the bond required by the laws of Louisiana, where an injunction is obtained to stay execution upon an order for the seizure and sale of mortgaged property; and therefore considered this bond as creating the same obligations and giving the same rights to parties as if it had been given under the laws of the state. And by these laws, when the party obtains an injunction, and fails to support it at the trial, judgment is given against him and his sureties for the debt, interest and damages, at the time the injunction is dissolved, and it forms part of the same judgment. 8 Rob., 20. The sureties in the bond are treated as parties to the suit; and the amount of interest and damages which the court may award by their judgment is regulated by the laws of the state.

§ 1599. — *and suit cannot be brought on such bond until after judgment for damages has been rendered.*

It is with reference to this mode of proceeding that the injunction bond in question appears to have been framed; and it is to this judgment, as prescribed by the laws of the state, that the condition must refer, when it binds the obligors to pay all such damages the obligee might recover against them, in case it should be decided that the injunction was wrongfully obtained. There must be a recovery, that is, a judgment against them, before the condition is broken, and before any proceeding could be had upon the bond.

§ 1600. *The eighth rule, authorizing the judges of the circuit courts to modify their process and practice, does not authorize the adoption of a state law defining the rights and obligations of parties to an injunction bond.*

Now, there is manifest error in subjecting the parties to an injunction bond, given in a proceeding in equity in a court of the United States, to the laws of the state. The proceeding in a circuit court of the United States in equity is regulated by the laws of congress, and the rules of this court made under the authority of an act of congress. And the ninetieth rule declares that, when not otherwise directed, the practice of the high court of chancery in England shall be followed. The eighth rule authorizes the circuit court, both judges concurring, to modify the process and practice in their respective districts. But this applies only to forms of proceeding and mode of practice, and certainly would not authorize the adoption of the Louisiana law, defining the rights and obligations of parties to an injunction bond. Nor do we suppose any such rule has been adopted by the court. And if it has, it is unauthorized by law, and cannot regulate the rights or obligations of the parties.

And when an injunction is applied for in the circuit court of the United States sitting in Louisiana, the court grant it or not, according to the established principles of equity, and not according to the laws and practice of the state in which there is no court of chancery, as contradistinguished from a court of common law. And they require a bond, or not, from the complainant, with sureties, before the injunction issues, as the court, in the exercise of a sound discretion, may deem it proper for the purposes of justice. And if, in the judgment of the court, the principles of equity require that a bond should be given, it prescribes the penalty and the condition also. And the condition prescribed by the court in this case, but which was not followed, is the one usually directed by the court.

In proceeding upon such a bond the court would have no authority to apply to it the legislative provisions of the state. The obligors would be answerable for any damage or cost which the adverse party sustained, by reason of the injunction, from the time it was issued until it was dissolved, but to nothing more. They would certainly not be liable for any aggravated interest on the debt, nor for the debt itself, unless it was lost by the delay, nor for the fees paid to the counsel for conducting the suit. But the bond, in the case before us, is not one to pay the damages which the opposing party should sustain by reason of the injunction, but it is to pay the damages that might be recovered against them; obviously referring, we think, to the practice in Louisiana above mentioned.

§ 1601. *In equity, judgment cannot be given against the obligors in an injunction bond when the injunction is dissolved.*

A court proceeding according to the rules of equity cannot give a judgment against the obligors in an injunction bond when it dissolves the injunction. It merely orders the dissolution, leaving the obligee to proceed at law against the sureties, if he sustains damage from the delay occasioned by the injunction. This was done by the circuit court in the former suit between the parties. No judgment was or could be given against the obligors for debt or damages, and none were recovered against them previously to the institution of this suit. The contingency on which they agreed to pay has not, therefore, happened, and the condition of the bond is not broken, and consequently no action can be maintained upon it. It would be against the well-established rule of the chancery court to extend the liability of the surety, by any equi-

table construction, beyond the terms of this contract. And, in a proceeding upon a bond, the liability of the principal obligor cannot be extended beyond that of the surety.

In this view of the case, it is unnecessary to examine the questions which have been raised as to the Louisiana laws in relation to injunction bonds. The judgment of the circuit court must be reversed and a *venire de novo* awarded.

OELRICHS v. SPAIN.

(15 Wallace, 211-231. 1872.)

APPEAL from the Supreme Court for the District of Columbia.

Opinion by MR. JUSTICE SWAYNE.

STATEMENT OF FACTS.—This litigation grows out of a prior suit, to which it is necessary briefly to advert in order to render intelligible the issues to be decided in the case before us.

The Bank of the United States assigned to William S. Wetmore certain bonds of the state of Texas as security for a debt which the bank owed him. He surrendered the bonds to the state and received in their stead certificates of indebtedness which he deposited in the treasury of the United States for payment, under the act of congress of the 9th of September, 1850, and the explanatory act of February 28, 1855. The bank thereafter transferred one-tenth of the certificates, less the amount due to Wetmore, to General James Hamilton. Hamilton subsequently became indebted to Wetmore, and gave Wetmore a lien upon his share of the fund to secure the payment of the debt and interest. He gave like liens to Corcoran & Riggs, to James Robb & Co., and to H. R. W. Hill. Robb & Co. transferred their claim to Hill. The trustees of the bank also claimed a part of the one-tenth as not embraced in the transfer to Hamilton. Before the fund was paid over by the treasury department, Albert C. Spain, as guardian of Mary McCrae, a lunatic, filed a bill in equity, wherein he asserted a prior and paramount lien upon the fund in behalf of his ward, and prayed an injunction to prevent the defendants from receiving any part of the amount in question until the claim set up in the bill should have been passed upon by the court. To this bill Wetmore and the other claimants, except Hill, were made parties defendant. An injunction was granted as prayed for, and on the 31st of May, 1856, an injunction bond was executed. The penalty was \$15,000. The obligees were Wetmore and the other defendants. The obligors were John F. and Henry May. The condition was that Spain "should prosecute the writ of injunction with effect and pay all damages and costs" which the obligees, "or any of them, shall sustain by the granting of this injunction." On the 23d of April, 1856, a further bond was given, pursuant to the order of the court, in the penal sum of \$20,000. The obligees were Wetmore and others. Hill was not one of them. The obligors were Spain and Oelrichs. The condition was that Spain should prosecute the writ of injunction "with effect and satisfy and pay as well the costs, damages and charges which shall accrue in said circuit court of Washington county, as all costs, damages and charges which shall be occasioned by said writ of injunction, unless the said court shall decree to the contrary."

By consent of parties it was thereupon ordered by the court that this bond should be filed in lieu of the prior bond, "reserving the right to the obligees to have recourse to the original bond for interest theretofore accrued, at the election of the obligees, and not otherwise."

On the 31st of May, 1856, the James River & Kanawha Company having filed a bill and procured a like injunction, gave bond in the sum of \$5,000. The obligees were Wetmore and all the other adverse claimants of the fund, including Spain and the executor of Hill. The obligors were Thomas H. Ellis, Hugh Caperton and Robert Ould. The condition of the bond was that the company "shall well and truly prosecute the said suit with effect, and shall answer all damages and costs which the defendants, or either of them, may sustain by the granting of this injunction, in case it shall be dissolved." On the 20th of June, 1856, Pierce Butler procured a like injunction and gave bond in the sum of \$2,500. The obligees were Wetmore and the other claimants of the fund, including Hill's executor. The condition was that Butler should "pay and satisfy all costs and damages that may accrue to the obligees, or either of them, by reason of said injunction, in case the same shall be dissolved." In the progress of the cause, Spain dismissed his injunction as to the claim of the trustees of the bank for the sum of \$12,051.50. That amount was paid to them, and they thereupon released their claim under the injunction bonds. By agreement of counsel the cases of Spain and Butler were heard together. The court decreed that there should be first paid to Wetmore the principal and interest of his debt, amounting together, including the cost of audit, to \$4,333.66. That there should be next paid to Corcoran & Riggs the amount of their lien, \$30,000. And, thirdly, to the representatives of Hill the debt due to his estate, found to be then, with interest, \$52,457.

The amount applicable to this demand, after satisfying the demands of Wetmore and Corcoran & Riggs, was \$38,171. This left a balance due Hill's estate of \$14,285.54 unsatisfied and unprovided for. The case was removed to this court by appeal, and the decree of the court below was here affirmed. *Spain v. Hamilton*, 1 Wall., 604 (ASSIGNMENTS, §§ 8-12). The James River & Kanawha Company dismissed their bill. Corcoran & Riggs subsequently collected upon the bond executed by Ellis, Caperton & Ould the sum of \$5,000. The penalty of the bond of Butler, \$2,500, was paid to the complainant, J. Dick Hill.

This bill is brought by the executors of Wetmore, the executor of H. R. W. Hill and J. Dick Hill, his devisee and only heir-at-law, against John F. May, William W. Corcoran, George W. Riggs, Hugh Caperton and Henry Oelrichs. It gives sufficient reasons for not making additional parties whose presence would otherwise be necessary, though not indispensable, in this litigation. The object of the bill is to enforce in favor of Hill's estate the liability for damages arising under the injunction bonds, and if need be to marshal the assets. The executors of Wetmore claim nothing except in trust for the benefit of Hill's estate.

The court below allowed Corcoran & Riggs, for damages, interest on the amount of their lien during the time payment was delayed by the injunction, being a period of four years, eight months and sixteen days.

The interest, thus computed, makes the sum of.....	\$3,475 00
The court also allowed them for counsel fees in the adverse litigation.....	1,000 00
	\$4,475 00
From this was deducted the amount they received upon bond given in behalf of the James River & Kanawha Co.....	5,000 00
Balance.....	\$4,475 00

Of this sum, \$2,455.94 was apportioned to May's bond, and \$2,019.06 to Oelrichs'.

The damages awarded to Hill's estate were as follows:

Loss of principal by reason of the fact that part of the fund which would otherwise have been applied to it in part payment was absorbed for the interest upon the prior claims.....	\$827 41
Interest on \$36,214.35 for four years, eight months, sixteen days.....	10,230 55
Counsel fees in the adverse litigation.....	1,500 00
	<hr/>
	\$12,557 96
Deduct the amount received on the Butler bond.....	2,500 00
	<hr/>
Balance.....	\$10,057 96

Of this sum there was appropriated to May's bond \$5,027.15, and to Oelrichs' \$5,030.81. May and Oelrichs appealed, and the case is now before this court for final adjudication.

§ 1602. *The objection that there is a complete remedy at law is jurisdictional, and may be enforced by the court sua sponte, though not raised by the pleadings, nor suggested by counsel.*

It has been insisted by the counsel for the appellants that there is a complete remedy at law, and that the bill must, therefore, be dismissed. Such must be the consequence if the objection is well taken. In the jurisprudence of the United States this objection is regarded as jurisdictional, and may be enforced by the court *sua sponte*, though not raised by the pleadings nor suggested by counsel. *Parker v. Winnipiseogee Co.*, 2 Black, 551 (§§ 698-89, *supra*); *Graves v. Boston Co.*, 2 Cranch, 419; *Fowle v. Lawrason*, 5 Pet., 495; *Dade v. Irwin*, 2 How., 383 (§§ 98-100, *supra*).

The sixteenth section of the judiciary act of 1789 provides "that suits in equity shall not be sustained in any case where plain, adequate and complete remedy can be had at law;" but this is merely declaratory of the pre-existing rule, and does not apply where the remedy is not "plain, adequate and complete;" or, in other words, "where it is not as practical and efficient to the ends of justice, and to its prompt administration, as the remedy in equity." *Boyce v. Grundy*, 3 Pet., 215. Where the remedy at law is of this character, the party seeking redress must pursue it. In such cases the adverse party has a constitutional right to a trial of the issues of fact by a jury. *Hipp v. Babin*, 19 How., 278 (§§ 1134-36, *supra*).

§ 1603. *Remedy at law. Principles of equity jurisdiction.*

But this principle has no application to the case before us. Upon looking into the record it is clear to our minds, not only that the remedy at law would not be as effectual as the remedy in equity, but we do not see that there is any effectual remedy at all at law. If the injunction bonds were sued upon at law, and judgments recovered, a proceeding in equity would still be necessary to settle the respective rights of the several obligees to the proceeds. The direct proceeding in equity will save time, expense and a multiplicity of suits, and settle finally the rights of all concerned in one litigation. Besides, there is an element of trust in the case, which, wherever it exists, always confers jurisdiction in equity.

§ 1604. *The sureties on an injunction bond cannot go behind the decree in the case in which it was given.*

It has been urged that Hamilton's arrangement with the bank was illegal and void, and never fulfilled on his part, and that he had no title to the residuum of one-tenth of the certificates to which his assignment related. It is a sufficient answer to say that the trustees of the bank were parties to the former suit, and that the court recognized and affirmed the validity of the claim

by administering the fund arising from it. The appellants cannot go behind the decree in the case in which their bonds were given. The law and the facts of that case, as settled by the court, are conclusive of their rights in this proceeding. They cannot be permitted to raise any question as to either.

§ 1605. *Effect of sealed or unsealed release of bond.*

The release given by the trustees of the bank cannot avail the defendants. If it were not by a sealed instrument, it would not be a technical bar even in a suit at law. In what form it was given is not disclosed in the record. But if it were properly executed under seal, it cannot in equity affect the severable and separate rights of parties to the bonds other than those by whom it was executed.

§ 1606. *Where the obligee in an injunction bond holds the legal title to a fund he may recover at law upon the bond to the full extent of the damages touching the entire fund; and in such case equity follows the law as to the distribution.*

It is true that neither Hill nor his representatives were parties to either the bond of May or the bond of Oelrichs, and that they were not named in the writ of injunction issued upon the filing of the first bond. But Spain's bill averred that Wetmore held the fund in trust for Hill. Wetmore was an obligee in both bonds. The legal title to the entire fund was in him, and was never divested. It was extinguished by the payment of the money by the treasury department, and its distribution pursuant to the decree of the court. Wetmore during his life-time, and after his death his legal representatives, might have recovered upon the bonds at law to the full extent of the damages touching the entire fund. Such was his and their legal right. Equity would have distributed the proceeds, if need be, according to his rights and the equities of the other parties in interest. In this case equity follows the law as regards the liability of the appellants, and, having the proceeds in hand, will distribute them in this proceeding. *Livingston v. Moore*, 7 Pet., 547; *Riddle v. Mandeville*, 5 Cranch, 322.

The objection that proper releases were not filed in the treasury department is untenable. The proofs establish three facts: The fund would have been paid over earlier but for the injunction. It was paid after the injunction was dissolved. The delay caused by the injunction was the period for which interest was allowed by the court below. Whether the payment was, or would have been, improperly made, is an inquiry which does not arise in this case, and with which the appellants have nothing to do.

It is sufficient for the purpose of this case that there was, in fact, such delay, and that it proceeded from the cause alleged in the bill. The decree of the court below was preceded by the report of the master, which the decree affirmed and followed. Upon looking into the report we find it clear and able, and we are entirely satisfied with it, except in one particular. We think that both the master and the court erred in allowing counsel fees as a part of the damages covered by the bonds.

§ 1607. *On injunction bonds counsel fees are not recoverable.*

In *Arcambel v. Wiseman*, 3 Dall., 306, decided by this court in 1796, it appeared "by an estimate of the damages upon which the decree was founded, and which was annexed to the record, that a charge of \$1,600 for counsel fees in the courts below had been allowed." This court held that it "ought not to have been allowed." The report is very brief. The nature of the case does not appear. It is the settled rule that counsel fees cannot be included in the damages to be recovered for the infringement of a patent. *Teese v. Hunting-*

don, 23 How., 2; *Whittemore v. Cutter*, 1 Gall., 429; *Stimpson v. The Railroads*, 1 Wall. Jr., 164. They cannot be allowed to the gaining side in admiralty as incident to the judgment beyond the costs and fees allowed by the statute. *The Baltimore*, 8 Wall., 378.

In actions of trespass, where there are no circumstances of aggravation, only compensatory damages can be recovered, and they do not include the fees of counsel. The plaintiff is no more entitled to them, if he succeed, than is the defendant if the plaintiff be defeated. Why should a distinction be made between them? In certain actions *ex delicto* vindictive damages may be given by the jury. In regard to that class of cases this court has said: "It is true that damages assessed by way of example may indirectly compensate the plaintiff for money expended in counsel fees, but the amount of these fees cannot be taken as the measure of punishment or a necessary element in its infliction." *Day v. Woodworth*, 13 How., 370, 371.

The point here in question has never been expressly decided by this court, but it is clearly within the reasoning of the case last referred to, and we think is substantially determined by that adjudication. In debt, covenant and *assumpsit* damages are recovered, but counsel fees are never included. So in equity cases, where there is no injunction bond, only the taxable costs are allowed to the complainants. The same rule is applied to the defendant, however unjust the litigation on the other side, and however large the *expensa litis* to which he may have been subjected. The parties in this respect are upon a footing of equality. There is no fixed standard by which the *honorarium* can be measured. Some counsel demand much more than others. Some clients are willing to pay more than others. More counsel may be employed than are necessary. When both client and counsel know that the fees are to be paid by the other party there is danger of abuse. A reference to a master or an issue to a jury might be necessary to ascertain the proper amount, and this grafted litigation might possibly be more animated and protracted than that in the original cause. It would be an office of some delicacy on the part of the court to scale down the charges as might sometimes be necessary.

We think the principle of disallowance rests on a solid foundation, and that the opposite rule is forbidden by the analogies of the law and sound public policy. The amount of the allowance in this case may be remitted here, as was done in the case in 3 Dallas, and the decree of the circuit court will thereupon be affirmed. Otherwise the decree will be reversed and the cause remanded for the reformation of the decree in conformity to this opinion.

§ 1608. *Remedy at law.*—A court of equity cannot proceed against the principal and sureties upon an injunction bond, and enforce the payment of the damages secured by its condition. The remedy is at law upon the bond for the damages occasioned by the injunction. *Merryfield v. Jones*,* 2 Curt., 306.

§ 1609. *Dissolution and reinstatement.*—Where an injunction has been dissolved, and, after an amendment to the bill, has been reinstated, it is not considered a new cause, but as being a continuation of the same cause, and there is therefore no breach of the condition of the injunction bond for which an action can be brought until the final dissolution of the injunction. *Bentley v. Joslin*,* Hemp., 218.

§ 1610. *No action against surety, when.*—Where, upon the issue of an injunction against the use of the complainant's trade-mark, a bond is given for the payment of all damages and costs to be awarded against the complainant, and in favor of the defendant, upon the trial or final hearing of the matter referred to in the bill, no action can be maintained against the surety upon the bond, where no damages are awarded at the trial of the cause. *Deakin v. Stanton*,* 3 Fed. R., 435.

§ 1611. *Judgment and satisfaction.*—Action to recover interest.—Where the plaintiff in an action at law, after the dissolution of an injunction, took out execution upon his judgment

and obtained satisfaction, it was held that he could not proceed upon the injunction bond to recover interest upon the judgment during the pendency of the injunction. *Grundy v. Young*, 2 Cr. C. C., 114.

§ 1612. *Condition construed.*—An injunction bond given on an application to restrain proceedings at law on a judgment in a state court, and conditioned “to abide the decision which shall be made thereon (the original suit), and pay all sums of money, damages and costs that shall be adjudged against them (the obligors), if the said injunction shall be dissolved,” does not cover the amount of the original judgment and its costs, nor the attorneys’ fees. *Browning v. Porter*,* 2 McC., 581.

§ 1613. *Breach.*—A bond conditioned to pay all costs and damages occasioned by an injunction must not be taken literally, but on condition that the injunction be improperly granted or be dissolved. Dissolution of the injunction is a technical breach of the bond, for which nominal damages may be recovered. And where an injunction against the use of a ferry is dissolved, the question of the right to use the ferry affects only the damages and not the right of action. *Stone v. Cason*,* 1 Or., 100.

§ 1614. *Dissolution not on merits.*—Where the dissolution of an injunction was not consequent upon a final determination or adjudication upon the merits of the action, the obligors in the injunction bond, in a suit thereon, may show the facts and circumstances entitling them to the injunction, if not in full defense, at least in mitigation of damages, the order of dissolution being in such cases only *prima facie* evidence that the injunction was improperly issued. *Stewart v. Miller*,* 1 Mont. T’y, 301.

§ 1615. *Parties to suits on.*—Where an injunction bond, upon which suit is brought, has been executed by the defendants to the plaintiffs jointly, all the parties to the bond should be brought before the court so that the damages claimed may be apportioned. *Ibid.*

§ 1616. *Death of surety.*—Under a statute requiring the execution of a bond in order that an injunction might issue restraining proceedings at law, A., a defendant in a suit at law, upon application for an injunction, executed, together with B., a joint bond, the statute not requiring the bond to be joint and several, and B. being in fact merely a surety. Before the judgment at law was rendered B. died and A. became insolvent. It was held that, the death of B. having extinguished the obligation, at law, against his representatives, the obligee could not subject the estate of B. to the payment of the bond by proceedings in equity. *Pickersgill v. Lahens*, 15 Wall., 140 (BONDS, §§ 550-51).

3. Violation of Injunction.

SUMMARY—*Practice*, § 1617.—*Work on street enjoined; resumed under a new ordinance*, § 1618.

§ 1617. In case of the violation of an injunction the proper proceeding is to move, on notice to the defendant, that he be committed therefor, and a motion for such commitment, without notice, will be overruled. *Worcester v. Truman*, §§ 1619-20.

§ 1618. Persons engaged in grading and filling a certain street in a city were enjoined by a preliminary injunction granted at the instance of a resident on that street, the court being of opinion that the city ordinance under which defendants were proceeding was void because not made in accordance with the requirements of the city charter, and that a private nuisance was likely to result from the work. Subsequently, the defendants procured the passage of another ordinance (considered to be valid for the purposes of this decision), authorizing the work, and proceeded with the grading and filling, without applying to the court to be relieved from the injunction. *Held*, that they were in contempt. *Muller v. Henry*, §§ 1621-22.

[NOTES.—See §§ 1623-1652.]

WORCESTER v. TRUMAN.

(Circuit Court for Ohio: 1 McLean, 483-486. 1839.)

Opinion of the Court.

STATEMENT OF FACTS.—Messrs. Chase & Fox, who appear for the complainants, move for attachment against the defendants on the ground that they have violated the injunction heretofore granted in this case restraining the publication of certain school books. The allowance of the injunction at the last term is shown, and also a summons with an order indorsed enjoining

the publication of the works, which was served on the defendants. And several affidavits were read which prove that the publication of the books had been continued after notice of the injunction had been served. Messrs. Wright & Vaughan objected to the attachment, because no notice had been served on the defendants of this motion; and they insisted that a rule to show cause why an attachment should not issue is the proper mode of proceeding for a disobedience of the injunction.

By a rule adopted by the supreme court to regulate proceedings in chancery, it is provided that, "in all cases where the rules prescribed by that court or by the circuit court do not apply, the practice of the circuit courts shall be regulated by the practice of the high court of chancery in England."

§ 1619. *An attachment is not now issued against a party who violates an injunction. A motion that he stand committed is the modern process, and notice must be given of the motion.* See COURTS, §§ 2134-36.

No rule has been adopted by this court to regulate this motion, and we must look to the precedents established in the English courts. "The practice in England formerly was, that, upon affidavit of the service of the injunction, an attachment issued for the breach of it. If the defendant was arrested on the attachment, and entered his appearance, and answered interrogatories under oath, etc., if he denied the service of the injunction, it was required to be proved," etc. Har. Ch. Pr., 552. But in Eden on Injunctions, 56, it is stated that the modern practice, where a contempt for a breach of the injunction is charged, is to give notice of a motion, not that the defendant should show cause why he should not be committed, but that he may stand committed for breach of the injunction, which is moved upon affidavit of the service of the injunction.

In the case of *Argerstein v. Hunt*, 6 Ves., 487, Mr. Romilly, for the plaintiff, moved that the defendant should show cause why he should not stand committed for breach of the injunction, etc. And the lord chancellor said: "It is not the practice in this court for a man to show cause why he should not stand committed. The motion ought to be that he shall stand committed for breach of the injunction; and it ought to be made upon personal service upon him, that the court will be moved for that purpose. When the injunction is to do a thing, the course is to move for an order that he shall do it by a particular day, or stand committed. But this is not to do a thing. The proper mode, therefore, will be to serve him with notice, that the court will be moved that he shall stand committed."

And in the case of *Schoonmaker v. Gilbert*, 3 Johns. Ch., 311, on a motion having been made for an attachment to bring up the defendant, the chancellor, on the authority of the above case, and on the due service of the affidavits and notice, ordered that an attachment issue to the sheriff to bring the defendant into court, to answer for the contempt. On these authorities, it is clear that it is not the English practice to issue a rule to show cause why an attachment should not issue for a breach of the injunction; and it is equally clear the motion that the defendant should stand committed for the contempt is made after personal service of a notice that such motion would be made. The case in *Vesey* is on the very point, and also the authority in *Johnson*.

In the present case, this rule has not been observed. No notice whatever has been given to the defendants that the counsel for the plaintiffs would move that they stand committed for a breach of the injunction. Verbal in-

formation was communicated to the counsel at Cincinnati, that a motion for an attachment would be made at the present term; and a motion to this effect was entered on the minutes of the court two days before it was called up and argued. This, although in the nature of a criminal proceeding, is not in fact strictly of that character. It is instituted and carried on by the counsel for the plaintiff, and not, necessarily, by the attorney for the government. The object of the proceeding is to enforce obedience to the process of the court, by punishing an intentional disregard of it. The mode is summary and rigorous, and the party who thus invokes the aid and power of the court should bring himself strictly within the rule which entitles him to the redress sought, and subjects the defendant to the punishment which must follow.

He must show the allowance of the injunction; that it has been issued on the terms specified and within the limitations imposed. That it has been duly served, and that notice has been given to the defendant of the time and place of the motion, "that he stand committed for a breach of the injunction." On this motion the court will not investigate the title of the complainants. That was considered on the allowance of the injunction, and will be again investigated on a motion to dissolve, or on the final hearing. But the court will look into the case to ascertain how far the defendants are restrained, and whether the writ of injunction extends beyond the allowance. And there are other points made in the argument which it may be proper to examine, when the defendants shall be properly brought before the court. But until the notice shall be served of the usual motion for a breach of the injunction, no other question except that of notice is before the court.

§ 1620. *If no notice of motion that a party stand committed for breach of injunction be given, no attachment can issue.*

Under the circumstances of this case, the court feel bound to consider the preliminary objection of want of notice as wholly disconnected with the facts and arguments adduced on what may be termed the merits of the motion. In requiring the defendants' counsel to argue the preliminary objections in connection with the other branch of the case, the court subjected them to no waiver of any legal objection. The appearance of the counsel, therefore, is not a waiver of notice, and such appearance is only considered for the purpose of objecting to the want of notice. The motion for an attachment is overruled.

MULLER v. HENRY.

(Circuit Court for California: 5 Sawyer, 464-474. 1879.)

STATEMENT OF FACTS.—This bill was filed to enjoin the filling up of a street, alleging that defendants were acting without lawful authority, and that their work would result in the flooding of a certain lot, causing irreparable injury. The court was of opinion that the ordinance under which the work was being done was void, and granted the injunction. Another ordinance was then passed, authorizing the work, and the defendants commenced work under it without bringing the matter to the attention of the court.

Opinion by SAWYER, J.

After a full examination of the question submitted in this case, in the matter of contempt, and of the authorities bearing on the subject, I am confirmed in the impression which I had at the hearing, that the parties are in contempt. The order of this court forbids the defendants doing certain specific acts, and those very acts they have performed.

§ 1621. *Where work is enjoined because of the illegality of a city ordinance under which it is being done, and another ordinance is passed authorizing the work, if the parties proceed without bringing the matter to the attention of the court, they are guilty of a contempt.*

The first question presented upon the application for the injunction was as to the validity of the ordinance authorizing the grading of the streets mentioned. The court held that ordinance to be invalid in consequence of a failure on the part of the board of trustees in passing it to pursue the methods prescribed by the statute. Then there was another question, as to whether or not the work ordered by that ordinance to be done would create a private nuisance. The court was of opinion, from the evidence adduced, that the case was one in which an injunction should be issued until that question could be determined. After the injunction issued, the board of trustees of the city of Napa took proceedings (which, for the purposes of the decision, may be assumed to have been regular) to authorize the grading of the street—the thing which the defendants were prohibited from doing by the injunction of this court; and under the authority of that action on the part of the board of trustees, without moving this court to modify the injunction, or to release them from the restraints which it imposed, the parties proceeded with the work.

In *Williamson v. Camon*, 1 Gill & J., 184, I find a case which I think is directly in point, and which fully sustains the impression which I had at the hearing, and which has been deepened and confirmed by subsequent investigation. In that case, the levy court, as it was called, had authorized, by proceedings had for the purpose, the closing of a public road which ran over the lands of the defendant in the injunction suit. The defendant was about to close the road, and an injunction was obtained from the Baltimore county court, sitting in equity, restraining him from so doing. A writ of *certiorari* had been issued, and a review of the proceedings of the levy court had in the meantime. It turned out that the proceedings of the levy court were invalid for want of formality, and, in consequence of that informality, the proceedings of that court were reversed. The parties interested then again applied to the proper court by petition, in the regular course, and obtained another order for the closing of the road, all the parties interested having notice of this application, and appearing to contest it. In pursuance of this authority, supposing that it would protect him from the operation of the injunction, the party enjoined again proceeded to close the road. This, substantially, is an outline of that case. It is rather long, and I shall only cite sufficient of it to show that it is a parallel case with the one now before me. The chancellor says (page 194): “At the March term, 1828, the complainants again by their petition stated that the defendant, disregarding the said injunction, did, by his agents, servants and himself, cause the road mentioned in the injunction to be obstructed on or about the 13th of December last, by causing a fence, etc., to be erected, and placing other obstructions on and across the same, etc., as will appear by the affidavits filed at the last term. That although an attachment issued, and was duly served on the defendant, it had not had the effect of causing him to remove the obstructions then existing; but, as would appear by the annexed affidavit, he had additionally obstructed the said road, etc. Prayer for an attachment against defendant, and that he be compelled to place the said road in the same situation as it was previously to his closing the same on or about the 13th of December last. An attachment was again ordered and issued, returnable forthwith; and was duly served, etc. The defendant appeared and filed

his petition, in which he stated that the proceedings of the levy court, in reference to the said road, having been set aside by the Baltimore county court, upon the hearing and examination thereof, under the writ of *certiorari*, which had been issued, etc., as will appear by a transcript of the proceedings exhibited, not upon the merits of the case, but for defect of form" — which is the ground upon which these very proceedings are held to be invalid — "as will appear by a copy of the opinion of said court. That the petitioner being advised that that part of the said road called the Garrison Forest Road, mentioned in the proceedings, having become a public road and highway, he, together with other petitioners, taxable inhabitants of the county, made a new application to the levy court, to alter and close the said part of said road; and that the complainants had notice thereof, and attended a meeting of the commissioners appointed under the said application, and opposed the confirmation of the return made by the said commissioners. That on the 13th of December, 1827, an order was passed by the commissioners of the county, to whom the powers and duties, heretofore exercised by the levy court, has been transferred, that all that part of the before mentioned road be shut up and closed; and that the petitioner, or any other person or persons, through whose lands the said old road may have been departed from by such altering, etc., are authorized to shut up and close the same, as by reference to a copy of the said proceedings exhibited will appear. That the complainants had knowledge of said order of the said commissioners, and that the said order being final and conclusive, without appeal, and no writ of *certiorari* having been applied for, and the said road so authorized to be closed passing transversely through the farm of the petitioner; and the complainants, by the altering of the said road, having another, and a better and shorter road, and the petitioner being greatly aggrieved by the passing of the said road through his lands, and conceiving himself fully authorized to do so by the said order, he, by virtue of the said order, and not, as he avers, in contempt of the court, did proceed to close the said road; and that he shut up and closed the same without force, etc., and before any attachment had issued against him. That since he has closed the said road he hath removed his inner fences, and planted an orchard on either side of and through the bed of the said road; and that the removal of his fences will be attended with great and irreparable damage to him. Prayer, that the said road may be suffered to remain closed, and that he may be released from custody, and that the attachment may be quashed."

There is a long opinion upon the case, of which I shall quote small portions. After stating the circumstances of the case, the chancellor says: "It appears, then, by the defendant's petitions of the 3d of January and 22d of April, that he had conceived himself fully and legally authorized to close this highway, by virtue of the order of the levy court, notwithstanding the injunction of this court, which had positively prohibited him from closing or obstructing it in any way whatever; or, in other words, that the final order he had obtained had virtually, yet effectually and completely, dissolved and annulled the injunction heretofore granted by this court. The defendant made no application or motion to have the injunction dissolved after the 2d of December, 1826, until the 22d of April last. He has not even deigned to speak of the injunction, in the body of either of those petitions, in which he acknowledges and attempts to justify the closing of the road; and yet, in the first, he asks to be permitted to file an amended answer, and to have the bill dismissed; and in the second, he prays that the road may remain closed, and that he may be discharged

from the attachment. If the prayer of his first petition had been literally and fully granted, and the bill dismissed, yet that would not have dissolved the injunction, unless it had been so expressly ordered. By the second petition this court is, in effect, gravely asked to make a most extraordinary transit over all its own proceedings, into those of the levy court; to approve and act upon them, and totally disregard its own.

“For, an order of this court, as prayed, that the road should be suffered to remain closed, and that the defendant should be discharged from the attachment, most manifestly could stand upon no other foundation than a complete affirmance of the proceedings of the levy court, and an entire disregard of all the previous proceedings of this court. I never before heard of such an indirect mode of obtaining a virtual dissolution of an injunction, by bringing to bear upon it a judicial decision of another and totally different tribunal, not exercising or having any appellate jurisdiction over the court whence the injunction issued. An injunction, emanating from a competent authority, is a command of the law; and the citizen is, as I have always understood, bound to yield implicit obedience, until the restriction has been removed by the authority which imposed it.”

So, in this case, these parties were enjoined from doing a specific thing—from grading this street and filling it up,—and they go and get authority from another tribunal, the board of trustees of the city of Napa, to go to work and fill it up, which, if permitted, will virtually work a dissolution of the injunction of this court by the said board.

The court, in the case cited, proceeds to say: “But, if the position assumed by this defendant be correct, then, instead of obeying or moving to dissolve an injunction, a party may avail himself of various modes of getting around, or under, or over it, without being chargeable with the slightest contempt of the law. The judgment of this court, continuing the injunction, was founded upon the proof or admission of certain facts, after hearing both parties, as to the very point whether it ought to be continued or not. But, if it could be indirectly and virtually dissolved by a judgment of the levy court, upon a different case, then it might be evaded by one party without hearing the opposite party as to the former, or any new facts or equity, which he might be able to show, as a most solid ground for its further continuance. The court, commanding obedience to an injunction, might thus be brought into collision with another court, alleged to have sanctioned, or, as this defendant has said, *ratified* the acts of disobedience of it, in which conflict of jurisdiction the rights of persons and of property, it is evident, must suffer, while he who produced the scuffle might escape with the spoils. Surely, such principles, which, to say the least of them, lead so directly to disorder and confusion, ought not to be tolerated for a moment.”

So, in this case, if these parties are to go to another tribunal and get an order which may be legal in itself, and thereby are enabled to “escape with the spoils,” and are to experience no trouble from this injunction, certainly disorder and confusion must result from such a state of affairs. “There is absolutely nothing in the prayer of the bill, nor in the writ of injunction itself, which limits the prohibition to a shutting up under the order of the levy court, or under any other particular and specified authority whatever.” So, in this case, there is nothing in the injunction that refers at all to the particular action of the board of trustees; it is simply an injunction preventing them from grading that street,—“from depositing any rock, earth, clay, ground or

other material on" said streets, is the language of the writ,—no reference whatever being made to the order of the board. It is not limited to that; it is not an injunction restraining these parties from doing this work under that order, but an injunction positively and absolutely forbidding their proceeding with it at all.

The court proceeds: "Neither the terms of the prayer nor of the writ make any allusion whatever to any judicial proceedings of any kind then pending or thereafter to be instituted. The restriction imposed upon the defendant is as general and comprehensive as it could well be expressed. The clear and unequivocal sense of which is, that the road shall continue to be considered as a public road or highway, which the defendant shall not be permitted to close until he shall produce and show to this court that he had obtained a legal authority to do so. Therefore, the only question now is, whether the acts done by this defendant are such as he was prohibited from doing by the injunction? These acts are the erection of obstructions upon this highway; now these are the very acts which this injunction does most positively and distinctly prohibit."

And so in this case the injunction was to prohibit these parties from filling up the streets; that is what is stated in distinct terms.

The court continues: "It is true that if the injunction had prohibited acts of one description from being done, and the party restrained had done acts of another description, he could not, as the defendant has alleged, be charged with a contempt. The injunction did not prohibit him or any other person from instituting any proceedings, or make any application for the purpose of obtaining a legal authority to close the road." So, in this case, the injunction did not prohibit the board of trustees from passing the proper order for the grading of this street. But they did not stop at that. The order having been passed, instead of coming to this court and presenting that order, and showing the fact that they were now in a position to proceed legally and regularly, and obtaining the order of this court allowing them to proceed, the defendants assumed the authority to go further, and, without the authority of the court, to do the very thing which this court enjoined them from doing.

The chancellor then proceeds to say: "Most unquestionably, this defendant cannot be allowed to do so, upon his obtaining an authority to close it, until he has first shown that authority to this court, and upon motion and notice to the opposite party, according to the established practice, obtained a dissolution of that general and unqualified restraint which has been imposed upon him by the injunction. This first cause shown by the defendant for his discharge, being based upon an assumed position not warranted by the proceedings, is therefore deemed insufficient. Indeed, the showing itself seems tacitly to admit the correctness of the charge of contempt, but for that qualification of the injunction which it has assumed and which has, in fact, no real existence."

§ 1622. *An injunction must be obeyed until it is dissolved by the authority, which granted it.*

Now, that is precisely the position of this case. The parties were grading, or about to grade, this street, assuming to act under the authority of the city board of trustees. By injunction issued from this court they were restrained from carrying on the work—from doing a specific thing. They then went and got another order from the same authority under which they were first acting, as was done in the case from which I have just read; and then, without

coming to this court and asking to be relieved from the injunction, on the ground that they now have proper authority, and are proceeding regularly, they undertook to go on and do the specific thing prohibited, and therefore dissolve the injunction granted by this court, by virtue of proceedings of the board of trustees of the city of Napa.

The injunction should be obeyed until it is dissolved by the authority which granted it. Undoubtedly, if a proper showing were made, if the court were satisfied that the injunction should be dissolved, it would be dissolved; but until that is done, the party himself has no right to determine the fact that he has authority to proceed, in violation of the injunction of this court, to perform the acts which have been prohibited.

For the purposes of this motion, it is assumed that the later proceedings of the board of trustees are regular in form—that the ordinance upon its face is valid. From an examination of the ordinance, and of the papers submitted, I understand that no provision has been made for draining off the water when this grade shall be carried out, and thus obviating what is claimed will be a nuisance. If such is the case, although the proceedings of the board may be regular in form, and an ordinance passed strictly in accordance with the provisions of the statutes, there still might result a private nuisance which the authorities of the city of Napa would not be permitted to create. That is one of the questions which is still left for the determination of the court, and the only question left for consideration in the case upon which the injunction issued. If it had been made to appear to the court, after the passage of this recent ordinance, that the grading of the street, without providing for drainage, would not create a private nuisance, the injunction would have been at once dissolved. The court granted the injunction because it appeared that a private nuisance was likely to be created, and because it appeared that the work was not being done under proper authority; but it does not follow that even the board of trustees of the city of Napa could take proceedings, even though regular in form, and passed in accordance with the modes provided by the statute, to create a private nuisance. In the case of *Spokes v. The Banbury Board of Health*, 1 Law Rep., Eq. Cas., 49, the board of health, proceeding strictly in accordance with the terms of the law, proceeded to, and did, cut into a stream which ran through the land of a party below, drains which were necessary to the health of the town, to carry off water and filth, thereby rendering the said party's place uninhabitable. The injured party applied for an injunction, and the court held, in very decided terms, that, even though the cutting of the drains were necessary to the health of the town, the authorities could not create such a nuisance, to the destruction of private property.

I only call attention to that case, at this time, in order to show that there are authorities holding that a private nuisance cannot be committed even by municipal authority, as that is one question still undetermined in this case, assuming the proceedings of the board of trustees to be regular in all other particulars. I leave this point open, however, till the hearing. The defendants must, therefore, be adjudged to be in contempt.

They, however, deny any intention of committing any contempt of this court, and assert that they resumed and proceeded with the work under advice of counsel that this later action of the board of trustees was sufficient authority to justify them in proceeding. I do not suppose that the contempt was wilful, and I do not propose to be vindictive in inflicting a penalty. The question of punishment for the contempt was not particularly discussed on the

hearing, and I do not know what the actual damage to the complainant has been, as there is no special evidence upon that point, and I am, therefore, not prepared at present to announce the penalty which should be inflicted. In order to enable counsel to prepare and produce evidence as to the amount of damage resulting from the performance of this work, which has been done since the issuing of the injunction, I will continue the matter until Monday, the 12th instant, at 11 o'clock in the forenoon.

§ 1623. *Practice.*—Upon motion for an attachment for disobeying an injunction, the court will not hear evidence to contradict the affidavit, or grant a rule to show cause. *Thornton v. Davis*, 4 Cr. C. C., 500.

§ 1624. A proceeding for contempt for the violation of an injunction is in the nature of a criminal proceeding, and is to be governed by the strict rules of construction which prevail in criminal cases. Its purpose is not to afford a remedy to the party injured, but to vindicate the authority and dignity of the court. *Vanzandt v. Argentine Mining Co.*, * 2 McC., 642.

§ 1625. The proper proceeding to punish a person for contempt in violating an injunction is a motion to commit, of which notice must be given to the party alleged to be in fault, and a hearing had thereon. *Gray v. Chicago, Iowa & Neb. R. Co.*, * 1 Woolw., 68. See § 1617, *supra*; *Courts*, §§ 2134-36.

§ 1626. Where a bill for freedom was filed by a slave, and also a bill to restrain the master from removing the slave out of the jurisdiction of the court, and the injunction was granted on the affidavit of the petitioner, and the defendant being before the court, and not denying that he had removed the petitioner after service of the injunction, the court refused to give any opinion on the effect of a misnomer in the injunction, or on the validity of an injunction granted upon the affidavit of a colored man, but refused to discharge him until he had given the usual security by way of recognizance. The court also refused to receive a plea of misnomer in abatement. *Thornton v. Davis*, 4 Cr. C. C., 500.

§ 1627. *Punishment.*—Where the fact of the violation of an injunction was established, and that it was wilful, although the master reported that the extent of the violation was not shown by the proofs, the court awarded as a punishment against the defendant the payment of costs and solicitor's fees, made necessary by the resistance by the defendant to the application for the attachment, in the course of the proceedings before the master, on the reference to take testimony as to the violation of the injunction. *Doubleday v. Sherman*, 8 Blatch., 45.

§ 1628. In this case the court imprisoned a party for violating an injunction. *Monroe v. Bradley*, * 1 Cr. C. C., 158.

§ 1629. *Punishment of corporation and officers.*—In cases of contempt of court by the breach of an injunction against a corporation, a fine may be levied against the corporation as well as against the individual directors and agents who committed the breach. *United States v. Memphis & Little Rock R. Co.*, * 6 Fed. R., 237.

§ 1630. Where plaintiff undertook, by stratagem, to cause defendant to violate an injunction, but failed, he was held liable for the costs of a motion for an attachment. *Sparkman v. Higgins*, * 2 Blatch., 29.

§ 1631. *Held*, also, that if the stratagem had succeeded, there would have been no ground, either in conscience or in law, for an attachment. *Ibid*.

§ 1632. *Advice of counsel.*—The trustees of the Internal Improvement Fund of the state of Florida, a trust fund created by law for the payment of certain bonds, were enjoined from selling the lands belonging to the fund except in accordance with the terms and provisions of the act creating the fund. The trustees were given a large discretion by the act. On motion for an attachment against them for a violation of the injunction, they answered, distinctly and positively denying any intention to violate the injunction, and averring that they had not done so, but had been guided by the opinion of their counsel in the endeavor to comply therewith. It was held, under the circumstances of the case, that they were not guilty of contempt. *Vose v. Trustees of Internal Improvement Fund*, 2 Woods, 647.

§ 1633. Where the officers of a railroad company who had violated an injunction did so under the advice of able and reputable counsel that they were not bound by it upon a correct construction of the injunction order, and there was no intention to disregard the orders of the court, and a construction of the injunction order was desired by counsel on both sides, the officers were held not to be guilty of any contempt. *Dinsmore v. Louisville, etc., R. Co.*, 3 Fed. R., 593.

§ 1634. *Impeachment of original decree.*—On a motion for an attachment for violation of an injunction, the original decree upon which the injunction issued cannot be impeached

except on a clear showing of fraud in its rendition, or a want of jurisdiction as to the subject-matter of the suit. *Drury v. Ewing*, 1 Bond, 540.

§ 1635. Party enjoined from asserting title to bonds.— Where, on a bill filed to establish the title of the state of Texas to certain bonds, the decree enjoined the defendant from asserting any title to the bonds, which were in possession of bailees in London, the defendant was held to have violated the injunction by serving on the bailees a written notice of his ownership, with reference to further judicial proceedings in support of it. *In re Chilea*, 22 Wall., 157 (COURTS, §§ 2171-72).

§ 1636. Injunction not served.— Those who procure an *ex parte* injunction, and make no efforts to serve it upon the persons who they claim shall be bound by it, though they are easily accessible, are not entitled to proceed for contempt upon any accidental, doubtful and disputed notice of the injunction alleged to have been conveyed indirectly, only through other persons. *In re Cary*, 10 Fed. R., 622.

§ 1637. Service on officer of corporation.— An injunction issued against a corporation alone, and served on any director, or on the treasurer, would bind him to obedience, and even without such service, if he has knowledge of it. *Hatch v. Chicago, Rock Island & P. R. Co.*, 6 Blatch., 105.

§ 1638. Doubt as to service of order.— A motion for an attachment for violation of an injunction will be denied where it is doubtful whether the writ of injunction was served on the defendant. *Whipple v. Hutchinson*, 4 Blatch., 190.

§ 1639. Service on law partner — Enjoining application for a receiver.— A preliminary injunction was issued in bankruptcy proceedings, restraining one C., a creditor of the bankrupt, and his attorney, H., from proceeding to obtain from the supreme court of the state the appointment of a receiver for the property of the bankrupt. The injunction was served, but the application for a receiver was made notwithstanding. H. was held not to be guilty of any violation of the injunction, his law partner, C., the plaintiff, having made the application, and H. having no control of his action, and having informed him of the injunction as soon as it was served on himself. But C., having been served while he was on his feet before the court making the application for a receiver, and having taken no further action except to inform the court that he was so enjoined and to hand up to the court his motion papers, with a draft order for the appointment of the receiver asked for, and not having withdrawn the application, was held guilty of a violation of the injunction, his application having been successful. *In re South Side R. Co. of Long Island*, 7 Ben., 394.

§ 1640. Service after lapse of term.— The teste of a writ, which verifies its authority, ceases to give it the character of a mandate of the court, for any primary action thereon, when the term during which the power was granted has terminated. So it was held that one could not be punished by attachment for disobeying a writ of injunction tested June 11, 1855, under an order granting the injunction April 28, 1855, and served June 4, 1856. *McCormick v. Jerome*,* 3 Blatch., 486.

§ 1641. Where the act enjoined is legalized.— Where a decree was rendered by the supreme court enjoining the existence and continuance of a bridge over the Ohio river at Wheeling, except upon condition of certain alterations, and an act of congress was subsequently passed legalizing the bridge as constructed, and, on its subsequent partial destruction by wind, a justice of the court in vacation granted an injunction restraining its reconstruction except in conformity with the requirements of the previous decree, which injunction was disobeyed, it was held that, as the court were of opinion that the act of congress afforded full authority for the reconstruction of the bridge, an attachment for the disobedience ought not to be granted. *State of Pennsylvania v. Wheeling and Belmont Bridge Co.*, 18 How., 421 (CONST., §§ 1203-12).

§ 1642. The defendant must be a party and have notice.— It seems that, in order to attach for the breach of an injunction, the party proceeded against must have been a party to the suit and had notice of the application for the injunction. *Sickels v. Borden*,* 4 Blatch., 14.

§ 1643. When the injunction is broader than the order of court defendant should have it set aside, and where there is doubt he cannot object on that ground when attached for a violation of the injunction. *Ibid.*

§ 1644. Violation by an employee.— The chief engineer of a steamboat was a party to a suit, and violated the injunction issued against him and the owners of the vessel. Upon attachment for the violation it is no excuse that he is a mere servant subject to the orders of the master of the boat. *Ibid.*

§ 1645. Complainant dealing with subject-matter.— For the purpose of preserving the status of mining property pending litigation, and upon application of the complainant, the defendant was enjoined from dealing with the property. The complainant himself, however, entered upon the property and removed certain ore. Held, that, while he could not be proceeded against for contempt in violating the injunction, the court would nevertheless compel

him to restore the property taken, and abstain from further interference; and, had the defendant asked it, might have dissolved the injunction on the ground that the complainant was no longer entitled to the exercise of the discretionary power of the court for his protection. *Vanzandt v. Argentine Mining Co.*,* 2 McC., 642.

§ 1646. In bankruptcy.—A creditor of a bankrupt, restrained by an injunction from the bankruptcy court from proceeding with an execution levied on the property of the debtor before the commencement of the bankruptcy proceedings, violates the injunction by proceeding to sell the property after service of the injunction, and is liable to attachment. *In re Atkinson*,* 7 N. B. R., 143.

§ 1647. Where, in bankruptcy proceedings, a creditor firm was enjoined from proceeding in an attachment suit against the bankrupt, and B., a member of the firm, was served with the injunction, but the suit was prosecuted to judgment notwithstanding the injunction, it was held that B. had violated the injunction by not taking affirmative steps to stop the proceedings, and by permitting the claim to be assigned, the attorney to be notified to receive instructions from the assignee, and the suit to proceed, and the property to be sold. As a punishment for the contempt, a fine was imposed equal to the amount of the attached goods at the time of the sale, together with interest and the cost of the contempt proceeding. *United States v. Bancroft*, 6 Ben., 392.

§ 1648. In patent suits.—Where a defendant in a suit for infringement of a patent has been perpetually enjoined from making or selling the patented article, he violates the injunction and is guilty of contempt, if he continues to sell, either in his own right or as agent for one to whom he has sold his establishment. *Potter v. Muller*, 1 Bond, 601. See PATENTS.

§ 1649. An infringer enjoined against the use and sale of the patented machine of the complainant, or any machine substantially the same in construction, violates the injunction by selling a machine patented by a third person who has himself been enjoined against the use of his patent as an infringement of that of the complainant. He can only purge himself of the contempt by showing that he had no knowledge of the injunction against the third person. *Woodworth v. Rogers*, 3 Woodb. & M., 135.

§ 1650. Where an attachment was moved for, for the violation of an injunction issued in pursuance of a decree in a patent suit, for the purpose of trying a question of right between the parties, and not on any charge of wilful disobedience of the orders of the court, it was held that the defendants could be heard upon the question of right without purging themselves of the contempt, and that, the defendants being adjudged guilty of contempt, the only punishment imposed should be the payment of all profits made or damages occasioned by the contempt committed by the use of the patented invention, together with the costs of the proceeding. *Ready Roofing Co. v. Taylor*, 15 Blatch., 94.

§ 1651. An injunction was obtained restraining the use, on the engine of the steamer *Metropolis*, of a certain patent. One Allen was employed by defendants in the injunction suit to so alter the engine that the running thereof would not be an infringement of the patent. *Held*, that making the said change was not using the patent, and Allen could not be punished, on those facts, for violating the injunction. *Sickles v. Borden*,* 4 Blatch., 14.

§ 1652. Where, upon a motion for an attachment for the violation of an injunction restraining the infringement of a patent, it appeared that the article sold since the decree was different from the one which had been enjoined, and the question was fairly raised whether the new article sold was an infringement, it was decided that such a question could not be disposed of on the motion and affidavits, but should be determined by a suit for infringement. *Liddle v. Cory*, 7 Blatch., 1.

4. Damages.

SUMMARY — *Bond conditioned to pay such damages as may be sustained*, § 1653.—*Court may impose terms*, § 1654.—*Where no bond has been given*, § 1655.

§ 1653. Where no specific provision for the assessment of damages is made either in the injunction bond or by any statute or rule of court, and the condition of the bond is simply to pay such damages as the parties enjoined may sustain by reason of the injunction, if the court finally decides that the party is not entitled thereto, the court is of the opinion that it has power to have the damages assessed under its direction; and decides, in this case, that it has the power to determine whether any damages ought to be recovered at all upon the bond, and that its decision that none ought to be recovered approaches so near to an exercise of discretion as to require a very clear case to reverse it. *Russell v. Farley*, §§ 1656-59.

§ 1654. A court of equity has power, upon the granting of an injunction, to impose terms and conditions upon the party asking it, in the absence of any act of congress or rule of court

upon the subject; and it also has power to mitigate the terms imposed, or relieve from them altogether, whenever in the course of the proceedings it would be inequitable or oppressive to continue them. *Ibid.*

§ 1655. Where no injunction bond has been required, the court has no power to award damages sustained in consequence of the injunction, except by making such a decree in reference to costs as it may deem equitable and just. *Ibid.*

[NOTES.— See §§ 1660-1663.]

RUSSELL *v.* FARLEY.

(15 Otto, 433-447. 1881.)

APPEAL from U. S. Circuit Court, District of Minnesota.

Opinion by MR. JUSTICE BRADLEY.

STATEMENT OF FACTS.—This case comes before us by appeal from a decree in a case in equity wherein Jesse P. Farley, as receiver of certain branch lines of the St. Paul & Pacific Railroad Company, and of all lands and other property appurtenant thereto, was complainant, and the firm of De Graff & Co., the Northern Pacific Railroad Company, the Lake Superior & Mississippi Railroad Company, B. S. Russell, G. W. Cass, receiver of the Northern Pacific Railroad Company, and C. W. Mead, general manager of said company, were defendants. The complainant was appointed receiver August 1, 1873, in a foreclosure suit brought by John S. Kennedy and others, trustees under a mortgage given by the St. Paul & Pacific Railroad Company to secure \$15,000,000 of bonds issued by a subsidiary corporation called the First Division of the St. Paul & Pacific Railroad Company, which had a contract to build the railroad, and a lease of the road for ninety-nine years. Amongst the assets supposed by the receiver to be subject to this mortgage was certain railroad iron which had been purchased in England with the money raised by the sale of the bonds, to wit, one thousand seven hundred tons lying at Glynndon, on the line of the road, and one thousand tons at Duluth, claimed by De Graff & Co., and one thousand eight hundred and sixty tons at Duluth, claimed by B. S. Russell,—that at Duluth being mostly held in the custom-house for unpaid duties, but some of it being about to be reshipped. The bill in this case was filed by the receiver in the state district court for the county of Ramsey on the 21st of June, 1875, seeking to set aside the respective transfers of iron by virtue of which De Graff & Co. and Russell claimed to hold it, and for an injunction to restrain them from removing it, or taking it from the custom-house.

By a statute of Minnesota it is declared that, “when no special provision is made by law as to security upon injunction, the court or judge allowing the writ shall require a bond on behalf of the party applying for such writ, in a sum not less than \$250, executed by him or some person for him, as principal, together with one or more sufficient sureties, to be approved by said court or judge, to the effect that the party applying for the writ will pay the party enjoined or detained such damages as he sustains by reason of the writ, if the court finally decide that the party was not entitled thereto. The damages may be ascertained by a reference or otherwise as the court shall direct.” 2 Bissell’s Statutes, 806, sec. 121.

On filing the bill in this cause, the complainant (the said receiver) obtained a temporary injunction upon giving to the defendants a bond in the penalty of \$10,000, with the following condition, to wit: “Whereas the said plaintiff is about to apply to this court for a temporary injunction enjoining and restrain-

ing the defendants, and each of them, from shipping, removing, selling, hypothecating, transporting, interfering or intermeddling with four thousand five hundred and sixty tons of iron rails now lying at Glyndon and Duluth, Minnesota, or any part thereof. Now, therefore, if the plaintiff will pay the parties enjoined by such writ, or detained thereby, such damages as they, or either or any of them, may sustain by reason of the writ, if the court finally decide that the party was not entitled thereto, the above obligation shall be void, else of full force and virtue."

De Graff & Co. having by consent rebonded one thousand tons of the iron claimed by them, the court, on the 11th of August, 1875, required a further bond from the complainant in the sum of \$79,000, the condition of which was as follows, to wit: "Whereas an injunction has heretofore been granted in this court enjoining and restraining the said defendants, and each of them, from shipping, removing, selling, hypothecating, transferring, or interfering or intermeddling with four thousand five hundred tons of iron rails now lying at Glyndon and Duluth, Minnesota, or any part thereof; and whereas said injunction is still in force and effect except as to one thousand tons of said iron, claimed by said De Graff & Co., at Duluth, aforesaid; and whereas the said court has ordered, as a condition for the continuance of said injunction, that the plaintiff execute to the defendants herein a bond in the sum of \$79,000, in addition to the bond for \$10,000 heretofore given by the plaintiff on the issuance of the injunction: Now, therefore, if the plaintiff will pay the parties enjoined by such injunction, or detained thereby, such damages as they, or either or any of them, may sustain by reason of such injunction, if the court finally decide that the party was not entitled thereto, the above obligation shall be void, else of full force and virtue."

The defendants severally answered the bill, and on the 1st of March, 1876, on application of the complainant, the cause was removed to the circuit court of the United States for the district of Minnesota. After taking a large amount of evidence, it was brought to a hearing, and, on the 13th of October, 1877, a final decree was made dismissing the bill as to De Graff & Co., without costs to either party. As to the defendant Russell, who was charged with holding one thousand eight hundred and sixty tons of the iron, it appeared that he was acting as agent for William G. Morehead, who was trustee or agent for the First Division Company in procuring the iron and carrying on the work of construction, and who had sold to De Graff & Co., subcontractors, the iron claimed by them, in part payment of moneys due them for work; and had pledged a portion of the one thousand eight hundred and sixty tons of iron (claimed by Russell) to pay Jay Cooke & Co. for advances of money, and Jay Cooke & Co. had pledged and sold it to the United States (the navy department) for a debt due to it. Some one thousand and ninety tons of the one thousand eight hundred and sixty tons in question remained at Duluth unsold, and this was claimed by Edward M. Lewis, trustee in bankruptcy of Morehead; but the court held that it was subject to the mortgage, and that the receiver was entitled to it. The decree on this part of the case was as follows, to wit:

"It is also further ordered, adjudged and decreed that the said Farley, as receiver, as against the defendant B. S. Russell, and against the defendant Edward M. Lewis, trustee in bankruptcy of William G. Morehead and others, is entitled, for the benefit of the trust which he represents, to all the iron rails in controversy herein not sold to De Graff & Co., and not pledged and sold to

the navy department; which said iron rails, subject to the customs duties to the United States, thus decreed to the said Farley as receiver, he is authorized to use in the construction of the said extension lines, or to sell at the best prices and on the best terms practicable, and apply the net proceeds thereof to the credit of the mortgage, dated April 1, 1871, executed by the St. Paul & Pacific Railroad Company to Horace Thompson, George L. Becker and William G. Morehead, trustees, who in the said trust have been succeeded by the said Wetmore, Pearsal and Denny, as trustees, and which mortgage is now being foreclosed in this court, neither party as against the other to recover costs or damages. It is further adjudged and decreed that all transfers of the one thousand eight hundred and sixty tons of iron in controversy herein claimed by defendant Russell from William G. Morehead to said Russell, except transfers relating to the iron pledged to the navy department, are null and void, and that said Russell has no right, title or interest therein as against the said Farley and said trustees. It is further ordered, adjudged and decreed that said Farley has no right, title or interest in the iron transferred to the navy department, and which is claimed herein by defendants Russell and Lewis; and it is further adjudged that neither the plaintiff nor the defendant Russell is entitled to costs or damages herein."

Russell alone appealed from this decree, and appealed only from that portion of it which declared that neither party as against the other is entitled to costs or damages.

§ 1656. *Where an injunction is granted without requiring bond, the circuit court cannot award damages to the injured party except by such a decree in the matter of costs as may be equitable.*

That an appeal does not lie from a decree in equity as to the costs merely is well settled. *Canter v. American & Ocean Ins. Co.*, 3 Pet., 307; *Elastic Fabrics Co. v. Smith*, 100 U. S., 110. But it is contended by the appellant that the circuit court had no power to decree that he was not entitled to damages, thereby precluding him from recovering damages on the injunction bond; and, if it had any power to make a decree on the subject of damages, the decree denying him damages in this case is erroneous.

Had the cause remained in the state court there can be no doubt that that court, under the Minnesota statute which required an injunction bond to be given, could have determined the question of damages. The statute expressly declares that "the damages may be ascertained by a reference, or otherwise, as the court shall direct." But the circuit court of the United States is not governed in its practice in equity by the laws of the state in which it sits, but by the rules of practice prescribed by this court and by the circuit court not inconsistent therewith; and, when these are silent, by the practice of the high court of chancery in England prevailing when the equity rules were adopted, so far as the same may reasonably be applied. Equity rule 90. The injunction bond taken by the state court, it is true, comes into the circuit court with the other proceedings in full force; but the power of the circuit court to deal with it depends upon the principles which govern the practice of that court the same as if it had been originally taken by its direction.

The question then arises whether the circuit courts have any power to make a decree on the subject of damages arising from an injunction where an injunction bond has been required. Where no bond or undertaking has been required, it is clear that the court has no power to award damages sustained by either party in consequence of the litigation, except by making such a de-

cree in reference to the costs of the suit as it may deem equitable and just. Has it any such power, or any power over the subject, where such a bond has been given? For a solution of this question it will be proper to advert briefly to the history and object of this kind of obligations.

It is a settled rule of the court of chancery, in acting on applications for injunctions, to regard the comparative injury which would be sustained by the defendant, if an injunction were granted, and by the complainant, if it were refused. Kerr on Injunctions, 209, 210. And if the legal right is doubtful, either in point of law or of fact, the court is always reluctant to take a course which may result in material injury to either party; for the damage arising from the act of the court itself is *damnum absque injuria*, for which there is no redress except a decree for the costs of the suit, or, in a proper case, an action for malicious prosecution. To remedy this difficulty, the court, in the exercise of its discretion, frequently resorts to the expedient of imposing terms and conditions upon the party at whose instance it proposes to act. The power to impose such conditions is founded upon, and arises from, the discretion which the court has in such cases to grant, or not to grant, the injunction applied for. It is a power inherent in the court, as a court of equity, and has been exercised from time immemorial. The older authorities refer to numerous instances in which it has been exercised. Chief Baron Gilbert in his *Forum Romanum*, p. 196 (repeated in Bacon's Abridgment, title Injunction. C), speaking of the course where an answer is put in, denying the equity of the bill, followed by a rule *nisi* to dissolve the injunction, says: "The plaintiff must show cause, either upon the merits, or upon filing of exceptions; if upon the merits, the court may put what terms they please upon him, as bringing in the money or paying it to the party, subject to the order of the court, or giving judgment with a release of errors, and consenting to bring no writ of error, or to give security to abide the order on hearing, or the like." See, also, Newland's Ch. Pract., 223, 224; Kerr, Injunctions, 212, 622; Story. Eq. Jur., secs. 958*b*, 959*d*. In *Marquis of Downshire v. Lady Sandys*, 6 Ves. Jr., 107, A. D. 1801, Lord Eldon said if there was a real doubt on the subject in controversy he would direct an issue, "taking care that if in the result of such a direction the defendant should be prejudiced by not being permitted to cut in the meantime [trees claimed to be ornamental], the plaintiff should undertake to pay the value if the decision should be against him." In a similar case, in 1825, the same judge made an order that the plaintiff should go before the master and give such security as would, in the master's judgment, secure to the defendants the value of all the trees which they should be prevented from cutting by the injunction, in case it should finally turn out in the judgment of the court that they ought not to have been enjoined in equity. *Wombell v. Belasyse*, id., 110, note.

Mr. Kerr, in his treatise on Injunctions, says: "In balancing the comparative convenience or inconvenience from granting or withholding an injunction, the court will take into consideration what means it has of putting the party who may be ultimately successful in the position he would have stood if his legal rights had not been interfered with. The court may often, by imposing terms on the one party, as the condition of either granting or withholding the injunction, secure the other party from damage in the event of his proving ultimately to have the legal right. . . . The defendant may be required to do such acts, or execute such works, or otherwise deal with the same, as the court shall direct; or to enter into an undertaking to refrain from doing in

the meantime the acts complained of by the bill, or to abide the order the court may make as to damages or otherwise, in the event of the legal right being determined in favor of the plaintiff. . . . So, on the other hand, as a condition of granting an injunction, [the court may] require the plaintiff to enter into an undertaking as to damages in the event of the right at law being determined in favor of the defendant, and the injunction proving to have been wrongly granted." Kerr, *Injunctions*, 212. Again, in another place, he says: "In doubtful cases where damage may be occasioned to the defendant in the event of an injunction or interim restraining order proving to have been wrongly granted, the court will require the plaintiff, as a condition of its interference in his favor, to enter into an undertaking to abide by any order it may make as to damages." Kerr, 622. In *Wilkins v. Aikin*, 17 Ves. Jr., 422, where a bill was filed to prevent the infringement of a copyright, but it being doubtful whether the defendant did more than make allowable extracts from the plaintiff's work, Lord Eldon said: "The proper course in this instance will be to permit this work to be sold in the meantime; the defendant undertaking to account according to the result of the action." Page 426.

The same practice has prevailed in this country, in some cases in pursuance of statute, and in others by the action of the court itself. As early as 1723 a law was passed in Maryland, that any person desiring to proceed in equity against a verdict or judgment rendered against him in the county court should be required to give security in double the amount of the debt for the due prosecution of the injunction and payment of debt and all costs and damages that should accrue in the chancery court, or should be occasioned by the delay, unless the court of chancery should decree to the contrary, and in all things obey such order and decree as the court should make. In 1793 an additional law was passed, to the effect that whenever application should be made for an injunction to stay proceedings at law, the chancellor should have power and discretion to require the applicant to give a bond to the plaintiff at law, with condition to perform such order or decree as the chancellor should finally pass in the cause.

Similar laws were passed in Virginia in 1787, and in New Jersey in 1799, and no doubt in other states at an early date. Their object was, where an adjudication had already been had at law, to make it compulsory on the chancellor to require security before granting an injunction. The jealousy of the courts of law at the interference of the court of chancery with their judgments is a matter of historical notoriety. But these laws did not interfere with the chancellor's discretionary power to require a bond in all other cases.

Regulations substantially similar to those above adverted to were prescribed by general rule of the court of chancery of New York prior to the adoption of the Revised Statutes. In 1828 they were codified, with amendments, in that revision. But the rule, as well as the statute, only related to injunctions for staying proceedings at law.

In 1830 the chancellor of New York, for the first time, made a general rule (No. 31), that where no special provision was made by law as to security, the *vice-chancellor*, or *master*, who allowed an injunction out of court, should take from the complainant, or his agent, a bond to the party enjoined, either with or without sureties in the discretion of the officer, in such sum as might be deemed sufficient, not less than \$500, conditioned to pay such party all damages he might sustain by reason of such injunction if the court should decide that the complainant was not entitled to the same; and that the damages

might be ascertained by a reference or otherwise, as the court should direct. 1 Hoff. Ch. Pr., 80; 1 Barb. Ch. Pr., 622; 2 Paige (N. Y.), 122. The object, no doubt, was to prevent hasty and oppressive injunctions from being issued by subordinate officers.

This rule, enlarged and made applicable to all courts and judges, was copied in the New York Code of Procedure of 1848, section 195 (now section 222), and has been followed in other codes and systems of practice in other states. See 2 R. S. Wisconsin, 748; also Laws of Illinois, Iowa, Colorado, etc. It was substantially adopted in the chancery rules of New Jersey in 1853, except that it was left to the discretion of the officer to require a bond or not. It was copied in the statutes of Minnesota, under which the bonds in the present case were taken, as may be seen by comparing it with the section of said statutes already cited.

§ 1657. *In the absence of acts of congress and rules of court, the circuit court can impose terms before granting an injunction, and relieve from them whenever it is oppressive to continue them.*

But no act of congress or rule of this court has ever been passed or adopted on this subject. The courts of the United States, therefore, must still be governed in the matter by the general principles and usages of equity. To these we have already adverted so far as concerns the power to require security or impose terms before granting an injunction. It remains to notice the control which a court of chancery may exercise in relieving from or modifying such terms during the progress or at the termination of the cause, and of enforcing and carrying out the conditions imposed or the undertakings entered into.

Since the discretion of imposing terms upon a party, as a condition of granting or withholding an injunction, is an inherent power of the court, exercised for the purpose of effecting justice between the parties, it would seem to follow that, in the absence of an imperative statute to the contrary, the court should have the power to mitigate the terms imposed, or to relieve from them altogether, whenever in the course of the proceedings it appears that it would be inequitable or oppressive to continue them. Besides, the power to impose a condition implies the power to relieve from it. If, for example, it is deemed proper, upon an application for an injunction, to require, as a condition of granting or withholding it, that a sum of money should be paid into court, or that a deed or other document should be deposited with the register, and the developments of the case are afterwards such as to make it manifestly unjust to retain the fund or document and deprive the owner of its use, the court assuredly has the power (though, undoubtedly, to be exercised with caution) to order it to be delivered out to the party. When the pledge is no longer required for the purposes of justice, the court must have the power to release it, and leave the parties to the ordinary remedies given by the law to litigants *inter sese*. Where the fund is security for a debt or a balance of account, or other money demand, this would rarely be allowable; but in many other cases it might not unfrequently occur that injustice would result from keeping property impounded in the court. On general principles the same reason applies where, instead of a pledge of money or property, a party is required to give bond to answer the damage which the adverse party may sustain by the action of the court. In the course of the cause, or at the final hearing, it may manifestly appear that such an extraordinary security ought not to be retained as a basis of further litigation between the parties; that the suit has been fairly and honestly pursued or defended by the party who was required to

enter into the undertaking, and that it would be inequitable to subject him to any other liability than that which the law imposes in ordinary cases. In such a case it would be a perversion, rather than a furtherance, of justice to deny to the court the power to supersede the stipulation imposed.

Against this view, however, the appellants have strenuously urged the case of *Novello v. James*, 5 De G., M. & G., 876, in which an injunction against the sale of certain compositions of Mendelssohn in violation of a copyright was obtained on an undertaking of the plaintiff to abide the order of the court as to damages. After a three years' litigation the case was decided against the plaintiff. The legal title having been a doubtful one, the plaintiff moved that his bill might be dismissed without costs, and the defendant moved that the plaintiff might be decreed to pay him damages sustained by reason of the injunction. The vice-chancellor decided that the proper damages would be the costs of the suit. Upon appeal, this order was reversed, upon the ground that the defendant, under the circumstances, had a right to insist on having his damages ascertained, either by reference to an officer of the court or by a trial at law. The lords justices thought that it would be unjust to the defendant to disregard, or not to give effect to, the undertaking which was the price at which the plaintiff accepted the injunction; and that there was not sufficient evidence before the vice-chancellor to enable him to decide what the defendant's damages amounted to, or whether the costs, supposing him not otherwise entitled to them, were a just measure of the damages.

It is evident from a careful reading of this case that the decision was based on the merits; and that the lords justices were of opinion that the defendant was entitled to damages, not as a matter of course because an undertaking had been given, but as a matter of justice and equity, which the undertaking would enable him to enforce. They held, therefore, that evidence of the damages should have been taken; and that the decree of the vice-chancellor was erroneous, because made without any such evidence. We do not perceive that this case is at all adverse to the view which we have taken.

When the court sees no just cause for superseding or suspending the effect of an injunction bond or undertaking, it should be enforced in pursuance of its terms; and the party for whose benefit it was given will be entitled to an assessment of damages.

§ 1658. *Where the mode of assessing damages is not prescribed by bond, nor statutes, nor rule of court, they may be assessed under the direction of the court or the party remitted to his action at law.*

But then arises the question (not essential, however, to be decided in this case) how the damages should be assessed, and on this point different opinions have been entertained. Sometimes the form of the bond itself, or the order requiring it, or the statute or rule of court under which it is given, prescribes the mode of assessment, as by a reference, or otherwise, as the court shall direct. This is the ordinary course in England, and is that prescribed in Chancellor Walworth's order, which, as before stated, is followed in several state statutes, and, amongst others, in the statute of Minnesota. In such case no question can arise as to the authority of the court of chancery to cause the damages to be assessed under its own direction.

But where, as in the present case, no specific provision is made either in the bond or by any statute or rule of court, and the condition of the bond is simply to pay such damages as the parties enjoined may sustain by reason of the injunction, if the court finally decide that the party was not entitled thereto, as

before stated, some difference of opinion exists as to the power of the court of chancery to assess the damages, and whether the only proper method is not an action at law on the bond. The appellants insist that the latter is the only proper and legal course. In the case of *Bein v. Heath*, 12 How., 168, 179 (§§ 1598-1601, *supra*), Mr. Chief Justice Taney made this remark: "A court proceeding according to the rules of equity cannot give a judgment against the obligors in an injunction bond when it dissolves the injunction. It merely orders the dissolution, leaving the obligee to proceed at law against the sureties, if he sustains damage from the delay occasioned by the injunction." In that case an injunction bond had been given to stay proceedings on an executory process in the circuit court for the district of Louisiana, and, in an action on the bond, that court had given judgment against the sureties, not merely for the damages arising from the delay caused by the injunction, but for the whole debt, interest and costs, in accordance with the law of Louisiana, where injunction bonds are binding to that extent, and where judgment is usually given against the sureties as parties to the cause, on dismissing the injunction, similar to the proceeding against stipulators in admiralty. This court held that the circuit courts sitting in equity could not take such a bond or give it such effect, and reversed the judgment. The remark that the bond must be prosecuted at law was a mere passing remark; it was so prosecuted in that case; but from the great experience of the chief justice, it undoubtedly expressed the prevailing practice with regard to ordinary injunction bonds given under the Maryland statute in cases of injunctions to stay proceedings at law. Whether the remark can be understood as having a wider scope is doubtful.

A decision on the point, however, was made by Mr. Justice Curtis, on the first circuit, in the case of *Merryfield v. Jones*, 2 Curt., 306. That was a patent case in which an injunction had been issued upon condition of entering into bond to pay the defendant any damages he might suffer by reason of the injunction if finally determined not to be rightful. On dismissal of the bill, motion was made to refer to a master the question of damages. Mr. Justice Curtis denied the motion, holding that the party's remedy was an action at law; but he only referred to the case of *Bein v. Heath*. The opinion is brief, and it does not appear that the question was very fully examined. The learned justice seemed to think that, inasmuch as the bond gave a legal action, the court sitting in equity had no jurisdiction over the question of damages.

Other cases are referred to by the counsel of the appellants to sustain their position, but, upon a careful examination, we are not satisfied that they furnish any good authority for disaffirming the power of the court having possession of the case, in the absence of any statute to the contrary, to have the damages assessed under its own direction. This is the ordinary course in the court of chancery in England, by whose practice the courts of the United States are governed, and seems to be in accordance with sound principle. The imposition of terms and conditions upon the parties before the court is an incident to its jurisdiction over the case; and, having possession of the principal case, it is fitting that it should have power to dispose of the incidents arising therein, and thus do complete justice and put an end to further litigation. We are inclined to think that the court has this power; and that it is an inherent power which does not depend on any provision in the bond that the party shall abide by such order as the court may make as to damages (which is the usual formula in England); nor on the existence of an express law or rule of court (as adopted in some of the states) that the damages may be ascer-

tained by reference or otherwise, as the court may direct; this being a mere appendage to the principal provision requiring a bond to be taken, and not conferring the power to take one, or to deal with it after it has been taken. But whilst the court may have (we do not now undertake to decide that it has) the power to assess the damages, yet, if it has that power, it is in its discretion to exercise it or to leave the parties to an action at law. No doubt, in many cases, the latter course would be the more suitable and convenient one.

In the present case, however, the court did not attempt to assess any damages which the defendants may have sustained in consequence of the injunction and proceedings in the cause, but decreed that it was not a case for damages; in other words, that the bond ought not to be prosecuted. That damages were sustained is very probable. Such a litigation as this was could hardly fail to result in damage to all the parties engaged in it. But it is generally *damnum absque injuria*. The question before the court, or at least that which it undertook to determine, was whether, under the circumstances of the case, any damages at all ought to be recovered. Its decision was that none ought to be recovered; or, in effect, that the bond ought not to be prosecuted. In view of what has already been said, we think that the court had power to decide this question.

§ 1659. *When a matter is very nearly within the judicial discretion of the trial court, the decision should not be disturbed except upon very clear grounds.*

But the appellants contend that, even if the court had the power to pass upon the question at all, its decision was erroneous, and ought to be reversed on the merits. On this point, the judgment of the court approaches so near to an exercise of discretion that we should require a very clear case to be made in order to induce us to reverse it. The conduct of the parties and the course of litigation in the court below pass so directly under the inspection of that court as to give it many advantages which no other court can possess for forming a correct decision on the question whether any extra damages should be allowed for the issuance of the injunction. Nevertheless, we have looked at the case with the view of ascertaining whether injustice has been done. And at the very threshold of the inquiry, we are met by the prominent fact that the injunction has never been entirely dissolved, and it has never been decided that the complainant was not entitled to it, at least for a portion of the iron claimed by the appellant. The latter strenuously defended the suit as to the whole; but it turns out on the final hearing that, as to more than half of it, his claim is unsupported, and that the injunction was properly issued. A decree was made accordingly, from which no appeal has been taken. We must presume that it was equitable and just. This fact alone would make a *prima facie* case for the decree in relation to damages. We have not been able to find anything in the record which leads us to think that it was erroneous or improper.

Decree affirmed.

§ 1660. **Damages.**—Under section 7 of the act of June 24, 1812, when an injunction staying proceedings on a judgment in the circuit court of the District of Columbia is dissolved, damages at the rate of ten per centum must be allowed, unless it is granted to obtain a discovery, or any part of the judgment remains enjoined. *Mason v. Muncaster*, 8 Cr. C. C., 408.

§ 1661. In assessing damages sustained by an injunction restraining the cutting of timber on public land of the United States, the government value of the land affords no criterion. *Jordan v. Updegraff, McCahon*, 103.

§ 1662. In a suit to recover possession of a mining claim, a temporary injunction was granted restraining the defendants from working the claim. The title was decided in favor of the defendants, and they brought a suit for damages on the injunction bond. It was de-

cided that they could recover the value of their time for the time they were compelled to remain idle by being restrained from working the mine; that they could not recover for attorneys' fees and expenses incurred in defending the action to determine the title; and that they could recover for attorneys' fees and expenses in procuring a dissolution of the injunction. *Campbell v. Metcalf*,* 1 Mont. Ty, 378.

§ 1668. *Quære*: Whether a court of chancery on dissolving an injunction will itself proceed to assess damages resulting therefrom, or send defendant to a suit at law on the injunction bond. *Browning v. Porter*,* 2 McC., 581.

5. Procedure.

SUMMARY — *Mandatory in fact, but preventive in form; interlocutory application, § 1664. — Dissolution; denials of answer, § 1665. — Removal to federal courts, §§ 1666, 1667. — Continued till final hearing, § 1668. — Practice on dissolution, 1669.*

§ 1664. In a suit in equity to prevent a diversion of water of which the complainant claimed to be the owner, for purposes of mining, by prior discovery and appropriation, the court refused to dissolve a preliminary injunction upon the ground that it was mandatory in fact though preventive in form; being of opinion that a court of equity could grant an injunction, upon an interlocutory application, which would require the defendants to do substantive acts in order to obey it, but that this jurisdiction should only be exercised where irreparable injury would follow from a neglect to do the acts required. *Cole Silver Mining Co. v. Virginia Gold Hill Water Co.*, §§ 1670-72.

§ 1665. A denial in the answer of the allegations of the bill, not purporting to be made upon any personal knowledge possessed by the defendants, but only according to their information and belief, is not sufficient to authorize the dissolution of a preliminary injunction. *Ibid.*

§ 1666. When a bill for an injunction has been removed from a state to a federal court after the allowing of the preliminary injunction by the former, the latter may, before the time for final hearing, modify the injunction. *City of Portland v. Oregonian R'y Co.*, §§ 1673-75.

§ 1667. In 1880 the legislature of Oregon granted to the Oregonian Railway Company an unimproved and vacant piece of land in the city of Portland, which had been dedicated to that city by map and ordinance for a public levee, to be held and used by the company for tracks, side tracks, depots, and such other erections as were found necessary or convenient; saving to the city of Portland, however, whatever property rights it might have in the land which the state could not lawfully grant away. The grant was to be forfeited if the road was not completed within a certain time. The city filed a bill in a state court to enjoin the company from occupying or using the premises, claiming that the act of the legislature was void. On the removal of the case to the federal court, the company petitioned for a modification of the injunction so as to allow it to use the premises for tracks and side tracks, in order to enable it to complete its road in time to prevent a forfeiture of the grant. It was held that the suit was only a suit to try the title; that the presumption was in favor of the validity of the act; and that, as the work was one of public importance, as the laying of the tracks would not injure the premises, and as the injunction, if continued as it stood, would cause great injury to the company, the injunction should be modified as prayed. *Ibid.*

§ 1668. Where the question presented by a bill for an injunction is difficult and cannot be determined until the final hearing, it is usual to continue the injunction in force and thus keep the parties *in statu quo* until the final hearing. But there are exceptions to this rule, and equity will sometimes substitute a bond of indemnity for an injunction if the ends of justice demand it, and especially if any public interest may suffer by continuing the injunction in force pending the litigation. The complainant had for years operated a railroad running across the state of Minnesota, having constructed it under authority of an act of congress passed when the land on which it was built was public land. But at the time the road was located and built the land was owned by S., to whom it had in the meantime been patented. The respondents, claiming through S. by mesne conveyances, began the construction of their road across it and across the track of the complainant, without making compensation, as neither S. nor any of his grantees had ever sought any damages from the complainant for the land taken by it. The complainant sought to enjoin the respondents. There was no doubt as to the right of the respondents to cross the track of the complainant, the controversy being not as to the amount of damages, but as to the right of the complainant to any damages; and this question depended for its solution upon doubtful questions of law and fact. The court, anticipating that a somewhat protracted litigation might precede the decision of this question, refused to continue the injunction until the final hearing, and, instead of stopping the progress of what was considered to be a great work of internal improvement and of general and public

as well as of private importance, required a bond to be given, and allowed the work to go on. *Northern Pacific R. Co. v. St. Paul, etc., R. Co.*, §§ 1676-78.

§ 1669. Common injunctions are dissolved as a matter of course if the answer denies the whole merits of the bill, and the plaintiff will not be permitted to read affidavits in contradiction to the answer, upon the motion to dissolve the injunction. But the granting and dissolving of special injunctions in cases of irreparable mischief rests in the sound discretion of the court, whether applied for before or after answer; and the affidavits, whether filed before or after the answer, whether they are to the title of the plaintiff or to the acts of the defendant, though they are contradictory to the answer, and the answer contradicts the substantial facts of the bill, may be read in support of the injunction. The defendant may also read affidavits in support of his motion. But if the rule applicable to common law injunctions were also applicable to special ones, the answer would furnish no ground for an application to dissolve the injunction where it does not positively deny the material facts, or the denial is merely from information and belief. A bill was filed to enjoin the sale or transfer of certain shares of stock which the complainant claimed. The defendants denied the allegations of the bill, but had no personal knowledge of the transactions set forth by it. In opposition to a motion to dissolve the injunction the plaintiff insisted that it would cause him irreparable mischief, and offered to read certain depositions to establish that one of the principal defendants was insolvent, that another was indigent and irresponsible and of a low character, and that the third was a minor. The depositions were allowed to be read and the motion to dissolve the injunction was refused. *Poor v. Carleton*, §§ 1679-85.

[NOTES.—See §§ 1686-1772.]

THE COLE SILVER MINING COMPANY v. THE VIRGINIA GOLD HILL WATER COMPANY.

(Circuit Court for Nevada: 1 Sawyer, 685-695. 1871.)

Opinion by FIELD, J.

STATEMENT OF FACTS.—This is a motion to dissolve an injunction issued upon the bill of complaint. It is made upon three grounds:

1. That Herman Glauber, who is a citizen of the state of California, is an indispensable party defendant in the suit, without whose presence the court cannot proceed to a decree.

2. That the injunction, though preventive in form, is mandatory in fact, and an injunction of this character cannot issue upon an interlocutory application.

3. That the equities of the bill are fully denied by the answer.

I. The question whether Glauber is an indispensable party depends upon the further question, whether he is materially interested in the matter in controversy, or object of the suit, and that interest would be necessarily affected by any available decree consistent with the case presented by the bill.

§ 1670. *All persons materially interested in the matters in controversy should be made parties.*

It is undoubtedly a general rule in equity that all persons materially interested in the matter in controversy, or object of the suit, should be made parties, in order that complete justice may be done and a multiplicity of suits be avoided. And usually when it appears that persons thus interested are not brought in, the court will order the case to stand over until they are made parties.

§ 1670a. *If the interests of absent parties are severable, equity will proceed without them; otherwise not.*

A court of equity, as has been said by a distinguished chancellor, delights to do complete justice, and not by halves. But sometimes, from the residence of parties thus interested, the court is unable to bring them all before it. Particularly is this so with the circuit court of the United States, which possesses no power to authorize a constructive service of process upon absent or non-resident defendants, and which can only exercise its jurisdiction in that

class of cases depending upon the citizenship of the parties, where all the parties, however numerous, on one side, are from a state different from that of the parties on the other side. In all such cases the court will consider whether it is possible to determine the controversy between the parties present, without affecting the interests of other persons not before the court, or by reserving their interests. If the interests of those present are severable from the interests of those absent, such determination can generally be had, and the court will proceed to a decree. But if the interests of those present and those absent are so interwoven with each other that no decree can possibly be made affecting the one without equally operating upon the other, then the absent persons are indispensable parties, without whom the court cannot proceed, and, as a consequence, will refuse to entertain the suit. *Shields v. Barrow*, 17 How., 130; *Barney v. Baltimore City*, 6 Wall., 280 (COURTS, §§ 1221-25).

The inquiry, then, is this: Whether Glauber possesses any interest in the controversy, or object of the suit, which is so interwoven with that of the other defendants that no available decree consistent with the case presented by the bill can be rendered against them, which will not necessarily affect him. The suit is brought to prevent a diversion of water of which the complainant claims to be the owner by discovery and prior appropriation. The water, or, which amounts to the same thing, the exclusive use of it, is the matter in controversy, and the substantial object of the suit is to prevent any interference with such use by the defendants. Glauber, according to the allegation of the bill, is not interested in the water in controversy, but only in the tunnel by means of which the water is diverted.

Now if a decree can be rendered which will secure to the complainants the exclusive use of the water, and at the same time leave the right and interest of Glauber in the tunnel unimpaired, the objection founded upon his absence as a party defendant will not be tenable. The learned counsel of the defendants intimated on the argument of the case, that, should the court ultimately determine that the complainant is entitled to the water, it might be necessary to decree that the tunnel be filled up. If only a decree of that character can be rendered to give protection to the complainants' rights, then undoubtedly Glauber is an indispensable party. But the complainants' counsel suggest several forms in which a decree may be made protecting the asserted rights of the complainants without in any respect trenching upon Glauber's rights in the tunnel. The defendants might, for instance, be restrained from interfering with the water or performing acts to prevent the resumption by the complainants of its possession and use. It is stated that even if the defendants should not be decreed to do any specific act, such as the erection of a bulkhead or the restoring of the water diverted, a decree would not be altogether fruitless which would allow the complainants to pump the water from the bed of the Nevada Tunnel into its own tunnel, provided no counter work should be carried on in the Nevada Tunnel to prevent such pumping; or allow the complainants to resume possession of the water at the mouth of the tunnel. A decree which would enjoin the defendants from opposing the complainants' resumption of the water in either of these modes would substantially accomplish the objects of the suit, and at the same time leave the Nevada Tunnel and the interests of Glauber therein as they existed previously.

§ 1671. *Where the bringing in of a material absent defendant would oust the jurisdiction, equity will strain hard to give relief as between the parties present.*

It would certainly be going a great way, and not entirely consistent with

proper respect for my associate, who is possessed, in the circuit court, with equal authority with myself, if I should undertake to determine against his conclusions upon substantially the same representation of facts, without leave first granted for a re-argument of the question, that Glauber is an indispensable party, and thus decide, in advance of the presentation of the entire case, that no decree could possibly be rendered which would afford protection to the complainant without infringing upon the rights of the absent Glauber. I shall leave the matter to his determination, simply observing that in a case of this kind, when the absent person alleged to be interested would, if brought into court, oust its jurisdiction, I should follow the course suggested by Mr. Justice Story in *West v. Randall*, 2 Mason, 196, and strain hard to give relief as between the parties before the court.

§ 1672. *A preliminary injunction may be mandatory in effect. Authorities reviewed.*

II. The injunction, although preventive in form, is undoubtedly mandatory in fact. It was intended to be so by the circuit judge who granted it, and the objection which is now urged for its dissolution was presented to him, and was fully considered. I could not with propriety reconsider his decision, even if I differed from him in opinion. The circuit judge possesses, as already stated, equal authority with myself in the circuit, and it would lead to unseemly conflicts, if the rulings of one judge, upon a question of law, should be disregarded, or be open to review by the other judge in the same case.

But were I not restrained by this consideration from interfering with the order of the circuit judge, I should hesitate before dissolving the injunction upon the ground stated. The benefit of the preventive remedy afforded by courts of equity in the process of injunction would often be defeated, if the remedy only extended to cases where obedience would not require any affirmative acts on the part of the party enjoined.

The owner of flumes, aqueducts or reservoirs of water might, for instance, flood his neighbor's fields by raising the sluice gates to these structures, and, if the flowing should not be speedily stayed, might destroy the latter's crops; and yet, according to the argument of the learned counsel, no injunction could issue to restrain the owner from continuing the flood, if obedience to it should require him to do the simple affirmative act of closing his gates. The person whose fields were inundated and whose crops were destroyed, in the case supposed, would find poor satisfaction in being told that he must wait until final decree before any process could issue to compel the shutting of the gates, and he must seek compensation for the injuries his property may suffer in the meantime, in an action at law.

There is no species of property requiring more frequently for its protection and enjoyment the aid of a court of equity, and particularly of its preventive process of injunction, than rights to water. For purposes of mining as well as for ordinary consumption, water is carried in the mining regions of Nevada and California over the hills and along the mountains for great distances, by means of canals and flumes and aqueducts, constructed with vast labor and enormous expenditures of money. Whole communities depend for the successful prosecution of their mining labors upon the supply thus furnished; and it is not extravagant to say that much of the security and consequent value of this species of property is found in the ready and ample protection which courts of equity afford by their remedial processes of injunctions, anticipating threatened invasions upon the property, restraining the continuance of an invasion when

once made, and preserving the property in its condition of usefulness until the conflicting rights of contesting claimants can be considered and determined. The limitation of the process to cases calling for no affirmative action on the party enjoined would strip the process in a multitude of cases of much of its practical benefit.

I am aware that there are adjudications of tribunals of the highest character denying the authority of a court of equity, on a preliminary application, to issue an injunction, even in a restrictive form, when its obedience would require the performance of a substantive act.

Such is the case of *Andenreid v. The Philadelphia & Reading Railroad Company*, recently decided in the supreme court of Pennsylvania, to which my attention has been called by the defendants' counsel (since reported in 68 Penn. St., 370). The opinion in that case was delivered by Judge Sharswood, who is a jurist of national reputation, and anything which falls from him is justly entitled to great consideration. He states that the authorities both in England and in this country are very clear that an interlocutory or preliminary injunction cannot be mandatory. By this he means, I suppose, that the authorities show that such an injunction cannot be mandatory in form, for he refers to the case of *Lane v. Newdigate*, 10 Ves., 193, where Lord Eldon ordered an injunction to be drawn so that, although restrictive on its face, it compelled the defendants to do certain specific things. Of that case the learned judge observes that it is not a precedent which ought to be followed in any court, and that a tribunal which finds itself unable directly to decree a thing, ought never to attempt to accomplish it by indirection.

Notwithstanding the great respect I entertain for the opinions of Judge Sharswood, and for the decisions of the supreme court of Pennsylvania, I am not prepared to assent to the view of the authorities stated in the case cited, nor to the conclusion there expressed that the cases in England ought not to be followed in any instance.

Certain it is that the jurisdiction of the court of chancery in England to decree in special cases upon motion the issue of injunctions which, though restrictive in form, may still require for their obedience the performance of substantive acts, has been uniformly maintained since the time of Thurlow. In *Robinson v. Byron*, 1 Brown's Ch. Cas., 588, a motion was made for injunction upon affidavits, stating that since April 4, 1785, the defendant who had large pieces of water in his park, supplied by a stream which flowed to the mill of the plaintiff, had at one time stopped the water, and at another time let in the water in such quantities as to endanger the mill. The lord chancellor, Thurlow, ordered an injunction to restrain the defendant "from maintaining or using his shuttles, floodgates, erections and other devices, so as to prevent the water flowing to the mill in such regular quantities as it had ordinarily done before the 4th of April, 1785." The defendant was, therefore, compelled by this injunction, to remove such floodgates and other erections as he had constructed if they impeded the regular flow of the water as it had existed before the date designated.

In *Lane v. Newdigate*, 10 Ves., 192, already mentioned as referred to by Judge Sharswood, the plaintiff was assignee of a lease granted by the defendant for the purpose of erecting mills and other buildings, with covenants for the supply of water from canals and reservoirs on the defendant's estates, reserving to the defendant the right of using the water for his own collieries. The bill prayed generally that the defendant might be decreed to use and man-

age the waters of the canal so as not to injure the plaintiff in the occupation of his manufactory, but particularly that the defendant might be restrained from using certain locks, and thereby drawing off the water which would otherwise run to and supply the manufactory, and be decreed to restore a particular cut for carrying away the waste waters, and a certain stop-gate, and to restore the banks of the canal to their former height, and also to repair such stop-gates, bridges, canals and towing-paths as existed previous to the lease, and to remove certain locks since made. Upon motion for an injunction, the lord chancellor, Eldon, expressed a doubt whether it was according to the practice of the court to decree repairs to be done, but finally made an order restraining the defendant from impeding the plaintiff in the use and enjoyment of the demised premises and the mills erected thereon, and the privileges granted by the lease, by continuing to keep the canals, or the banks, gates, locks or works, out of repair; and from preventing such use and enjoyment by diverting the water or the use of any locks erected by the defendants, or by continuing the removal of the stop-gate, the chancellor observing at the same time that the injunction would create the necessity of restoring the stop-gate.

In *Rankin v. Huskisson*, 4 Sim., 13, the defendants were restrained, on motion, by Vice-Chancellor Shadwell from continuing the erection of stables on certain premises agreed to be laid out as an ornamental garden, adjoining a club house, and from preventing such part of the building as was already erected from remaining thereon. They were therefore compelled to remove the building already commenced.

In *Hepburn v. Lordon*, 2 Hemm. & Mill., 345, the defendants were restrained, upon motion, by Vice-Chancellor Wood from allowing inflammable damp jute deposited on premises adjoining those of the plaintiff, to remain there, and from bringing any more in such quantities as to occasion danger to the plaintiff's property.

Other cases to the same purport might be cited, but these are sufficient, I think, to show that a court of equity has jurisdiction to issue, upon an interlocutory application, an injunction which will operate to compel the defendants, in order to obey it, to do substantive acts. It is a jurisdiction which should only be exercised in a case where irreparable injury would follow from a neglect to do the acts required. Some of the adjudged cases evince a disposition on the part of the court to restrict rather than enlarge this jurisdiction. *Blakemore v. Glamorganshire Canal Co.*, 1 Mylne & K., 154. Undoubtedly the general purpose of a temporary injunction is to preserve the property in controversy from waste or destruction or disturbance until the rights and equities of the contesting parties can be fully considered and determined. Usually this can be effected by restraining any interference with it; but in some cases the continuance of the injury, the commencement of which has induced the invocation of the authority of a court of equity, would lead to the waste and destruction of the property. It is just here where the special jurisdiction of the court is needed — to restore the property to that condition in which it existed immediately preceding the commencement of the injury, so that it may be preserved until final decree.

III. It only remains to consider whether the equities of the bill are so fully denied by the answer as to justify the dissolution of the injunction. The material allegations of the bill are that the complainant, in running certain tunnels into its mining claims, discovered and appropriated the water in controversy; and that the defendants subsequently, by means of the Nevada Tunnel, struck

the water, and diverted it from the complainant. These allegations are not positively denied by the answer.

The construction of the tunnels of the complainant, and the diversion of the water by the defendants through the Nevada Tunnel, are admitted. The discovery and prior appropriation of the water by the complainant are only denied upon information and belief; and every denial which relates to the title of the water is made in a similar manner. Denials in that form may be sufficient to raise an issue for trial, but they amount, for the purposes of the motion, to no more than hearsay evidence. They will not justify the dissolution of the injunction.

"The sole ground," says Mr. Justice Story, "upon which the defendants are entitled to a dissolution of an injunction upon an answer is that the answer in effect disproves the case made by the bill, by the very evidence extracted from the conscience of the defendant, upon the interrogation and discovery sought by the plaintiff to establish it. But what sort of evidence can that be, which consists in the mere negation of knowledge by the party appealed to? Such negation affords no presumption against the plaintiff's claims; but merely establishes that the defendant has no personal knowledge to aid it or disprove it. It is upon this ground that it has been held, and in my judgment very properly held, that if the answer does not positively deny the material facts, or the denial is merely from information and belief, it furnishes no ground for an application to dissolve a special injunction." *Poor v. Carlton*, 3 Sumn., 78 (§§ 1679-85, *infra*); see, also, *Roberts v. Anderson*, 2 Johns. Ch., 202; *Ward v. Van Bokkelen*, 1 Paige, 100; *United States v. Parrott*, 1 McAl., 300.

The same objection applies to the allegations respecting the new matter relied upon to establish prior rights in the two Schiels, with whom the defendants claim to be in privity. Upon inspection of the answer, it appears that all which is stated in relation to the origin, working, continuance and transfer to the defendants of the claims of these parties is founded upon information and belief.

The statement does not purport to be made upon any personal knowledge possessed by the defendants, but only "according to their information and belief." Allegations resting upon this foundation furnish no ground for disturbing the injunction. For all the purposes of this motion the case stands precisely as though these allegations were omitted from the answer.

The questions suggested by the learned counsel of the defendants — whether the water exists in such state or condition as to render its diversion, under the circumstances, remediable, or anything more than *damnum absque injuria*; and whether the injunction is consistent with the policy and license of the general government to miners upon public lands — can be better considered and more justly determined on the hearing after the entire facts of the case are developed by the evidence.

Upon the case as presented, I am of opinion that the injunction should be continued until the hearing. The motion to dissolve the injunction is therefore denied.

CITY OF PORTLAND v. OREGONIAN RAILWAY COMPANY.

(Circuit Court for Oregon: 7 Sawyer, 122-127. 1881.)

Opinion by DEADY, J.

STATEMENT OF FACTS.—At the last session (1880) of the legislative assembly an act was passed granting the defendant — the Oregonian Railway Company,

limited — among other things, the use of the triangular-shaped piece of ground lying between the east line of blocks 112 and 113 of the city of Portland, and the east bank of the Wallamet river, the same being, as appears from the map, about five hundred and twenty feet long and fifty feet wide at the south end, and three hundred feet at the north end, and known as the “Public Levee,” and dedicated to public use as a levee, by a map and ordinance of the plaintiff — the city of Portland — recorded March 6, 1869, “to be held, used and enjoyed for occupation by track, side-track, water stations, depot buildings, wharves and warehouses,” and such other “erections” as may be found necessary or convenient in the shipping and storing of freight under the exclusive control of the owners of the railway then being constructed by the defendant from Portland to the head of the Wallamet valley, with a proviso that the defendant should not sell or assign the premises otherwise than as an appurtenance to said railway, and that said grant shall be forfeited if said railway is not completed to the said premises before January 1, 1882; saving to the plaintiff “any pecuniary or property rights” which it may have in said premises “as a municipal corporation, and which the state may not lawfully appropriate in this act.” In pursuance of this act the plaintiff entered upon the premises and commenced to prepare the ground for the uses specified in the act.

The plaintiff, claiming the act of the legislature to be in excess of its power, and therefore void, on January 31, 1881, commenced a suit in the state circuit court for this county perpetually to enjoin the defendant from occupying or using the premises thereunder, and on the same day obtained an *ex parte* order for a temporary injunction restraining the defendant as prayed for in the bill, which was served on February 2, thereafter. Afterwards, on February 17, the suit, on the petition of the defendant, was removed to this court and a transcript filed herein on February 25.

On March 17, the plaintiff filed a petition asking that the injunction heretofore granted be modified so as to allow it the use of the premises for a track and side-tracks to facilitate the construction of its road from Portland to the point where it will connect with the junction of the sections thereof already constructed between a point in Marion county and Brownsville, Linn county, on the east side of the Wallamet river, and Dayton, and Sheridan and Dallas on the west side, stating that it is the owner of the east part of block 71, lying immediately north of said levee, and has a wharf thereon for the loading and unloading of sea-going vessels; that the iron for constructing said railway must be imported in such vessels, and that if allowed the use of the levee as aforesaid, in connection with said block 71 and wharf thereon, it can receive and forward said iron at a great saving of time and expense; that no use is now being made of said levee, and that a track can be laid across it without interfering with the use of it as a levee, and without materially affecting the surface of the ground. On March 21, the plaintiff showed cause against the application by the affidavit of its clerk, and the matter was argued by counsel.

§ 1673. *Upon the removal of a cause the United States circuit court can modify or allow an injunction before the first day of its next term.*

There is no doubt of the power of the court to grant this petition at this stage of the proceedings. For although the cause is not for trial or hearing in this court until the first day of the next term — the second Monday in April — yet, it is in this court from the date of the removal, and such conservatory acts as the allowance or modification of an injunction may be had

therein at any time thereafter. *Mahoney Mining Co. v. Bennett*, 4 Saw., 289; *New Orleans City R. Co. v. Crescent City R. Co.*, 5 Fed. R., 160.

The final determination of this case will turn upon the validity of the legislative act granting the use of the premises to the defendant.

§ 1674. *Presumption in favor of validity of a statute. Limitation of an injunction to such restraints as are necessary to preserve the property to its proper uses in case of an adverse decision.*

The presumption is in favor of the validity of the act, and at this stage of the litigation this presumption ought to have weight. At least it will not do to assume that the act is invalid, but only that it may be so. There are no particular equities in the bill which the defendant must answer before it is entitled to a modification of this injunction. At best, it is only a suit to try the title of the defendant to property which is claimed to be subject to a public easement, and a preliminary injunction is only allowed to preserve the property for such use, in case it is determined that the defendant has no title thereto. Therefore the defendant ought not to be any further restrained, until the invalidity of its title is determined, than is necessary to preserve the property for the purpose to which the plaintiff claims it is devoted. The property is an unimproved piece of ground of which no practical use has ever been made as a public levee or landing, and probably never will be until it is improved by the erection of wharves and warehouses thereon. The business of loading and unloading vessels is not done in this country upon open quays or mud banks. The use of the property for laying and operating a track and side-track thereon during the pendency of this suit, so as to enable the defendant to connect the construction of its road by rail with its wharf on block 71 aforesaid, and complete it in time to prevent a forfeiture of the grant, will work no possible harm to the plaintiff or public, and may be of much benefit to the defendant. For it seems that by the act the defendant must complete its road "to the said premises," or place "erections" thereon of the value of \$10,000 before January 1, 1882, or the grant is forfeited. On account of this injunction it cannot place the "erections" on the property, and unless it is modified as suggested it may not be able to comply with the other condition.

Indeed, there is but little reason for a preliminary injunction in this case at all. As has been said, the public is making no use of the property as a levee or otherwise, and cannot until it is improved. And if the defendant was even permitted to go on and build a depot thereon, as well as a track and side-tracks, what harm would result to the plaintiff from it? If the final determination is against the defendant, it may be compelled to remove them (*C. S. U. Co. v. V. & G. H. W. Co.*, 1 Saw., 482), or what is more likely, the plaintiff may keep the improvements as a part of its property, and thereby gain what the other loses. Nor is there any suggestion that the defendant is insolvent and unable to respond in damages for any injury it may cause to the property of the plaintiff. If this were a public levee or landing in fact as well as name, and the defendant was materially interfering with the public use of the premises by its proposed "erections" and "constructions," there would be ground for restraining it until its right to do so was finally determined. But as it is, there is no public use to be disturbed, and the actual controversy is confined to the right of the defendant to the exclusive use of the premises; and their use by it in the meantime, in such a way as to cause no injury thereto, and at least not to materially interfere with the public use, if any, ought not to be restrained.

Again, in the consideration of this question, it ought not to be forgotten that the speedy construction of the defendant's railway to a deep-water landing in this city is a public enterprise in which the public is interested. As such the legislature has undertaken to encourage and promote its completion at an early day. On this consideration alone a court will be careful in the exercise of the power of injunction before final decree, not needlessly or lightly to interfere with the progress of such an enterprise, or, by delaying or impeding its construction for a season, deprive the community of the benefits that may be derived from it. Besides, the court has authority, in the exercise of this power, to take security against any injury which the plaintiff may sustain by reason of the acts permitted to the defendant. *N. P. R. Co. v. St. P., M. & M. R'y Co.*, 4 Fed. R., 692.

§ 1675. *The court has power to require of the party seeking a modification of an injunction a suitable security in the shape of a bond.*

Let the injunction be modified so as to permit the defendant to construct and operate a track and side-tracks over and upon the premises during the pendency of this suit; it first giving bond in the penal sum of \$5,000, with one or more sureties to be taken and approved by the master of this court, conditioned that it will, upon the order of this court, or upon the entry of a final decree in this suit against the right and claim of the defendant to the use of said premises under and by virtue of said legislative act, remove said track and side-tracks from said premises and leave the same in as good a condition for use as a public levee as they now are; or the defendant may deposit in the registry of this court United States bonds of the par value of \$5,000 as a security for the performance of said acts.

NORTHERN PACIFIC RAILROAD COMPANY v. ST. PAUL, MIN. & MAN. R. CO.

(Circuit Court for Minnesota: 2 McCrary, 260-266. 1880.)

Opinion by McCRARY, J.

STATEMENT OF FACTS.—The complainant owns and has for years operated a line of railroad running across the state of Minnesota, constructed by virtue of authority conferred by certain acts of congress in this bill mentioned. The respondents are the owners of another line of railroad, now in process of construction under authority conferred by the state of Minnesota, as alleged in the answer. Each of these companies has power to acquire by purchase or condemnation the land required for right of way, depot grounds, etc. The lines of the two railroads cross each other at a point near Fargo in this state, the exact point of crossing being on the northwest quarter of section 9, township 139, range 8, in the county of Clay, Minnesota. In 1872 the plaintiff company entered upon this land and took, without condemnation, so much of the same as is now occupied by it for right of way, and has ever since operated its railroad across the same.

At the time of the passage of the act of congress incorporating the complainant company, the land in question was public land; but at the time of the definite location of the line of the road under that act, said land was owned by one J. S. Schreiber, who in the meantime had obtained a patent therefor, and from whom, through several mesne conveyances, the title passed to the respondents. No proceedings under the statute of Minnesota to recover damages for the right of way were ever instituted by said Schreiber, or any of his grantees, against the complainant. The respondents claim, under these cir-

cumstances, that they are the owners of the land and have the right to construct their railroad across it, and, in doing so, to cross the track of complainant, without making compensation. The complainant claims that it has a vested right and a valuable property in its right of way, which cannot be taken by the respondents without condemnation under the statute, and payment of damages. Numerous questions, arising upon the admitted facts, have been discussed by counsel, the more important of which are the following:

1. Whether, under the charter of the complainant company (act of congress of July 2, 1864), that company acquired the right of way over all lands that were public at the time of its passage, or only over such as were public at the time of the location of the line.

2. Whether the respondents or those under whom they claim had a complete title to the *locus in quo* at the time the complainant entered upon the same; and

3. If so, whether by permitting the complainant to take the right of way, and use the same for eight years, the respondents and their grantors lost their rights therein, and the complainant acquired a vested right.

4. Whether the respondents' right to claim so much of the land as is embraced within complainant's right of way is barred by section 7 of the aforesaid act of congress.

Besides these questions which arise upon the admitted facts, there is another which depends for its decision upon facts which are controverted. It is alleged in the answer that the plaintiff well knew that the enterprise in which respondents had embarked "involved the crossing of plaintiff's road at or near the point of crossing aforesaid, and that the place and manner of said crossing, as aforesaid, were fully explained to the plaintiff, and that the plaintiff expressly assented to and approved the place and manner of crossing, as aforesaid, and represented to the defendants and gave them to understand that they could and should be permitted to build and operate the said Barnesville & Moorhead Railroad across the said plaintiff's road at the place aforesaid whenever and as soon as they desired so to do, and that they would assist in effecting such crossing, and that no obstacle would be interposed thereto. And that after such representations and license, and in firm reliance upon the same, and without and before any notice or knowledge that the said representations would not be carried out in good faith, or of any design on the part of the plaintiff to interpose any obstacles whatever to such crossing or to attempt so to do, the said defendant companies went on and expended large sums of money in the construction of said road, to wit: several hundred thousand dollars," etc. These allegations are denied by certain affidavits filed by complainant; but it is manifest that the question of fact thus presented cannot be finally decided until the final hearing upon the testimony.

§ 1676. *When a court of equity will direct a bond of indemnity to be given instead of continuing an injunction.*

The right of the complainant to damages for the crossing of its track on the land above described by the respondents' railroad depends upon the decision of these several questions, some of which are by no means free from difficulty, and one of which (the last named) cannot be finally determined until the final hearing. In such a case the usual course is to continue the injunction in force and thus keep the parties *in statu quo* until the final hearing. But this rule has its exceptions. Courts of equity will sometimes substitute a bond of indemnity for an injunction if the ends of justice will thereby be promoted,

and especially if any public interest must suffer by continuing the injunction in force pending the litigation. There are several cogent reasons which should impel us to adopt this latter course in the present case, if upon examination it is found to be within our discretion to do so.

1. Whatever doubts we may have upon other questions, we have none as to the absolute right of the respondents to build their railroad along the line specified in their charter, and to cross the line of the complainant at the point in controversy, upon paying the damages, if it be finally decided that complainant is entitled to damages, and without such payment, if upon final hearing it shall be so determined. The most that the complainant is entitled to is its damages; and if that be amply secured its rights are protected.

2. The case is peculiar in this: that the controversy is not as to the amount of damages, but as to the right of complainant to any damages. It is not a controversy that can be settled in a few days by the appointment of a board of commissioners to assess the damages of complainant. As already suggested, the right of complainant to damages may depend upon a disputed question of fact, which cannot be determined until proofs are taken in the regular course of proceedings. Enough has already appeared in the case to satisfy us that a somewhat protracted litigation may precede the determination of the question of damages. Already the proceedings instituted in the state court for the purpose of having the complainant's damages assessed have been interrupted and delayed by a removal thereof into this court, where they are now pending. We will not anticipate, much less decide, any of the questions that may arise here in that proceeding. It is enough for the present to say that the controversy which must precede an assessment and payment of damages in this case may be protracted.

§ 1677. Policy of the law as to construction of railroads.

3. The public is interested in the construction of new lines of railway, which are indeed only improved highways. The policy of the law is to encourage and facilitate such construction. The statute of Minnesota provides for railroad crossings upon the theory that the public interest requires that these highways of commerce and travel should run in different directions over the state, and that no one line shall erect a barrier not to be passed by others. It is manifest from these considerations, and others that might be named, that the respondent companies ought to be permitted to complete their line across that of the complainant at the earliest moment compatible with the full and complete protection of the rights of the latter. That these rights can be fully and completely protected by requiring the respondents to give bond with approved security to pay the damages which may be awarded to complainant is entirely clear.

• § 1678. Rule in federal courts as to accepting a bond for indemnity in lieu of issuing an injunction.

But we are met with a question as to the power of this court in a case of this character to adopt this course. It is not necessary to cite authority to show that to accept such a bond is within the ordinary powers of a court of chancery when proceeding according to the general principles of equity. It is a mode of proceeding not only authorized by the general principles of equity jurisprudence, but it is in common use in courts of chancery, and especially in federal courts. In patent cases, for example, where it is supposed that an injunction to restrain the use of a patented article may operate injuriously, the complainant is protected by a bond to account for profits and pay

damages, instead of an injunction. It is only necessary to add that the federal courts of equity administer the same general principles in all cases and in every state, irrespective of local laws and state practice. If the court has jurisdiction to try and determine a case in equity, it must determine it according to these general principles, which are the same in every state. *United States v. Howland*, 4 Wheat., 115; *Boyle v. Zacharie*, 6 Pet., 658; *Neves v. Scott*, 13 How., 268; *Noonan v. Lee*, 2 Black, 499.

It is not necessary, in view of these authorities, to decide what the power of a state court might be in a case of this character; but we see nothing in the statute which in our judgment ought to be construed to forbid a court of chancery of the state to accept a bond under the circumstances disclosed by the record in this case. It may be suggested that a bond cannot be substituted for payment of the damages. After the damages are assessed, the amount ascertained, this may be so. But the question here is, whether, in a case where a prompt assessment cannot in all probability be had, and where the right of the complainant to any damage is a matter of dispute, depending for its solution upon doubtful questions of law and fact, a court of chancery may, instead of stopping the progress of a great work of internal improvement of general and public as well as of private importance, require a bond to be given, and allow the work to go on. The statute itself recognizes the propriety of substituting a bond for the actual payment of the damages, even after assessment, in case an appeal is prosecuted (see sec. 23, ch. 34, statutes of Minnesota).

It is said to dissolve this injunction and accept a bond instead would in effect authorize the respondents to commit a trespass, if not a crime, by laying their track across that of complainant. After this court has decided that upon giving bond the respondents may extend their track across that of complainant, and after such bond shall have been given and approved, the right of the respondents to go on with the construction of their line and to cross that of the complainant will be no longer open to dispute or question. The case is before us; our jurisdiction of the parties and the subject-matter is complete.

The order will be that the injunction be dissolved upon the execution by the respondents to the complainant of a bond, with sureties to be approved by a judge of this court, in the sum of \$5,000, conditioned that the respondents will pay all damages which may be awarded or adjudged in favor of complainant by reason of the construction of respondents' line of railway across that of complainant.

POOR v. CARLETON.

(Circuit Court for Massachusetts: 8 Sumner, 70-83. 1837.)

BILL to enjoin the sale or transfer of certain certificates of stock.

Opinion by STORY, J.

STATEMENT OF FACTS.—The motion to dissolve the injunction granted, in this case, has been made and argued by the counsel for the defendants upon the general ground that, by the rules of courts of equity, after the answers have come in, denying the whole equity of the bill, the defendants are entitled to have the injunction dissolved. On the other hand, the plaintiff insists that the motion ought not to be granted, upon the ground of irreparable mischief; and in support of the argument he has offered and read certain depositions to

establish that one of the principal defendants is insolvent, and another is of low character, indigent and irresponsible, and that the third is a minor; and if the certificates of stock stated in the bill are transferred, or payment of the sums due and recoverable on them is received by the defendants, there will, in the event of the suit being sustained, be an irreparable loss of the whole property to the plaintiff. The defendants insist, in reply to this statement, that the affidavits are not, in this stage of the cause, admissible for the purposes alleged; and that if they are, the case made by them of insolvency, and low and irresponsible character, will not justify the court in the extraordinary step of continuing the present injunction, after such a full denial by the answer of the whole equity of the bill.

§ 1679. *Where the answer denies all the equities of the bill, the injunction will usually be dissolved.*

In the first place, let us consider the ground of the defendants, as to the right to have the injunction dissolved, upon the coming in of the answer. This, it is to be observed, is not the case of the common injunction issued against the defendants for not appearing, or for not answering the bill at the time prescribed by the practice of the court. In such cases, which usually occur in bills to stay proceedings at law, it is of course to dissolve such an injunction, if the answer denies the whole merits; and the plaintiff will not be permitted to read affidavits in contradiction to the answer, upon the motion to dissolve the injunction. This is sufficiently apparent from the statements made by Mr. Eden, in his valuable book on injunctions. Eden on Injunct., 88, 108, 109, 118, 326.

§ 1680. *The case of a special injunction considered.*

But the present case is one of a special injunction granted to restrain the negotiation of the certificates, and the receipts of payment thereon, until the further order of the court. Now, in such cases, there are two points which seem well established in practice; first, that the dissolution of the injunction is not of course upon the coming in of the answer, denying the merits; and secondly, that upon the motion to dissolve such an injunction, the plaintiff, under some circumstances, is entitled to read affidavits in contradiction to the answer, not indeed to all points, but to many points. Mr. Eden (p. 326) asserts, in broad terms, that "there are few points of practice which have been more discussed, or which are more satisfactorily established, than that by which the right of the plaintiff has been established to read affidavits on the motion to dissolve in contradiction to the defendant's answer." This is, perhaps, stating the doctrine more broadly than the authorities will justify.

§ 1681. *Where irreparable mischief may be done, an injunction is dissolved or continued at the sound discretion of the court.*

The main distinctions, which seem supported by the authorities, or at least by the weight of authority, are these: In the first place, in cases of special injunctions, if the whole merits are satisfactorily denied by the answer, the injunction is ordinarily dissolved. But there are exceptions to the doctrine, and these, for the most part, are fairly resolvable into the principle of irreparable mischief; such as cases of asserted waste, or of asserted mismanagement in partnership concerns, or of asserted violations of copyrights, or of patent rights. In cases of this sort, the court will look to the whole circumstances, and will continue or dissolve the injunction in the exercise of a sound discretion. This doctrine is, as I think, fully borne out by Lord Hardwicke in *Potter v. Chapman* (Amb., 99; S. C., 1 Dick., 146); by Lord Talbot in *Gibbs v. Cole*

(3 P. Will., 255); by Lord Kenyon in *Strathmore v. Bowes* (2 Dick., 673; S. C., 1 Cox, 263; 2 Bro. Ch., 88); by Lord Eldon in *Norway v. Rowe* (19 Ves., 153; and *Peacock v. Peacock*, 16 Ves., 49). See, also, *Isaac v. Humpage*, 1 Ves. Jr., 427; S. C., 2 Bro. Ch., 463; Mr. Swanston's note to *Smythe v. Smythe*, 1 Swanst., 254, note (b); *Wyatt*, Pr. Regist., 236; *Hendis*, Ch. Pr., 596. A doubt, too, in point of law, will furnish a sufficient ground against dissolving an injunction; and was so ruled in *Maxwell v. Ward*, 11 Price, 17. Indeed, Mr. Chancellor Kent, in *Roberts v. Anderson*, 2 John. Ch., 204, laid down the proposition generally, that the granting and continuing of injunctions must always rest in sound discretion, to be governed by the nature of the case.

It is true that it was said by Lord Eldon, in *Clapham v. White*, 8 Ves., 36, 37, that "if the answer denies all the circumstances upon which the equity is founded, the universal practice, as to the purpose of dissolving or not reviving the injunction, is, to give credit to the answer; and that is carried so far that, except in the few excepted cases, though five hundred affidavits were filed, not only by the plaintiff, but by many witnesses, not one could be read as to this purpose." This is strong language; but many qualifications must be engrafted on it, as will be manifest from the learned chancellor's own decision in *Peacock v. Peacock*, 16 Ves., 49, and *Norway v. Rowe*, 19 Ves., 144, on which I shall presently comment; and, indeed, as his own exceptive words, "in the few excepted cases," clearly import. I confess that I should be sorry to find that any such practice had been established, as that a special injunction should, at all events, be dissolved upon the mere denial by the answer of the whole merits of the bill. There are many cases in which such a practice would be most mischievous; nay, might be the cause of irreparable mischief. The true rule seems to me to be, that the question of dissolution of a special injunction is one which, after the answer comes in, is addressed to the sound discretion of the court. In ordinary circumstances the dissolution ought to be ordered, because the defendant has *prima facie* repelled the whole merits of the claim asserted in the bill. But extraordinary circumstances may exist, which will not only justify, but demand, the continuation of the special injunction. This, upon the principles of courts of equity, which always act so as to prevent irreparable mischiefs and general inconvenience in the administration of public justice, ought to be the practical doctrine; and I am not satisfied that the authorities, properly considered, do establish a contrary doctrine. If they did, I should hesitate to follow them in a mere matter of practice, subversive of the very ends of justice.

§ 1682. *There are numerous cases which show the necessity of certain changes in the practice of courts of equity, to meet the exigencies of society.*

Indeed, there are numerous cases which show the gradual meliorations or changes, often silent and almost unperceived, which have been introduced into the practice of the courts of equity, to obviate the inconveniences which experience has demonstrated, and to adapt the remedial justice of these courts to the new exigencies of society. Thus, for example, thirty years ago, it seems to have been thought by Lord Eldon, that an injunction to restrain the negotiation of a negotiable instrument was an extraordinary interference of the court, and that, upon the coming in of the answer, the case stood exactly as if the case had been upon the common injunction to stay proceedings at law. *Berkeley v. Brymer*, 9 Ves., 355, 356. And the case was then thought distinguishable from that of an injunction granted to stay waste, in which the court would interfere, on account of the danger of irreparable mischief, and

continue the injunction to the hearing. But this doctrine has been since completely abandoned; and in *Hood v. Astor*, 1 Russ., 412, Lord Eldon himself, advertg to the supposed practice not to interfere in cases of negotiable securities to prevent their negotiation, said: "I do not recollect such a doctrine to have been at any time in my experience the law of this court. It is true that applications for injunctions of the sort now moved for have become much more frequent than they were in former days. But the reason is that, in the present state and form of the transactions of mankind, there is an increased necessity for them; a necessity, too, which is not likely to become less." This last doctrine has been in the fullest manner recognized and acted upon by the supreme court of the United States. *Osborn v. Bank of United States*, 9 Wheat., 738, 845 (Consr., §§ 2363-87).

But supposing the doctrine were as comprehensive, as to the dissolving of a special injunction on the coming in of the answer, as the counsel for the defendants has contended; the question occurs whether it is applicable to all kinds of answers which deny the whole merits of the bill, or whether it is applicable to such answers only as contain statements and denials by defendants consonant of the facts, and denying the allegations upon their own personal knowledge. It seems to me very clear, upon principle, that it can apply to the latter only. The ground of the practice of dissolving an injunction upon a full denial, by the answer, of the material facts, is that, in such a case, the court gives entire credit to the answer, upon the common rule in equity that it is to prevail, if responsive to the charges of the bill, until it is overcome by the testimony of two witnesses, or of one and other stringent corroborative circumstances. But it would certainly be an evasion of the principle of the rule if we were to say that a mere naked denial by a party who had no personal knowledge of any of the material facts were to receive the same credit as if the denial were by a party having an actual knowledge of them. In the latter case the conscience of the defendant is not at all sifted; and his denials must be founded upon his ignorance of the facts, and merely to put them in a train for contestation and due proof to be made by the other side. This distinction is alluded to and relied on by the supreme court in *Clarke v. Van Riemsdyk*, 9 Cranch, 160, 161. See, also, *Hughes v. Garner*, 1 Younge & Coll., 328.

§ 1683. *It is only when an answer denies the material facts in the bill that it should form a basis for an application to dissolve a special injunction.*

The sole ground upon which the defendants are entitled to a dissolution of an injunction upon an answer is that the answer in effect disproves the case made by the bill by the very evidence extracted from the conscience of the defendant, upon the interrogation and discovery sought by the plaintiff to establish it. But what sort of evidence can that be which consists in the mere negation of knowledge by the party appealed to? Such negation affords no presumption against the plaintiff's claims, but merely establishes that the defendant has no personal knowledge to aid it or to disprove it. It is upon this ground that it has been held, and, in my judgment, very properly held, that if the answer does not positively deny the material facts, or the denial is merely from information and belief, it furnishes no ground for an application to dissolve a special injunction. The cases of *Roberts v. Anderson*, 2 Johns. Ch., 202, 204; *Ward v. Van Bokkelen*, 1 Paige, 100; *The Fulton Bank v. New York & Sharon Canal Co.*, 1 Paige, 311; *Rodgers v. Rodgers*, 1 Paige, 426, are fully in point.

The importance of this distinction is manifest in the present case. Here the defendants are merely the heirs and representatives of the original party (Isaac Carleton) deceased; and the original transactions detailed in the bill, and under which the plaintiff asserts his title to relief, took place from twenty-eight to thirty years ago; and there is no pretense to say that any of these defendants have any personal knowledge of these transactions. This is sufficiently apparent from their answers. But by a certificate of the births of the defendants, which is very properly in the case for the present purpose, it appears that the principal defendants, Richard Carleton and Isaac Carleton (the other defendant being yet a minor), were, at the time of the transactions, so young as to demonstrate that they could have no personal knowledge, Richard being then only nine or ten years old, and Isaac only two or three years old. For the purpose, then, of dissolving the injunction, their answers cannot be treated as competent evidence to repel the allegations of the bill, or to disprove the transactions on which it is founded.

§ 1684. *Defendants may repel affidavits filed after answer, by filing counter affidavits.*

In regard to the admission of the affidavits, there are other considerations which require attention. All the affidavits, except that of Josiah Barker, are simply to the point of the insolvency and indigence of the defendant Isaac Carleton, and of the low character, intemperance and indigence of the defendant Richard Carleton. They satisfactorily, to my mind, establish the facts, if they are admissible in evidence; and that they are so admissible I cannot doubt, for they are merely to collateral matters, not touched by or contradictory to the answers. *Taggart v. Hewlett*, 1 Meriv., 499, and *Morgan v. Goode*, 3 Meriv., 10, and other cases cited by Mr. Swanston in his note to *Smythe v. Smythe*, 1 Swanst., 254, sufficiently establish this position. See, also, *Eden on Injunctions*, 109. Without doubt the defendants are at liberty to repel such affidavits by counter affidavits to the same points; for otherwise they might be compromised by statements which they would have no opportunity to answer.

In regard to the affidavit of Barker, that is of a very different character, and goes to the proof of the original transactions stated in the bill, and is in direct contradiction to the negative allegations in the answers. It was not filed when the injunction was obtained; but it has been filed since the answers have come in. Under these circumstances the question arises, whether it is admissible to be read on the present motion.

§ 1685. *An affidavit filed after answer can be read even though it contradicts the answer, and defendants may file counter affidavits, both parties subject to the sound discretion of the court.*

In cases of the common injunction, it has been already stated that, after an answer denying the whole facts and merits, affidavits cannot be read to contradict the answer, on the motion to dissolve. The language of Lord Eldon, in *Clapham v. White*, 8 Ves., 35, 36, already cited, is full to this purpose. But in cases of special injunctions, affidavits filed in support of the original injunction may be read, upon the motion to dissolve, in contradiction to the answer, in special cases, that is to say, in cases of irreparable mischief, such, for example, as of waste. See *Eden on Injunctions*, 326; *Peacock v. Peacock*, 16 Ves., 49, 50; *Smythe v. Smythe*, 1 Swanst., 253, and cases cited in note (b); *Norway v. Rowe*, 19 Ves., 144; *Charlton v. Panther*, 19 Ves., 149, note (c). But it has been held by Lord Eldon, that even in cases of waste such affidavits are

not admissible to found a motion for an injunction after the answer (none having been previously granted); because, if the affidavits are filed before the answer, the defendant possesses an opportunity of explaining or denying the facts stated in those affidavits; but if the plaintiff reserves his affidavits until after the answer is filed, he does not deal fairly with the defendant, who is entitled, before answer, to be apprised of the points on which the plaintiff rests his case. *Smythe v. Smythe*, 1 Swanst., 253. I confess myself not so strongly impressed with the force of the reasoning as the learned judge seems to have been. And it would be very easy to obviate the objection, by allowing the defendant, by his own as well as other counter affidavits, to repel the statement, which he has not, by his answer, had an opportunity to meet and explain or deny.

There is another qualification of the doctrine in cases of irreparable mischief, and that is, that, though the original affidavits may be read as to other facts contradicted by the answer, they cannot be read in support of the title of the plaintiff which is contradicted by the answer. The ground of this exception seems to be that the court ought not collaterally to decide upon the title. So the doctrine was established in *Norway v. Rowe*, 19 Ves., 144, 157. Whether that doctrine stands upon a satisfactory foundation is quite a different question. Upon general principles, I cannot well see why the court, to prevent irreparable mischief, may not, upon an application to continue an injunction, look to affidavits in affirmance of the plaintiff's title, not so much with a view to establish that title, but to see whether it has such a probable foundation in the present stage of the cause as to entitle the plaintiff to be protected against irreparable mischief, if upon the hearing it should turn out to be well founded.

In cases of irreparable mischief,—and I think the present case properly falls under that head, or stands upon the same analogy,—it seems to me that the more fit course for the due administration of public justice is to follow out the suggestions of Lord Eldon himself, in the case of *Peacock v. Peacock*, 16 Ves., 51. His lordship in that case, which was upon a motion respecting an injunction in a case of partnership, said: “With regard to the point of practice as to reading affidavits, this court has interfered in these cases of partnership upon principles not the same, but analogous to those on which it interposes in the case of waste. In that instance, if the fact can be maintained, the objection is proved with very little effect, that the parties may proceed, vying with each other by affidavits without end. The court does permit affidavits, taking care to prescribe limits according to the circumstances of each case.” This, it appears to me, is the true view of the matter. The admission of the affidavits, whether filed before or after the answer, whether they are to the title of the plaintiff or to the acts of the defendant, although they are contradictory to the answer, ought to rest in the sound discretion of the court, according to the circumstances of each particular case, without the court's binding itself by any fixed and unalterable rules as to the exercise of that discretion. This seems to have been the course which commended itself to the mind of that great equity judge, Mr. Chancellor Kent. See *Roberts v. Anderson*, 2 John. Ch., 202, 205. But see *Eastham v. Kirk*, 1 John. Ch., 444.

I have looked into the earlier practice of the court of chancery, in order to satisfy myself whether, in all cases of irreparable mischief, the court had positively limited its own discretion, under all circumstances, in the manner supposed by the modern authorities. Mr. Dickens, whose great experience in the practice of the court has been thought by Lord Eldon to entitle his opinion

to great weight in such matters (*Norway v. Rowe*, 19 Ves., 154), in reporting the case of *Strathmore v. Bowes*, 1 Dick., 673; S. C., 1 Cox, 263; 2 Bro. Ch., 88. has, it is true, given us his view of the practice in the following terms: "On application to continue or dissolve an injunction, either of course or special, I have always understood it to be the rule that, though affidavits are not to be read to support the plaintiff's equity, that is, his right to come into the court, when denied by the defendant's answer, yet in injunctions to stay waste, or in the nature of waste, when the waste sworn to and upon which the injunction is grounded is denied, the court will admit proof by affidavit in support of the facts." This passage seems certainly corroborative of what has been supposed to be the later general practice. Yet it is difficult, notwithstanding Mr. Dickens' subsequent explanations of the grounds of this practice, to perceive what solid distinction there is, or ought to be, between admitting affidavits as to title and affidavits as to the facts of waste; for each of them are equally in opposition to the answer in relation to the material points of relief. Mr. Dickens at that time also thought, that affidavits by the defendant, in support of his answer, were not admissible. But Lord Eldon considers the present practice to be, or at least that it ought to be, upon principle, otherwise. However, Lord Eldon does not understand Mr. Dickens to mean to assert, what the passage above cited may seem at first sight to import; for he says, in *Norway v. Rowe*, 19 Ves., 164, "Mr. Dickens, however, did not mean, that if there is, by the answer, a total denial of the plaintiff's title to stay waste, the plaintiff could not by affidavit assert his title, contradicting the answer in that respect;" a concession, if well founded, which removes the statement of Mr. Dickens out of the present case. See, also, *Eden on Injunctions*, p. 328.

The truth seems to be, that, in cases of this sort, the practice has been shifting, from time to time, to meet the new exigencies of society and the pressure of peculiar circumstances; and the court has never suffered itself to be entrapped by its own rules, so as to interfere with the purposes of substantial justice. The practice in America has, I believe, on this subject, become more liberal than it is in England; and if it were necessary, I should not hesitate to admit affidavits to contradict the answer, for the purpose of continuing or even of granting a special injunction, where I perceived that, without it, irreparable mischiefs would arise. In the present case, there are circumstances which might free me from the necessity of asserting so broad a doctrine. But I wish rather to dispose of the case upon the general ground that the granting and dissolving injunctions in cases of irreparable mischief rest in the sound discretion of the court, whether applied for before or after answer; and that affidavits may after answer be read by the plaintiff to support the injunction, as well as by the defendant to repel it, although the answer contradicts the substantial facts of the bill, and the affidavits of the plaintiff are in contradiction of the answer.

The motion to dissolve the injunction is accordingly refused.

§ 1686. In general.—An injunction is never granted requiring a party to do a particular thing until after final hearing and decree. *Kamm v. Stark*, 1 Saw., 547 (§§ 1302-6).

§ 1687. A mandatory injunction will not be ordered upon a preliminary or interlocutory motion, but only upon final hearing, and then only to execute the decree or judgment of the court. *McCauley v. Kellogg*, 2 Woods, 18.

§ 1688. An injunction bill is not considered as an original bill. *Doe v. Johnston*, 2 McL., 323.

§ 1689. Notice.—Injunction granted without notice of the application to the opposite party. *Love v. Fendall*, 1 Cr. C. C., 34.

§ 1690. Under the act of congress of 1793 an injunction will not be granted without notice to the adverse party or his attorney of the time and place of suing for the same. *Wynn v. Wilson*,* Hemp., 698.

§ 1691. The provision of the judiciary act of 1793, requiring reasonable previous notice of applications for preliminary injunctions, being left out of the Revised Statutes of June 22, 1874, stands repealed by section 5396. And since the passage of the judiciary act of June 1, 1872, preliminary injunctions may be granted in any case deemed exigent by the court, without previous notice. Simultaneously with the time of giving the rule to show cause against the motion, the court may grant an order restraining the act threatened until the decision of the motion. *Yuengling v. Johnson*, 1 Hughes, 607.

§ 1692. Irregularity in the service of the subpoena affords no reason for withholding an injunction against a defendant who has notice of the motion for injunction and appears to oppose it. *Thayer v. Wales*, 9 Blatch., 170.

§ 1693. The notice of an application for an injunction required by the fifth section of the act of congress of March 2, 1793, may be waived; and after an appearance notice will be presumed to have been given. *Marsh v. Bennett*, 5 McL., 117 (DR. AND CR., §§ 285-88).

§ 1694. An appearance of counsel for defendants has uniformly been held a waiver of notice of an injunction. *Bell v. Ohio Life & Trust Co.*, 1 Biss., 260.

§ 1695. Defendants in a bill for an injunction who make an affidavit to oppose the motion are concluded from setting up want of sufficient notice. *Brown v. Pacific Mail Steamship Co.*, 5 Blatch., 525 (§§ 1814-23).

§ 1696. The court cannot grant an injunction against parties who have not been served, unless they are parties holding such a position as that they can be considered a single party, for the purpose of restraining them from doing an act in which all are concerned, such as being members of a body of trustees or of the board of directors of a corporation. But failure to serve some of the defendants will not prevent the granting of the injunction as to the others. *Ibid.*

§ 1697. Equity would seem to demand that, in cases of emergency, where irreparable injury would follow unless an immediate injunction were ordered, the national courts should have power to grant temporary injunctions without notice of the application for them to the party enjoined. But, under the act of congress of March 2, 1793, and the fifty-fifth rule in equity of the supreme court, such an injunction cannot issue without reasonable previous notice to the adverse party or his attorney. *Mowrey v. Indianapolis & Cincinnati R. Co.*, 4 Biss., 78 (CORP., §§ 1565-73).

§ 1698. Injunctions being prohibited in the courts of the United States, by an act of congress, without notice first to the opposing party, it follows that all of them must be regarded as special, rather than some of them as common, or a matter of course, and therefore when resisted under such notice, whether the hearing comes on before or after answer, no injunction can be granted unless special and sufficient cause is clearly shown. *Perry v. Parker*,* 1 Woodb. & M., 280.

§ 1699. Under the statute which requires reasonable previous notice of an application for an injunction to be given to the adverse party, service on a corporation at its office is sufficient service on the directors. But such a service is not sufficient to authorize an injunction against all other shareholders generally. *Brown v. Pacific Mail Steamship Company*, 5 Blatch., 525 (§§ 1814-23).

§ 1700. Under rule 55, special injunctions in the circuit court of the United States are granted only on due notice to the opposite party. No fixed rule can be recognized as to what constitutes due notice. The term must be applied in each case in the discretion of the court in view of the particular circumstances. In ordinary circumstances, the application for an injunction to stay proceedings at law, which are fixed by the consent of the parties for trial on the following day, will be viewed with suspicion. But where the circumstances disaffirm wilful laches, the delay will not *per se* prevent the granting of the writ. *Lawrence v. Bowman*, 1 McAl., 419 (§§ 1809-18).

§ 1701. The relaxation of the rule requiring personal service of an order of injunction as the basis of proceedings for contempt exists only in cases where it is necessary in order that the ends of justice should not be defeated. Such service cannot be dispensed with where it may easily be procured by the ordinary course of legal proceedings. *In re Cary*, 10 Fed. R., 622.

§ 1702. If a creditor against whom an injunction is issued from the bankruptcy court, restraining him from proceeding against the bankrupt in a suit at law, resides outside of the district, a service of the injunction on his agents and attorneys within the district is sufficient, the injunction being prayed against the creditor and his attorneys and agents. If either of these proceeds with the suit, notwithstanding the injunction, they are liable to be committed for contempt. *In re Bellows*, 8 Story, 428.

§ 1703. The statutory prohibition against the allowance of injunctions without reasonable

notice applies to injunctions granted by the supreme and circuit courts, as well as to those which may be granted by a single judge. As a rule a shorter time will be considered reasonable when the application is made to the court than when it is made to a single judge. *New York v. Connecticut*, * 4 Dall., 1.

§ 1704. Informality in the service of notice of an injunction is cured by the appearance and answer of the defendant, upon a motion to dissolve. *Brammer v. Jones*, 2 Bond, 100.

§ 1705. Federal courts not governed by state laws.—The circuit court of the United States is not governed in its practice in equity by the laws of the state in which it sits. It is not governed by a state law with reference to the assessment of damages upon an injunction bond. *Russell v. Farley*, 15 Otto, 483 (§§ 1656-59).

§ 1706. The chancery jurisdiction given by the constitution and laws of the United States is the same in all the states, and the rule of decision is the same in all. In the exercise of that jurisdiction the courts of the United States are not governed by the state practice. *Boyle v. Zacharie*, 6 Pet., 648.

§ 1707. Answer.—The answer of a corporation aggregate under its common seal and not on oath denying the equity of the bill is sufficient to prevent the granting of an injunction, and even to dissolve it after it has been granted. *Haight v. Proprietors of Morris Aqueduct*, * 4 Wash., 601.

§ 1708. A motion to dissolve an injunction against the crossing of the track of one railroad company by the track of another was denied in this case, where the allegations of the bill were not fully denied in the answer. *Northern Pacific R. Co. v. Burlington & Missouri R. Co.*, * 2 McC., 203; 4 Fed. R., 298.

§ 1709. A bill was filed for an injunction against a judgment at law, and the usual affidavit was made verifying the allegations of the bill; and an order was at the same time obtained that the service of the subpoena upon the defendant's attorney in the action at law should be deemed sufficient, the defendant himself residing abroad. After an interval of nearly five years, the injunction was moved for and granted for want of an answer, the attorney of the defendant having acknowledged service of the subpoena. The court refused to dissolve the injunction without an answer by the defendant or an affidavit denying the equities of the bill. *Read v. Consequa*, * 4 Wash., 174.

§ 1710. Where a bill to enjoin a judgment at law seeks a discovery of facts to enable the complainant to make defense to the suit at law, the answer of the respondent's attorney in the action at law, on whom the subpoena was ordered to be served, will not be admitted for the answer of the defendant himself, the attorney not pretending to be informed personally of the matters charged in the bill, and being unable to make the discovery. *Ibid.*

§ 1711. A mere denial, by an answer, of the equity of a bill, does not prevent the court from looking into the law and facts of the case, when a special injunction is moved for, and granting or refusing it according to its discretion; and where the right to an injunction does not depend upon any controverted or doubtful facts, but upon the interpretation to be put by the court upon a written instrument, it is the duty of the court to interpret it on such a motion and to grant or refuse the injunction according to the result of the interpretation. *Clum v. Br. w. r.*, 2 Curt., 506.

§ 1712. In a bill to enjoin a judgment at law, the defendant answered that he had before the institution of his suit at law assigned his claim to W., and that W. was the real plaintiff therein. Upon the affidavit of W. that the answers were not full, and a suggestion that they had not been fairly taken, it was held to be proper for the court, upon the motion of W., to issue a commission to take the defendant's answer. *Wilkins v. Jordan*, * 3 Wash., 226.

§ 1713. Where the answer denies all the circumstances upon which the equity of a bill praying an injunction is founded, the court will refuse the writ. *Shoemaker v. National Mechanics' Bank*, 2 Abb., 416.

§ 1714. Upon an application for an injunction to restrain the use by the defendant of the plaintiff's trade-mark, it was held that a denial of the equity of the bill by the defendant's affidavit alone was not sufficient to defeat the motion for the injunction, resting upon the positive oath of the plaintiff and his long and unquestioned use of the design and mark. The affidavit was held not to have the weight and effect of an answer. *Walton v. Crowley*, 3 Blatch., 440.

§ 1715. On motion for an injunction all direct denials in the answer responsive to the allegations in the bill have the effect of an answer as evidence on final hearing, but matters set up by way of avoidance are to be received as affidavits. *United States v. Parrott*, * 1 McAL., 271.

§ 1716. Where the bill makes a proper case for an injunction, a denial on information and belief is no defense. *Ibid.*

§ 1717. Where the answer denies all the circumstances on which the bill is founded, the court will refuse a preliminary injunction. *Shoemaker v. National Mechanics' Bank*, 1 Hughes, 101 (BANKS, NAT., §§ 188-85).

§ 1718. **Authority of judges.**—The circuit courts of the United States have the same power to issue injunctions when held by district judges, as when held by the circuit justice or judge, or by two justices. *Goodyear Dental Vulcanite Co. v. Folsom*,* 3 Fed. R., 509.

§ 1719. Where both the district and circuit judges and the justice of the supreme court allotted to the circuit are absent from and without the circuit and district, to the circuit court for which an application for an injunction is made, another justice of the supreme court may, notwithstanding the act of June 1, 1872, hear the application, though not in the circuit or district himself at the time. *United States v. Louisville, etc., Canal Co.*, 1 Flip., 260.

§ 1720. The circuit and district judges cannot hear applications for injunctions outside of their own circuits, whereas the supreme court judges could, before the act of June 1, 1872, entitled "An act to further the administration of justice," do so at any place. Under the seventh section of this act, declaring that "no justice of the supreme court shall hear or allow any application for an injunction or restraining order, except within the circuit to which he is allotted, or at such place outside of the circuit as the parties may in writing stipulate, except in causes where such application cannot be heard by the circuit judge of the circuit or the district judge of the district," it is held that a justice of the supreme court may hear and allow such an application at any place, where the circuit and district judges are both absent from the circuit. *Searles v. Jacksonville, Pensacola & Mobile R. Co.*,* 2 Woods, 621.

§ 1721. **Hearing of motion.**—On an application for an injunction in the case of an infringement of a patent the defendant will be allowed to answer, and the motion will be heard on the affidavits of the parties. *Wilson v. Stolley*,* 4 McL., 272.

§ 1722. **Granted in vacation.**—Though injunctions could not be granted in England except in term time, yet by statute they may be granted in the United States by the judges in vacation. *Gray v. Chicago, Iowa & Neb. R. Co.*,* 1 Woolw., 68.

§ 1723. An injunction granted by a district judge in vacation expires at the commencement of the next term of the circuit court thereafter. *Ibid.*

§ 1724. **Duration of injunction.**—An injunction ordered by a district judge does not continue longer than to the circuit court next ensuing unless so ordered by the circuit court. But where the circuit court treats the injunction as continuing, by refusing to dissolve it upon motion, it remains in force although no order is made for its continuance. *Parker v. The Judges of the Circuit Court of Maryland*,* 12 Wheat., 561.

§ 1725. **Under Nevada statutes.**—It is held that section 1182 of the statutes of Nevada, providing that the complainant may be required to give security against injuries resulting to the opposite party from any act of his during the suit, upon penalty of dissolving any injunction in his favor, applies only to cases pending, over which the court still has control. *Eureka Mining Co. v. Richmond Mining Co.*,* 5 Saw., 121.

§ 1726. **Interlocutory orders.**—The issuing or dissolution of an injunction is in the sound discretion of the court, and the interlocutory orders of the court therein are not appealable. *Norton v. Hood*, 12 Fed. R., 763 (APPEALS, §§ 292-94).

§ 1727. **Requisites of bill.**—An injunction will not be granted upon a bill charging fraud upon information and belief. *Brooks v. O'Hara*, 2 McC., 644 (§§ 2045-49).

§ 1728. **New matter in the answer.**—Upon the hearing of a bill in equity, after the answer is put in issue, new matter set up by way of avoidance must be proved by the defendant; but on a motion for an injunction, or to dissolve one, such new matter in the answer responsive to the bill is to be deemed evidence in favor of defendant, as his affidavit or sworn statement. *Tobin v. Walkinshaw*, McAL., 26.

§ 1729. **Dismissal on division of opinion.**—A provisional injunction granted upon the filing of a bill falls when the bill is dismissed on account of a division of opinion in the supreme court upon a division of opinion certified to that court as to the jurisdiction of the court to entertain the bill. The court has no power to continue the injunction until a decision is made on the appeal taken from the order dismissing the bill. An appeal taken within the time and in the mode prescribed by the acts of September 24, 1789, and March 3, 1803, will not operate by virtue of those acts to continue the injunction. *Coleman v. Hudson River Bridge Co.*, 5 Blatch., 56.

§ 1730. **Effect of appeal.**—The plaintiff in a suit to recover a mine filed a bill to enjoin the defendant from working the mine during the litigation, and a preliminary injunction was granted. The defendant filed a cross-bill and obtained a similar injunction against the plaintiff. The law and equity cases were heard together, and the court found for the plaintiff in the law case and gave judgment for possession; and in the equity case entered a decree for the plaintiff in the original bill, making the injunction perpetual and dismissing the cross-bill absolutely and without qualification, and dissolving the injunction issued thereon. The decree was enrolled and the term adjourned. An appeal was taken by the defendant in proper time and form to operate as a *supersedeas*, but there was nothing to supersede except the decree for costs. It was held that the court rendering the decree had no jurisdiction thereafter to enjoin

the plaintiff from working the mine pending the appeal, there being no suit pending in which such an order could be made. It was also held that the taking of an appeal in accordance with the acts of congress of September 24, 1789, and March 3, 1803, did not operate by virtue of those acts to continue the injunction. *Eureka Mining Co. v. Richmond Mining Co.*,* 5 Saw., 121.

§ 1731. An appeal from the decision of the court denying an application for an injunction does not operate as an injunction or stay of proceedings pending the appeal. Neither does an appeal from an order dissolving an injunction suspend the operation of the order so as to entitle the appellant to stay the proceedings pending the appeal. *Slaughter House Cases*, 10 Wall., 297 (APPEALS, §§ 1484-92).

§ 1732. Modification of order.—A deed between parties provided that the grantor should have the right to enter for condition broken. The grantor, having improperly attempted to dispossess the grantee, was enjoined from taking possession of the premises until the further order of the court. Held, that as the injunction prevented the grantor from exercising the right of entry for any future breach without first applying to the court, the injunction should be so modified as to prohibit him from taking advantage of any previous breach. *Marble Co. v. Ripley*, 10 Wall., 354.

§ 1733. Hearing as to question of citizenship.—On application for an injunction, where the bill avers the citizenship of a defendant, the court will not, on affidavit, dispose of the objection that he is an alien. *Rateau v. Bernard*,* 3 Blatch., 246.

§ 1734. Requisites of writ.—A writ of injunction ought, as a general rule, to contain a concise description of the particular acts or things in respect to which the party is enjoined. It may be sufficient for the defendant that the writ refers to the complaint for the description of the act enjoined, the complaint having been served on him, but as to all others concerned this is not sufficient. *Whipple v. Hutchinson*, 4 Blatch., 190.

§ 1735. Affidavits in support of title.—On motion for an injunction to enjoin waste, the complainant cannot, after the coming in of the answer, read affidavits in support of his title. *United States v. Parrott*,* 1 McAl., 275.

§ 1736. Delay in hearing.—Defendant in a bill of injunction may have the matter disposed of in a reasonable time, and is not compelled to wait for a hearing till the day fixed by complainant. *Walworth v. Board of Supervisors*,* 5 Biss., 133.

§ 1737. Injunction granted before answer.—There is a class of cases where the court will, although not satisfied with but entertaining doubt as to the complainant's title, grant an injunction forthwith before answer. But this is only done to prevent irreparable mischief. Thus in a suit to enjoin the defendant from infringing the complainant's exclusive privilege to a ferry, where the title of the complainant is set forth in his documentary proofs, and all the materials for its investigation by ascertaining their legal effect are before the court, and no inquiry into complicated facts is involved, the court will not postpone the investigation and grant the injunction in the meantime. *Minturn v. Larue*,* 1 McAl., 370.

§ 1738. Decree final.—The decree of the court awarding a perpetual injunction against the collection of a treasury distress warrant issued under the act of May 15, 1820, is final until reversed on appeal, and no action can afterwards be maintained on the account on which the distress warrant issued. *United States v. Nourse*,* 9 Pet., 8.

§ 1739. Appeal.—The granting or dissolution of a temporary injunction is in the sound discretion of the court, and furnishes no ground of appeal. The granting of a permanent injunction is a part of the final decree, and abides the fate of the decree itself. *Buffington v. Harvey*, 5 Otto, 99.

§ 1740. While as a general rule the granting or dissolving of an injunction is an interlocutory order, and no final decree is rendered thereon from which an appeal will lie, yet under the act of May 15, 1820, relating to relief from a treasury warrant of distress, the decision of the district court in awarding a perpetual injunction is a final decree from which an appeal will lie under the act of March 3, 1803. *Porter v. United States*,* 2 Paine, 313.

§ 1741. The grant of an injunction pendente lite is merely a provisional remedy, and is not conclusive either upon the court or upon the parties in a subsequent disposition of the case by a decree. *Andrae v. Redfield*,* 12 Blatch., 407.

§ 1742. Removal to federal court.—Under section 646, Revised Statutes, providing that "any injunction granted before the removal of the cause against the defendant applying for its removal shall continue in force until modified or dissolved by the United States court into which the case is removed;" and section 640, declaring that "all injunctions, orders and other proceedings had in such suit prior to its removal shall remain in full force and effect until dissolved or modified by the court to which the suit shall be removed," an injunction issued by the state court against the defendant in the suit is continued in force on the removal of the suit to a federal court by the motion of the plaintiff, and does not cease to operate by the peremptory effect of the provision in section 720, that "the writ of injunction shall not be granted

by any court of the United States to stay proceedings in any court of a state, except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy." Such an injunction is to be dealt with in the federal court without in any way being affected by section 720. *Perry v. Sharpe*, 8 Fed. R., 15.

§ 1743. Where a case is removed from a state to a federal court under the judiciary act of September 24, 1789, any injunction issued before its removal *ipso facto* falls, for the reason that the twelfth section of the act, while it is careful to preserve the lien of an attachment issued before the removal, does not preserve an injunction, and, where congress has intended to preserve the lien of an attachment, and also continue in force an injunction, it has so expressly declared, as in the acts of 1866 and 1867. *Hatch v. Chicago, Rock Island & P. R. Co.*, 6 Blatch., 105.

§ 1744. Where a suit in a state court, in which an injunction has been granted, is removed into the circuit court of the United States under the twelfth section of the judiciary act of 1789, the injunction falls, and a motion to dissolve is not necessary. An attachment for the violation of the injunction cannot be granted, but a motion may be made, in the circuit court to which the case is removed, for an injunction on the face of the bill as it stands before that court. *McLeod v. Duncan*, 5 McL., 342.

§ 1745. Where a suit or prosecution against an internal revenue officer is removed from a state to a federal court under the act of congress of July 13, 1866, which provides that "all attachments made, and all bail and other security given upon such suit or prosecution, shall be and continue in like force and effect as if the same suit or prosecution had proceeded to final judgment and execution in the state court," an injunction issued by the state court is dissolved. *Northwestern Distilling Co. v. Corse*, 4 Biss., 514.

§ 1746. A demurrer to a bill praying for an injunction must be determined, before a motion for the injunction can be heard. *Ketchum v. Driggs*, 6 McL., 13.

§ 1747. Effect of service of notice.—Where a defendant in an action for the recovery of the possession of real estate, against whom a judgment has been rendered, files a bill in equity to enjoin the execution of the judgment, the service of the notice of motion for an injunction does not prohibit the plaintiff from proceeding to enforce his judgment. *Kamm v. Stark*, 1 Saw., 547 (§§ 1802-6).

§ 1748. Order delayed for trial of title.—Injunctions being prohibited in the courts of the United States, by act of congress, without notice to the opposing party, they must all be regarded as special rather than some of them as common or a matter of course; and therefore, when resisted under such notice, whether the hearing comes on before or after an answer, no injunction can be granted unless special and sufficient cause is clearly shown. In cases of injunction against waste or trespasses, it is not only necessary for the complainant to make out a *prima facie* title to the property, but if his title, to the extent to which it is set up by him, is denied and contested by the respondent, and evidence enough is offered to show some ground for this denial, the injunction will not be granted till the disputed title between the parties is first settled on appropriate pleadings and full testimony. *Perry v. Parker*,* 1 Woodb. & M., 280.

§ 1749. Money penalty.—The court in this case refused to insert a money penalty in an injunction, holding that this had not been the practice in the circuit, the remedy being always by attachment, and that such an injunction was subject to be misunderstood by the defendant as an alternative. *Low v. Haul*, 1 Wall. Jr., 345.

§ 1750. A jury trial in an equity case cannot be demanded as a right; and the court will decree a perpetual injunction in a patent case without first taking the verdict of a jury on the validity of the patent, where the case has been set down for final hearing on the exhibits and proofs, without any motion or order of court for such an issue; and the court feels no difficulty on the questions; and it is probable that from the confusion created by the great length of testimony no verdict would be obtained. *Goodyear v. Day*, 2 Wall. Jr., 283.

§ 1751. Affidavits.—The granting of a preliminary injunction is simply to hold the parties *in statu quo*, until their legal rights can be ascertained. Upon an application for a preliminary injunction, the parties do not come before the courts on legal proofs strictly, but with affidavits alone, on which there is no right to cross-examination. The practice is that the complainant must file his affidavits upon a certain day, and the defendant must file his affidavits in reply by another appointed day, and, except in case of entire surprise, the plaintiff cannot file affidavits in rebuttal. *Day v. Boston Belting Co.*,* 16 Law Rep., 329.

§ 1752. Case referred to master.—Upon a motion for a preliminary injunction to restrain the infringement of a copyright, the court in this case refused the injunction and referred the case to a master for examination and report as to the extent of the infringement. *Story v. Derby*, 4 McL., 160.

§ 1753. A motion for a provisional injunction to restrain the violation of a copyright must be disposed of on the moving papers of the plaintiffs, and opposing affidavits on the part of the

defendant. A reference to a master for a report on the facts will not be made. *Smith v. Johnson*, 4 Blatch., 252.

§ 1754. **Proof.**—An affidavit of the truth of the allegations contained in the bill is not the only evidence upon which an injunction is issued. It may be issued on other proof besides the oath of the parties. *Schermerhorn v. L'Espenasse*, 2 Dall., 360.

§ 1755. **Supersedeas.**—Strictly speaking, an injunction in equity does not operate as a *superseas* at law; although it may furnish a proper ground for the court of law in which the judgment is rendered, to interfere by summary order to quash or stay the proceeding on the execution. If the injunction is disobeyed, a court of equity has its own mode of administering redress. But a court of law is under no obligation to enforce it as a matter of right or duty. *Boyle v. Zacharie*, 6 Pet., 648.

§ 1756. **Dissolution.**—Upon the question of the dissolution of an injunction the allegations of the bill which are neither admitted nor denied by the answer are to be taken as true, though they must be proven on the final hearing. *Young v. Grundy*,* 6 Cr., 51.

§ 1757. Upon a motion to dissolve an injunction, the cause is neither heard nor set for hearing; the motion only is heard. *Robinson v. Cathcart*,* 2 Cr. C. C., 590.

§ 1758. The court will not dissolve an injunction until all of the defendants have answered. Thus, where the husband and trustee of a married woman who was a defendant were made parties and summoned, and there was little doubt that she had knowledge of the bill and might have appeared and answered, the court refused to dissolve the injunction without her answer, although the *subpœna* had not been served upon her. *Ibid.*

§ 1759. An injunction cannot be dissolved in favor of one who has not answered the bill. *Ibid.*

§ 1760. Upon a motion to dissolve an injunction, the answer of the respondent is to be taken as evidence in his favor only so far as it is responsive to the allegations of the bill. *Ibid.*

§ 1761. Where an injunction is continued to the hearing, the court will dissolve it if the plaintiff has been guilty of intentional delay in prosecuting the cause. But it would be most unreasonable to apply this rule to a case where the defendant resides abroad, beyond the reach of the process of the court, otherwise than as he may be affected by service upon his attorney at law under a special order of the court. In such a case the delay in prosecuting the cause is not imputable to the plaintiff. *Read v. Consequa*,* 4 Wash., 174.

§ 1762. The amendment of a bill for an injunction before answer, and within a short time after the granting of the injunction, will not dissolve the injunction. *Ibid.*

§ 1763. A motion to dissolve an injunction cannot be listened to without a previous reasonable notice, either in writing or setting it down for that purpose, a sufficient length of time before the motion is made to allow the complainant to take affidavits in support of his bill. *Wilkins v. Jordan*,* 3 Wash., 226.

§ 1764. Where a bill in equity is good upon its face, a motion to dissolve an injunction granted against the defendant cannot prevail where there is no showing outside of the bill. *Lyster v. Stickney*, 12 Fed. R., 609.

§ 1765. Where a corporation, defendant in a suit in equity, and under an injunction, becomes dissolved by a decree of the proper court, the assignee may move for a rule that the injunction stand dissolved, unless the plaintiff shall within a certain time file a bill to revive the suit against the assignee. *Chester v. Life Ass'n of America*, 4 Fed. R., 487.

§ 1766. A motion to dissolve an injunction restraining the collection of municipal taxes assessed should be disposed of on its merits, and not continued until the hearing, where the only ground on which it is claimed that the taxes should not be collected is the unconstitutionality of the act under which they are imposed, and for that reason the case will not stand differently at the hearing. *Wells v. Central Vermont R. Co.*, 14 Blatch., 426.

§ 1767. Where there is equity on the face of the bill an injunction will not be dissolved on the coming in of the answer, unless there is a positive denial of all the material facts which form that equity; and such denial, too, must be based on the personal knowledge of the defendant; and a denial on information and belief is not sufficient. *Nelson v. Robinson*,* Hemp., 464.

§ 1768. The court, at an adjourned session, refused to hear a motion to dissolve an injunction upon notice given after the first session of the term. *Burford v. Ringgold*, 1 Cr. C. C., 253.

§ 1769. An injunction called *special* will not be dissolved as a matter of course upon the coming in of an answer denying the equity of the bill, if the plaintiff has adduced auxiliary presumptions in favor of his right. *Orr v. Littlefield*, 1 Woodb. & M., 13.

§ 1770. Where an injunction had been issued at the instance of the state of Georgia, restraining her debtor from paying the debt to another claimant, and, on motion to dissolve the injunction and dismiss the bill, it was held that her remedy for the recovery of the debt was at law, the injunction was continued until the next term to give the state an opportunity to

proceed at law, the ground for granting the injunction still continuing. *State of Georgia v. Brailsford*, 2 Dall., 415.

§ 1771. Where a preliminary injunction has been issued upon the bill of the complainant, by consent, the court, in the absence of any pretense of fraud or mistake in giving or obtaining the consent, will not, upon motion to dissolve, consider any questions arising upon the bill alone, or the complainant's right to bring the suit; the parties, the writ and the subject-matter appearing to be within the jurisdiction of the court. The motion to dissolve must be considered solely upon the questions raised by the answer. *Farmer v. Calvert Lithographing, etc., Co.*, 1 Flip., 228.

§ 1772. A preliminary injunction will not be dissolved when the effect of such dissolution will be to put the property in regard to which litigation is begun beyond the jurisdiction of the court, and thus prevent it from doing justice in its final decree. *Schermerhorn v. L'Esperance*, 2 Dall., 360.

IV. CREDITORS' BILLS.

SUMMARY—*Creditor must show diligence*, § 1773.—*Bills entertained by English chancery and by state courts*, § 1774.—*Return nulla bona; fraudulent transfers*, § 1775.—*Fishing bill; complainant unable to locate and describe property*, § 1776.—*Writ of ne exeat*, §§ 1777, 1778.—*Conveyance by master sufficient*, § 1779.—*Lien created by filing bill*, § 1780.—*Lis pendens*, § 1781.—*Equity has jurisdiction where there is no lien*, § 1782.—*Pledged property must be first applied*, § 1783.—*Where the property is assets of a deceased debtor*, § 1784.—*Property subject to execution sufficient to satisfy a part of the debt*, § 1785.—*Execution returned without effort to find property*, §§ 1786, 1809.—*Execution need not be held for full period*, § 1787; *reasonable effort must be made to find property*, § 1788; *presumption in favor of nulla bona return*, § 1789.—*Jurisdiction of federal courts*, § 1790.—*Where the judgment has been satisfied*, § 1791.—*Transfer of partnership effects to one member of firm*, §§ 1792, 1794, 1795.—*Federal court follows state court on local laws*, § 1793.—*Priority among creditors*, § 1796.—*Auxiliary to original suit; jurisdiction*, § 1797.—*Jurisdiction of equity to set aside fraudulent transfers*, § 1798.—*Bill to set aside fraudulent conveyance after sale of property under execution*, § 1799.—*Michigan statute construed*, §§ 1800, 1809.—*Injunction and receiver*, § 1801.—*Prior incumbrancer*, § 1802.—*Bill by single creditor against administrator*, §§ 1803, 1804.—*Unpaid subscriptions to capital stock*, §§ 1805, 1807, 1808, 1814.—*Defendant cannot attack judgment on which bill is founded*, § 1806.—*Insolvency and assignment by life insurance company; receiver*, §§ 1810-1812.—*Ground of equitable jurisdiction*, § 1813.—*Debtor of judgment debtor*, § 1815.—*Sale to copartner; bond and mortgage to secure debt*, § 1816.

§ 1773. A judgment creditor who seeks the aid of a court of equity to obtain satisfaction of his judgment must show that he has used reasonable diligence to recover his debt, and that the difficulties in his way at law have not been occasioned by his own neglect. A delay of twenty years is considered an absolute bar in a court of equity unless it is satisfactorily accounted for. The relief asked was refused in this case where there had been a delay of forty-six years, under circumstances which evidently showed a want of diligence for a part of that time; and where, under the peculiar facts, the relief, if granted, would not only protect the complainant from the consequences of his own neglect, but would also enable him to derive a positive advantage from it. *Maxwell v. Kennedy*, §§ 1817-19.

§ 1774. Bills by creditors to subject the assets of debtors to the payment of their debts were entertained both by the English chancery courts and the courts of chancery of the several states, particularly in the courts of New York, prior to the adoption of the Revised Statutes of the latter state. *Lewis v. Shainwald*, §§ 1820-26.

§ 1775. After execution upon a decree and a return of *nulla bona*, equity has jurisdiction of a bill by the complainant to discover and apply property of the debtor to the satisfaction of the decree, where it is alleged that the debtor has made fraudulent transfers of his property, has converted portions of it into money and secreted the proceeds; that a large amount of other property has been concealed from the complainant to prevent him from taking it in execution; that he is about to carry his money and all of his other property beyond the jurisdiction of the court, and that all of these acts are for the purpose of defrauding the complainant and preventing him from collecting his decree. The ground of jurisdiction in such a case is fraud and trust. *Ibid.*

§ 1776. A bill by a creditor is a fishing bill where there are no allegations of a definite or positive character as to the defendant's having at any time owned property which could have been subject to execution upon the plaintiff's claim; or where it seeks a discovery of matters which

cannot in any way affect the rights of the parties. But a bill by a creditor, setting forth the recovery of a judgment against the respondent by the complainant, the issue of execution, and the return of *nulla bona*, and alleging that a short time before the recovery of the judgment and during the pendency of the action the respondent converted his real estate into cash, and has since the rendition of the judgment secretly transferred a large amount of his property and secreted the remainder; that he has a large amount of property which the complainant has been unable to reach by execution; that he intends and is about to convert all his property into cash and remove with it beyond the jurisdiction of the court; and that all these steps have been taken for the declared purpose of so fixing his property that it cannot be seized to satisfy the judgment, and to defraud the complainant of the money due on it; and praying a discovery, is not a fishing bill. That the complainant is unable to locate and describe the property and funds of the respondent ought not to make it impossible for him to bring his cause within the jurisdiction of a court of equity. *Ibid.*

§ 1777. A prayer in the bill for the writ of *ne exeat* is not necessary. It is sufficient if the facts alleged and proved show a proper case for the writ, and it may be granted in the decree under the prayer for general relief. Or the facts may be shown and the writ applied for upon a petition presented in the case, either before or after final judgment. The limitation of equity rule 21 applies only where the writ is asked for pending the suit. *Ibid.*

§ 1778. Under section 716 of the Revised Statutes, the district court has power to issue a writ of *ne exeat*, when necessary to the exercise of its jurisdiction. *Ibid.*

§ 1779. Where a court of equity has jurisdiction, a sale and conveyance by a master, in obedience to a decree in a creditor's bill to set aside a fraudulent conveyance and have the property sold to satisfy the judgment at law, is effectual to convey the title, and a conveyance by the fraudulent grantee is not necessary. *Miller v. Sherry*, §§ 1827-31.

§ 1780. The filing of a creditor's bill and the service of process creates a lien in equity upon the effects of the judgment debtor. But if it contains nothing specific with reference to the property fraudulently conveyed, it only creates a general lien, and not a specific one as against others than the fraudulent grantee. *Ibid.*

§ 1781. A creditor's bill, in order to create a *lis pendens*, operating as notice as to any real estate, must be so definite in the description that any one reading it can learn thereby what property is intended to be made the subject of the litigation. And where the bill is to set aside a fraudulent conveyance, the holder of the legal title must be made a party in order to affect persons acquiring interests from the defendant as purchasers *pendente lite*. Where the bill is amended so as to create a *lis pendens*, the notice operates only from the time of filing of such amended bill. It is regarded as an original bill for that purpose. *Ibid.*

§ 1782. A court of equity has jurisdiction to reach the property of a debtor justly applicable to the payment of his debts, even where there is no specific lien on the property. But the debt must be clear and undisputed, and there must exist some special circumstances requiring the interposition of the court to obtain possession of and apply the property. A decree which is merely interlocutory, and only fixes provisionally the indebtedness to the complainant, and which does not prevent a re-examination of the question of the debtor's liability, does not sufficiently establish the claim to authorize a creditor's bill. Unless the suit relates to the estate of a deceased person, the debt must be established by some judicial proceeding, and it must generally be shown that legal means for its collection have been exhausted. *Public Works v. Columbia College*, §§ 1832-37.

§ 1783. In all cases, property pledged or conveyed for the payment of the debt must be first applied before the creditor can maintain a creditor's bill to subject other property to the satisfaction of his claim. *Ibid.*

§ 1784. The rule requiring the existence of some special circumstances bringing the case within some recognized head of equity jurisdiction, in order to sustain a creditor's bill, should not only be insisted on with vigor whenever the property sought to be reached constitutes assets of a deceased debtor, which have already been subjected to administration and distribution, but some satisfactory excuse should be given for the failure of the creditor to present his claim, in the mode prescribed by law, to the representative of the estate, before distribution. The bill was dismissed in this case where, in addition to the uncertainty of the complainant's claim, he had never presented it for allowance in the probate court, nor brought it to the attention of the supreme court of the district, when the estate was before it for settlement, and publication had been made for the presentation of claims. *Ibid.*

§ 1785. It is not essential that there should be property subject to execution sufficient to fully satisfy the debt in order to defeat the remedy in equity by creditor's bill. If there be property sufficient to satisfy a considerable part of the debt, a creditor's bill should not be sustained until such property is exhausted. *Bassett v. Orr*, §§ 1838-40.

§ 1786. A creditor cannot issue execution on his judgment and procure its immediate return "no property found," when no effort whatever has been made by the officer to find property,

and when the debtor has tangible, visible property from which the amount of the judgment can be realized, and then make such proceedings the subject of a creditor's bill. *Ibid.*

§ 1787. For the purposes of a creditor's bill, the marshal is not bound to hold the execution the entire time it may run, before making his return. The remedy at law may be exhausted before the return day of the writ, and in that case the execution may be immediately returned. The only test is, has the remedy at law been exhausted before exhibiting the bill. *Ibid.*

§ 1788. As the basis for a creditor's bill, an execution upon the judgment should be in good faith issued, and should be returned unsatisfied by the officer after a reasonable and actual but ineffectual effort to find property. If the return on its face shows a failure in this respect there is no foundation for equity jurisdiction. If there has been collusion between the officer and the party and a false return made, proof of the fact is fatal to the bill. *Ibid.*

§ 1789. A return of *nulla bona* complete upon its face is sufficient, if unattacked, to sustain a creditor's bill. The presumption is that it is true and that the officer performed his duty, and this presumption is not overcome by the fact that he returned the process on the day he received it. The burden of showing a false return is on the defendant. But its falsity may be shown, and the creditor's bill defeated, by establishing the fact that the debtor had property liable to execution, and which could have been levied on to pay the debt. *Ibid.*

§ 1790. A federal court may entertain jurisdiction of a creditor's bill filed to obtain a discovery of property and to subject it to the satisfaction of the judgment, although the parties may be compelled to testify under an act of congress, and notwithstanding the code of the state gives special proceedings having in view the same purpose to reach the debtor's property. *Frazer v. Colorado Dressing & Smelting Co.*, §§ 1841-42.

§ 1791. A judgment creditor whose judgment has been satisfied by a purchase by him of property of the debtor, sold under a *seire facias* issued upon his judgment, cannot maintain a creditor's bill to set aside a fraudulent conveyance of that or other property by the debtor. *Walker v. Powers*, §§ 1843-48. See § 1799.

§ 1792. Where a transfer of partnership effects by one member of an insolvent firm to another is avoided as voluntary and constructively fraudulent, the jurisdiction of equity to proceed with the cause is founded upon the right of subrogation which equity gives to the firm creditors. The lien of partners and of creditors by subrogation upon the whole funds of the partnership, for the balance finally due to the partners respectively, seems incapable of being enforced in any other manner than by a court of equity through the instrumentality of a sale. *Johnson v. Straus*, §§ 1849-62.

§ 1793. Where a suit is brought by a creditor on the equity side of the circuit court of the United States, for the purpose of avoiding the effect of a constructively fraudulent transfer of partnership effects from one member of a debtor firm to the other, which suit is based on the second section of chapter 175 of the code of Virginia, allowing a creditor to maintain a suit to avoid a fraudulent conveyance by his debtor, without first obtaining a judgment, in cases where he might maintain such a suit after judgment, the court will follow the construction of the state courts upon this statute as to the disposition to be made of the fund thus obtained. The local courts having construed this statute to mean that such a bill operates as a lien from the day of its filing, and establishes for the complainant the right to be paid out of the fund which is the subject of the suit in preference to all other creditors having claims of equal dignity with his own, it is therefore held that the federal court will in such a suit follow this rule, and not distribute the fund *pro rata* among all the creditors of the firm, as it would do if it had jurisdiction of the case by virtue of the original inherent jurisdiction of a court of equity. *Ibid.*

§ 1794. One member of a firm, at a time when it was confessedly insolvent, sold out his interest to the other for a certain sum for which the latter gave his own notes, the goods and uncollected claims thus becoming the property of the purchasing partner. It was held that, the firm being insolvent and the rights of creditors imperiled, the transfer was voluntary and on the part of the firm constructively fraudulent, and it became competent for a court of equity to avoid the transfer under the second section of chapter 175 of the code of Virginia, allowing a creditor to maintain a suit to avoid a fraudulent conveyance by his debtor without first obtaining a judgment, in cases where he might maintain one after judgment, and to take charge of and administer the effects according to the equities of the case. It was held further that equity having jurisdiction in matters of account, partnership, trust and constructive fraud, the jurisdiction was complete in the absence of any actual fraud. *Ibid.*

§ 1795. In a suit in equity in the circuit court of the United States by the creditors of an insolvent firm to avoid the effect of a constructively fraudulent conveyance by one member of the partnership effects to the other, it was held the admitted fact of insolvency, the acknowledgment by the defendants of the indebtedness charged in the bill, and the imminent peril of the goods, made a case for the interposition of the court as a court of equity, too strong to be over-

come by the technical objection that part of the claims acknowledged to be due had not matured for payment. *Ibid.*

§ 1796. A creditor, filing a bill to set aside a fraudulent assignment, not having acquired a lien by judgment at law, is not entitled to priority of payment over other simple contract creditors coming in by petition and claiming *pro rata* payment. In such a case equality is equity. Such a bill, however, cannot be maintained by a creditor without first obtaining a judgment, if the objection is taken by the opposite side. *Day v. Washburn*, § 1868.

§ 1797. A bill in equity by a judgment creditor to set aside a fraudulent transfer of his property by his debtor, and in aid of the execution at law, is ancillary to the original suit, and is in effect a continuance of the suit at law to obtain the fruit of the judgment or remove obstacles to its enforcement. Such a suit cannot be maintained in any court which does not exercise auxiliary jurisdiction over the court in which the original suit was brought. A creditor, therefore, who has obtained judgment in California, cannot bring a creditor's bill in the circuit court of the United States in New York, to set aside fraudulent transfers made in California, without putting his claim in judgment in New York. The California judgment makes him only a creditor at large in New York; and a creditor at large cannot invoke the jurisdiction of equity to enforce his claim, unless upon some of the recognized grounds of trust or administration of equitable assets. The remedy at law cannot be said to be exhausted by the recovery of a judgment in California and by fruitless efforts to enforce it there. The creditor might be able to enforce a judgment in New York by execution. *Clafin v. McDermott*, §§ 1864-65.

§ 1798. A court of equity has general jurisdiction to set aside fraudulent transfers of property at the instance of a judgment creditor. Such bills are sustained, notwithstanding there may also be a remedy by ejectment, upon the ground that no remedy is full, adequate and complete which leaves the fraudulent deed outstanding as an apparent cloud upon the title. *Orendorf v. Budlong*, §§ 1866-72.

§ 1799. A judgment creditor may maintain a bill in equity to set aside a fraudulent conveyance by the judgment debtor, after a sale of the property under the execution and the purchase of the same by the judgment creditor at the sale. But in such a case he takes the proceedings to attack the conveyance as purchaser and not as judgment creditor. *Ibid.* See § 1791.

§ 1800. Section 4628 of the compiled laws of Michigan provides that "all the real estate of any debtor, including legal and equitable interests in lands acquired by parties to contracts for the purchase and sale of lands, whether in possession, reversion, or remainder, including lands fraudulently conveyed with intent to defeat, delay or defraud his creditors, and the equities and rights of redemption hereinafter mentioned, shall be subject to the payment of his debts, liabilities and obligations, and may be levied upon and sold upon execution as hereinafter provided;" and that "in case of levy upon the equitable interest of a judgment debtor, the judgment creditor may, before sale, institute proceedings in aid of said execution to ascertain and determine the rights and equities of said judgment debtor in the premises so levied upon; and that in case of a sale of said premises, after having ascertained and determined the interest of said judgment debtor in the premises so levied upon and sold, he shall, within one year, institute proceedings to ascertain and determine the same, and to settle the rights of the parties in interest therein." It is held that the limitation of this section applies only to "equitable interests," and not to the interest of a creditor in the land of his debtor which has been fraudulently conveyed, this being a legal interest. The propriety of this construction is evident by referring to the section of the Revised Statutes of 1846 from which this section was taken. *Ibid.*

§ 1801. After a decree in equity by which the defendant was adjudged to have fraudulently obtained the assets of a bankrupt firm by means of fictitious claims and collusive judgments, and the return of an execution thereon unsatisfied, the complainant filed a bill in the nature of a creditor's bill, alleging that the defendant had sold and transferred land, and threatened to leave the state with the proceeds, with the design of preventing a levy thereon, and with a design to hinder, delay and defraud the complainant; that, since the decree, the defendant had transferred his property to divers persons, and had secreted the remainder with the same intent, and that he had property debts and other equitable interests of great value, which could not be reached by execution. *Held*, that, on the allegations of the bill, an injunction would issue and a receiver be appointed, and the defendant would be ordered to make an assignment of all his property to the receiver, and that it was not necessary to specify in the bill the particular property sought to be affected, or that it should be made to appear that it was equitable in its nature. *Shainwald v. Lewis*, §§ 1873-75.

§ 1802. Where it is the object of a bill in equity to subject land to the payment of the complainant's debt, and a prior incumbrancer holds the legal title, and his debt is payable, it is proper to make him a party. But it is in the power of the court to order a sale, subject to the

prior incumbrance, in a fit case. It is such a case where the prior incumbrancer is not subject to the jurisdiction of the court, and cannot be joined without defeating the jurisdiction, and his incumbrance is admitted. *Hagan v. Walker*, §§ 1876-78.

§ 1803. A single creditor may maintain a bill against the administrator of a deceased debtor for the discovery of assets and the payment of his debt. But some special case must be made to entitle him to join with the administrator a third person who is in possession of property which is amenable to the payment of the debt. Such a special case is held to be made where it appears that the third person is in possession of all the assets of the deceased debtor, both real and personal, holding them under conveyances made to him by the deceased, absolute on their face and valid on their face as between the parties, but accompanied by secret trusts in favor of the grantor, and designed to defraud this particular creditor, and prevent him from obtaining payment of his judgment; and that this fraudulent design has been thus far successfully executed. The embarrassments which would, in such a case, attend any attempt by the administrator to possess himself, even of the personalty, by suit at law, would be great, if not insuperable, and the impracticability of taking an account of the debts at law, and proportioning the recovery to the amount required to pay them, would render a resort to equity indispensable to do entire justice between the parties, even if the assets were legal. It is not necessary, in such a case, for the creditor to request the administrator to sue, where two years have elapsed since the death of the debtor, and he has taken no steps to collect the assets; where he resists the creditor's bill by demurrer, relying on the statute of limitations; and as it is doubtful how far he has a remedy without the concurrence of any creditor; and as there is no danger by the proceeding of interfering with the due course of administration, or of taking from the administrator his proper control over suits for the recovery of assets. *Ibid*.

§ 1804. A bill by a creditor of a deceased debtor, against the administrator and a party who is fraudulently holding all the property of the deceased, which in equity should be applied to the payment of the debt, praying that the debt may be paid out of this fund, is not to be treated as an application by a judgment creditor for the exercise of the ancillary jurisdiction of the court, to aid him in executing legal process; but comes under a head of original jurisdiction in equity. In this view of the bill it is not necessary that the creditor should have a judgment lien on the property, and be in a condition at once to enforce his right if the obstacle should be removed. *Ibid*.

§ 1805. Unpaid subscriptions to the capital stock of a bank are corporate property, constituting a trust fund, which can be reached by creditors in a court of equity. The amount subscribed, and not that actually paid in, is the capital stock of the company. To the position that the equity of the creditor is a mere right to sue and cannot be assigned, it is sufficient to say that the equity is attendant upon the legal right vested in the holder of the bills as such. Billholders, therefore, who have obtained judgments against the bank for the amount of their bills, and whose executions have been returned *nulla bona*, may maintain a bill against the stockholders to reach their unpaid subscriptions for the payment of the judgments. *Marsh v. Burroughs*, §§ 1879-80.

§ 1806. Defendants in a creditor's bill cannot attack the judgment on which it is founded by interposing a defense which should have been made in the action at law. They cannot go behind the judgment unless they can show collusion between the plaintiffs and the debtor for the purpose of defrauding them. It was so held in a bill by billholders against stockholders of a bank, to reach unpaid subscriptions. *Ibid*.

§ 1807. It is no objection to a bill by billholders of a bank to reach unpaid subscriptions to the capital stock that it is not filed by or in behalf of all the creditors, since a judgment creditor who has exhausted his legal remedy by execution returned *nulla bona* may alone, or with other judgment creditors, file a bill against persons holding property of the debtor, which, on account of fraud or the existence of a trust, cannot be reached by execution; and since the law does not compel an equal distribution of this fund amongst all the creditors. *Ibid*.

§ 1808. It cannot be objected to a suit in equity by billholders of a bank to subject unpaid subscriptions to the payment of their debts that it is not filed against all the stockholders, since a judgment creditor who has exhausted his legal remedy may pursue, in a court of equity, any equitable interest, trust or demand of his debtor, in whosoever hands it may be; and if the party thus reached has a remedy over against other parties for contribution or indemnity, it will be no defense to the primary suit against him that they are not parties. *Ibid*.

§ 1809. Although it has been held that a creditor's bill cannot be maintained where the return of *nulla bona* was made before the return day of the writ, it is held, under the statute of Michigan of 1838, providing that "whenever an execution against the property of the defendant shall have been issued on a judgment at law, and shall have been returned unsatisfied in whole or in part, the party suing out such execution may file a bill in chancery against such defendant and every other person to compel the discovery of property, or things in action due to him, or held in trust for him," that the bill may be maintained notwithstanding this objec-

tion. The object of this statute is that there shall be record evidence of the defendant's inability to pay the judgment before the bill is filed, and his return becomes a matter of record and is conclusive, except in an action against the officer for a false return. Whether the persons charged in the bill as fraudulent assignees of the defendant may not allege in their answer and prove on the hearing, in such a case, that the defendant in the judgment has property out of which the whole or part of the judgment may be satisfied, is not decided. *Howe v. Cobb*, §§ 1891-92.

§ 1810. Where a life insurance company has become insolvent and made an assignment of all of its effects in liquidation, and the trustee has confessed his inability to administer the property by taking steps to obtain the aid of a court of chancery, all the conditions requisite for the authority of a court of chancery, at the instance of the creditors, to appoint a receiver, are present. *Buck v. Insurance Co.*, §§ 1898-97.

§ 1811. The fact of the failure of a life insurance company is *prima facie* evidence that its operations have been conducted in a fraudulent manner; and if the failure is not explained by some great casualty, such as a widespread pestilence, or sudden financial convulsion, or physical calamity, it is *per se proof* of fraud. In such a case a court of equity is not justified, when asked by creditors to appoint a receiver, in leaving in charge of its effects the trustee in the assignment which the company has made, or in appointing such trustee, or any one officially and responsibly connected with the mismanagement which brought the company to ruin, as its own receiver. *Ibid.*

§ 1812. An assignee in liquidation of an insolvent life insurance company instituted a suit in a state court asking the assistance of the court in carrying into effect the provisions of the deed of assignment, though his bill was not filed. On the same day a resident creditor of the company filed a bill in the same court against the company and the assignee alone, asking for a receiver and the setting aside of the deed of assignment and also for a personal decree for a certain amount. A few days later, and before either of these suits had proceeded to issue, they being still at the rules, or the state court had appointed a receiver or taken custody of the *res*, or made any order by which it took cognizance or assumed jurisdiction of the controversy between the parties to the respective suits, non-resident creditors filed a bill in the circuit court of the United States against the company, the assignee and the stockholders, asking, in the name of all the creditors who might come in, for the special and general relief usually asked in creditors' bills, that the trust deed should be set aside, that the funds be collected and distributed, and that a receiver be appointed. It was held that the jurisdiction of the United States circuit court was not defeated by these incipient steps taken in the state court. *Ibid.*

§ 1813. It is not ordinarily a sufficient defense to a suit at law or in equity that the plaintiff will not be able to enforce the judgment or decree; but in a judgment creditor's suit brought to enforce his demand out of the equitable interests and assets of the defendant, which are not subject to execution at law, the precise ground of relief is that a court of equity can enforce the remedy sought, while it cannot be obtained in a common law court. And in such suits courts of equity ought not to allow parties to go through a long course of expensive and perhaps vexatious litigation, when it is apparent that it must be fruitless in its result. *Winans v. McKean Railroad & Navigation Co.*, §§ 1898-1903.

§ 1814. The capital stock of a corporation and any unpaid subscriptions to the capital stock must be considered in equity as a trust fund specifically charged with the debts of the corporation; and a court of equity, upon a bill properly framed, in a suit by and against all proper parties, will enforce the trust. *Ibid.*

§ 1815. Whether a debtor of a judgment debtor can be compelled in equity to pay the judgment creditor must depend on the character of the contract out of which the indebtedness arises. If the debtor has bound himself to pay the judgment creditor he may be decreed to do so. *Sedam v. Williams*, §§ 1904-11.

§ 1816. If one partner sells to his copartner, and the latter binds himself to pay the debts of the firm out of the proceeds of the goods received, and gives a bond and mortgage to secure the faithful performance of the undertaking, the creditors of the firm, being beneficially interested in the contract, may maintain a bill in equity to enforce the mortgage. It is no objection to such a bill that a judgment at law was obtained against the retiring partner subsequent to the execution of the bond and mortgage. It is not a case where a remedy at law has been lost by negligence, as the remedy sought against the defendant did not exist against his partner who sold to him. The character of such a bill is immaterial, if it embodies principles which show that the complainants are entitled to relief. It is not technically a creditor's bill. *Ibid.*

[NOTES.— See §§ 1912-1959.]

MAXWELL v. KENNEDY.

(8 Howard, 210-228. 1849.)

APPEAL from U. S. Circuit Court, Southern District of Alabama.

This bill was filed to obtain satisfaction of a judgment at law, and was dismissed on demurrer.

Opinion by TANEY, C. J.

STATEMENT OF FACTS.—The facts stated in the bill are admitted by the demurrer, and the only question is whether the complainant is entitled to relief in a court of equity, when so many years have elapsed since the judgment was obtained against the father of the defendants.

The judgment was rendered in South Carolina on the 10th of November, 1797, and this bill was filed against the appellees in Alabama on the 22d of February, 1844. A period of more than forty-six years had therefore elapsed, during which neither the plaintiff who obtained the judgment, nor his administrator, nor the present complainant, who is administrator *de bonis non*, made a demand of the debt, or took any step to procure its payment.

It is not alleged in excuse for this delay that his residence was during all the time unknown. On the contrary it is admitted that it was known for some six or eight years after the judgment was obtained; and although he was afterwards lost sight of for a long time, and supposed to have gone beyond sea and died in parts unknown, yet he was again discovered in 1822 residing in the state of Alabama, where for three years afterwards he was accessible to the creditor, and amenable to judicial process. Neither is it alleged that he designedly and fraudulently concealed his place of residence from the creditor; nor that the conveyance of his property was made for the purpose of hindering or preventing the recovery of this debt. The delay is accounted for and sought to be excused altogether upon the ground that when his place of residence was known, he was always in a state of poverty and insolvency which made it useless to proceed against him.

§ 1817. *Equity will not remedy the consequences of laches.*

It is, however, not necessary, in deciding the case, to inquire whether even this state of poverty would justify the delay of so many years without some demand upon the party, or some proceeding on the judgment, to show that it was still regarded as a subsisting debt, and intended to be enforced whenever the debtor was able to pay. The facts stated in the bill, and those which appear in the exhibits filed with it by the complainant, do not show this continued condition of utter destitution and want which the complainant relies upon. For when he was discovered in 1822, in Alabama, his situation as to property was such as to make it highly probable that the debt might then have been recovered by an action at law, if it was not already barred by the act of limitations of that state.

This appears from the decree of the chancery court of the state, in a controversy between the heirs of William E. Kennedy, the debtor, and the heirs of his brother Joshua, which decree is one of the complainant's exhibits. It shows that in 1818 or 1819 the debtor held in his own right an undivided moiety of the real estate, which he conveyed to his brother, Joshua Kennedy, in 1824, as mentioned in the bill. And this conveyance upon the face of it purported to be in consideration of the sum of \$10,000; a sum sufficient to pay the principal of the judgment, and a large portion of the interest. It is true that the complainant, in that part of the bill in which he speaks of this

conveyance, states that he did not discover that the debtor was living and residing at Mobile until after the conveyance was made. If this allegation was consistent with the other statements in the bill, and could be regarded as a fact in the case, admitted by the demurrer, still, as he died in 1825, reasonable diligence required that the creditor should have taken some measures to ascertain whether the \$10,000 had been paid; and to compel his administrator, who was also the grantee in the deed, to account for it. The creditor had no right to presume, without inquiry, that his debtor, who had sold property for so large a sum of money, had within a year afterwards died utterly insolvent and almost penniless, so as to make it useless to investigate the state of his affairs, or to take any step towards the recovery of his debt. There is reason for believing, from the facts stated in the decree above mentioned, that, with proper efforts, he would at that time have learned the trust upon which the conveyance was made, and discovered that the debtor had left property of sufficient value to be at all events worth pursuing.

But the complainant cannot put his claim upon the ground that the residence of the debtor was not known until after he had made the conveyance and parted from this property. For in a previous part of his bill he admits that this information was obtained in 1822, which was two years before the deed was executed. And whatever might have been the wasteful and dissolute habits of the debtor, yet he at that time owned the land which at this late period the complainant is seeking to charge with this debt; and continued to hold it until the conveyance to his brother in 1824. And if the creditor chose to rest satisfied with information as to his habits and manner of living, instead of using proper exertions to find out his situation as to property, his want of knowledge in this respect was the fruit of his own laches. The fact that he held the title to these lands could undoubtedly have been ascertained with ordinary exertions on his part. And he moreover might have learned, according to the statement in his exhibit before referred to, that after the death of William E. Kennedy, his brother, the grantee in the deed, frequently spoke of this conveyance as intended merely to prevent the property from being wasted by the careless habits of his brother, and to preserve it for his family. And as late as 1829, in an advertisement in a newspaper of the place, offering some of this land for sale or lease, he described it as property of which the children of William E. Kennedy were entitled to one-half. With all these means of information open to him from 1822 to 1829, the creditor cannot be permitted to excuse his delay in instituting proceedings upon the ground that he supposed the debtor to have lived and died hopelessly insolvent, until he obtained information to the contrary about the time this bill was filed. If he remained ignorant, it was because he neglected to inquire. If he has lost his remedy at law by lapse of time, or the death of the debtor, it has been lost by his own laches, or that of the administrator who preceded him.

§ 1818. *Creditor seeking to collect debt by creditor's bill must show diligence.*

It is the established rule in a court of equity, that the creditor who claims its aid must show that he has used reasonable diligence to recover his debt, and that the difficulties in his way at law have not been occasioned by his own neglect. A delay of twenty years is considered an absolute bar in a court of equity, unless it is satisfactorily accounted for. But here there has been a delay of more than forty-six years; and under circumstances, for a part of that time, which evidently show a want of diligence.

Indeed, if the court granted the relief asked for, the complainant would

not only be protected from the consequences of his own neglect, but would derive a positive advantage from it. For if, when the debtor was discovered in Alabama, in 1822, the complainant had then brought an action at law against him and recovered judgment, and then suffered that judgment to sleep until the time when this bill was filed, his claim would have been barred by the statute of limitations of that state. And if he could now avoid that bar upon the ground that the act of limitations of Alabama applies only to domestic judgments, and could obtain the aid of a court of equity to enforce the judgment rendered in South Carolina upon the ground that it is not within that act, he would derive an advantage from his omission to proceed against the debtor when he discovered in 1822 the place of his residence. He would obtain relief because he neglected to sue at law when the debtor appears to have been in a condition to pay the debt; and when that fact could have been ascertained by reasonable exertions on his part. In the eye of a court of equity, laches upon a judgment of South Carolina cannot be entitled to more favor than laches upon a judgment in Alabama, and both must be visited with the same consequences. Relief in a court of equity, under the circumstances stated in the bill and exhibits, would be an encouragement to revive stale demands which had been abandoned for years. The property now sought to be charged might not, in the life-time of the original parties, have been thought worth pursuing; and in the changes in value continually occurring in this country, it may, after the lapse of so many years, have become of great value in the hands of the heirs of the debtor. And if under such circumstances it could be made liable, an old and abandoned claim, with the accumulated interest of near half a century, might become a tempting speculation. Sound policy as well as the principles of justice requires that such claims should not be encouraged in a court of equity.

It is unnecessary, in this view of the case, to determine whether the statute of limitations of Alabama does or does not apply to this judgment. For the reasons above stated we think the lapse of time, upon the facts stated in the bill and exhibits, is, upon principles of equity, a bar to the relief prayed, without reference to the direct bar of a statute of limitations.

§ 1819. *When laches appears on the face of the bill, defendant may demur.*

Another question has been made in this case, and that is, whether the objection arising from lapse of time, apparent on the bill and exhibits, can be taken advantage of on demurrer. Undoubtedly the rule formerly was that it could not; and that doctrine was distinctly laid down by Lord Thurlow in the case of *Deloraine v. Browne*, 3 Bro. Ch., 646. The rule was perhaps followed for some time afterwards. It was placed upon the ground that this defense was founded upon the presumption that the debt must have been paid, and as a demurrer admits the fact stated in the bill, it admits that the debt is still due; and if admitted to be due, the debtor in equity and good conscience is bound to pay it.

But the presumption of payment is not the only ground upon which a court of chancery refuses its aid to a stale demand. For there must appear to have been reasonable diligence, as well as good faith, to call its powers into action: and if either is wanting, it will remain passive and refuse its aid. This is the principle recognized by this court in *Piatt v. Vattier*, 9 Pet., 416; *McKnight v. Taylor*, 1 How., 168, and in *Bowman v. Wathen*, 1 How., 189. If, therefore, the complainant, by his own showing, has been guilty of laches, he is not entitled to the aid of the court, although the debt may be still unpaid.

Upon this principle the proper rule of pleading would seem to be, that when the case stated by the bill appears to be one in which a court of equity will refuse its aid, the defendant should be permitted to resist it by demurrer. And as the laches of the complainant in the assertion of his claim is a bar in equity, if that objection is apparent on the bill itself, there can be no good reason for requiring a plea or answer to bring it to the notice of the court. Accordingly, the rule stated by Lord Thurlow has not been always followed in later cases. In *Hovenden v. Annesley*, 2 Sch. & Lef., 638, Lord Redesdale says: "If the case of the plaintiff as stated in the bill will not entitle him to a decree, the judgment of the court may be required on demurrer whether the defendant ought to be compelled to answer the bill." And in Story's Eq. Pl., § 503, and the note to it, he states the rule as laid down by Lord Redesdale to be now the established one. In the opinion of the court it is the true rule. It is evidently founded upon sounder principles of reason than the one maintained by Lord Thurlow, and is better calculated to disembarrass a suit from unnecessary forms and technicalities, and to save the parties from useless expense and trouble in bringing it to issue, and applies with equal force to a case barred by the lapse of time and the negligence of the complainant, as to one barred by a positive act of limitations. In the case before us, therefore, the demurrer was proper and must be sustained and the decree of the court below affirmed.

LEWIS v. SHAINWALD.

(Circuit Court for California: 7 Sawyer, 408-418. 1881.)

Opinion by SAWYER, J.

STATEMENT OF FACTS.—This is a bill in equity, called by appellant's counsel a creditor's bill, based upon a prior proceeding, in which a decree had been entered in the district court against the respondent, appellant here, for a large sum of money, and execution issued, upon which a return of *nulla bona* had been made.

It is claimed by the respondent that, prior to the adoption of the Revised Statutes in the state of New York, no such thing as a creditor's bill, in the sense since used, was known; that a creditor's bill of the character here set forth was unknown to the court of chancery; and that, therefore, the case is not properly one of equity jurisdiction. Upon this proposition some decisions of the English courts are cited; and it appears that some of the later decisions overrule some of the former ones upon certain points.

§ 1820. *Construction of equity rule No. 90. Its object and effect.*

In this connection equity rule 90 is cited as having a bearing upon the case, as prescribing that the English chancery practice shall be adopted in cases where our equity rules do not apply. That rule is as follows:

"In all cases where the rules prescribed by this court or by the circuit court do not apply, the practice of the circuit court shall be regulated by the present practice of the high court of chancery of England, so far as the same may reasonably be applied consistently with the local circumstances and local convenience of the district where the court is held, not as positive rules, but as furnishing just analogies to regulate the practice."

In my judgment, that rule does not in any way affect the question. The jurisdiction of this court is derived from the constitution and laws of the United States, and these rules are simply rules of practice, for regulating the mode

of proceeding in the courts. They do not, and could not, properly, either limit or enlarge the jurisdiction of the court. The rule quoted simply regulates the practice in exercising the jurisdiction of the court in those respects wherein the rules adopted do not apply; but the practice of the high court of chancery is to be applied, not as controlling, but simply as furnishing just analogies to regulate the practice.

§ 1821. *Jurisdiction of courts of equity in cases of creditors' bills irrespective of statutes.*

I am satisfied that creditors' bills, of some kinds, whether of the precise character of that now under consideration or not, were entertained both by the English chancery courts and in the courts of chancery in the several states, particularly in the courts of New York, prior to the adoption of the Revised Statutes of the latter state. The creditors' bills which were recognized previous to that time were, perhaps, in different form from that then adopted; but there undoubtedly were instances of bills maintained by creditors to subject the assets of debtors to the payment of their debts. The discussions upon the subject related mainly to the character of the assets and the circumstances of the particular case.

In the case of *Hadden v. Spader*, 20 Johns., 554, before the court of errors, and in which the decision of Chancellor Kent sustaining a creditor's bill is affirmed, I think the rule is established that certain assets can be reached and appropriated by a bill filed by a creditor; and several prior cases recognized the same principle.

§ 1822. *Jurisdiction in cases of creditors' bills grows out of fraud and trust.*

In the subsequent case of *Donovan v. Finn*, Hopk., 59, there was suggested some limitation. That case, however, did not overrule, or purport to overrule, as it could not, the decision of the court of errors in the case last referred to. Indeed, the two decisions, as to the real point involved and decided, do not conflict. The latter case was one into which the element of fraud, either actual or constructive, did not enter. It was simply a case where a legacy had been left to a debtor, which was in the hands of an executor, and a creditor's bill was filed to reach that legacy. There was no collusion or fraud, or voluntary conveyance, or other subject-matter of equity jurisdiction in the case. The debt was treated as an honest debt; and the chancellor held that it could not properly be reached by a creditor's bill. He recognizes, however, the propriety of filing such bills in cases of fraud. Frauds and trusts are in themselves subjects of equity jurisdiction. Indeed, matters of fraud and trusts are among the most extensive heads of equity jurisdiction. Wherever there is fraud in a case which cannot be fully remedied at law, equity intervenes and uncovers the fraud; and the fact that a creditor is injured by a fraudulent concealment or withholding of property brings him into such relations to the fraudulent transaction that he may, on that ground, invoke the equitable jurisdiction of a court of equity; have the fraud uncovered, and take hold of the funds or the property fraudulently concealed and withheld from him. He comes within the jurisdiction of the court, not merely because he is a creditor; not because his bill is a creditor's bill; but because he presents a case in which he sets forth matters of fraud or trust; and equity entertains his bill simply because he stands in such a relation to the fraudulent transaction that he is entitled to have the fraud uncovered, or a trust declared and enforced.

§ 1823. — *cases reviewed.*

This principle is recognized in the case last referred to. I read from the

decision as reported in 14 American Decisions, page 533. After stating that "it is apparent that this case does not belong to any general head of equitable jurisdiction, such as frauds, trusts, accidents, mistakes, accounts, or the specific performance of contracts;" that "there is neither fraud, nor trust, nor accident, nor any other ingredient of equitable jurisdiction," the chancellor proceeds to say:

"The English cases cited proceeded, as I conceive, not upon the ground of subjecting the credits of the judgment debtor to the payment of his debts, but upon some ground of equitable jurisdiction, as fraud or trust, existing in each case. . . . The case of *Bayard v. Hoffman*, 4 Johns. Ch., 450, was not the case of a judgment creditor; but the object of the suit was to annul an assignment in trust, made by a debtor without consideration. The assignor was insolvent when the assignment was made; that fact not being then known, no actual fraud was intended; but the assignment had all the operation of fraud against the creditors of the insolvent debtor; and for these reasons the cause was of equitable jurisdiction. . . .

"The case of *Hadden v. Spader*, 5 Johns. Ch., 280, and 20 id., 554, was also a case of an assignment by an insolvent debtor of property upon various trusts. It was clearly a case of trust; the assignment was charged to have been made by fraud, and, though the answers denied that fraud was intended, the facts exhibited a case of fraud. The effect of the assignment, if it had prevailed, would have been to withdraw and screen from execution the property of the debtor; the assignment was held to be void, and the judgment creditor had relief. These are the principal cases which have been adjudged in this court, and in all of them some acknowledged ground of equitable jurisdiction existed. In general they were suits to set aside conveyances, which prevented the seizure of property by the sheriff, and the conveyances have been considered frauds, either actual or constructive. . . .

"In giving relief in such cases, this court does not proceed upon the idea of giving execution against a species of property which is exempt from execution at law; but it acts upon some of the most ancient grounds of its jurisdiction, which enable it to give relief in cases of fraud and trust, either to a judgment creditor or to any other person whose just rights may be destroyed or impeded by such a cause. . . .

"I fully concur with Judge Platt in his opinion given in the case of *Hadden v. Spader*, and in his view of the powers and jurisdiction of this court, in respect to the rights and remedies of creditors. The case now to be decided has not one feature of equitable jurisdiction. In it there is neither fraud, nor trust, nor conveyance of property, nor any interruption of the effect of an execution or the due course of justice at law. . . .

"But when equity has jurisdiction, by reason of some disposition of the debtor's property, made in fraud of the creditor, and when, in such a case, the sheriff of the county in which the property is situated returns upon the execution that no property is found, the return is important evidence to show that the fraudulent disposition has had effect by preventing the service of the execution. By the existing law, the property of a debtor consisting of things in action held by him without fraud is not subject to the effect of any execution issued against his property; and while a court of law does not reach these things by its execution, a court of equity does not reach them by its execution for the purpose of satisfying either judgments at law or decrees in equity.

"All conveyances made to defraud creditors are void, both in law and equity.

When a fraud appears to a court of law, the conveyance is there adjudged void. When such a fraud is presented to this court, it is of equitable jurisdiction; and the property of the debtor fraudulently transferred is subject to the satisfaction of his debts, in favor of a creditor complaining of the fraud. Does an insolvent debtor transfer his property to another person in trust for himself, or in such a manner as to defeat the effect of a judgment and an execution? This is the frequent case. It is a case of both fraud and trust, and it is of equitable jurisdiction. It was the case of *McDermut v. Strong*, and of *Hadden v. Spader*. In all such cases this court vacates the fraud, sets aside the conveyance in trust, and, acting both upon the debtor and his trustee, it does complete justice to the creditor. Thus the jurisdiction of this court reaches, and reaches effectually, those cases of fraudulent conveyances and assignments in trust, which form the great and most vexatious impediment in the course of justice between creditor and debtor. Bills for discovery, where no relief is sought, also afford important aid to creditors against their debtors. But this court has no power to cause stocks, credits and rights of action, held by a debtor, without fraud, to be sold or converted into money, to be transferred to the creditor or to be applied to the payment of debts."

Now this is the distinction between this case of *Donovan v. Finn* and the other cases referred to. In the latter case it is the element of fraud which brings them within the jurisdiction; and a creditor, as well as any other party who is injured by the fraud, is able to maintain a bill to have the fraudulent act vacated, and to be relieved from the consequences of it. In a note appended to the report of the case last cited it is said: "It is doubtful, where there has been no legislation upon the subject, whether, in the absence of fraud or any other well-known ground for supporting the exercise of its jurisdiction, equity will assist a creditor to reach those assets of his debtor which under no circumstances could have been subject to execution at law."

A large number of cases are then cited; and it is then added: "What stocks, choses in action, franchises and other property which was not subject to execution at common law, can now, in the absence of any statute on the subject, be reached by a creditor's bill, must still be regarded as unsettled. By such bills creditors have in several instances succeeded in obtaining satisfaction out of the interest of an heir or distributee while still in the hands of an executor or administrator." Then follows another citation of numerous authorities, which I have not examined, as I did not consider it necessary to this decision.

In this case the charge of fraud is set up in the bill, in which it is alleged that the respondent has made fraudulent transfers of his property; has converted portions of it into money, and secreted the proceeds; that other property, to the amount of many thousands of dollars, has been concealed from the complainant in order to prevent him from securing it by execution issued under the decree of the court; and that he is about to carry all his money and other property beyond the jurisdiction of the court; the notorious and declared purpose of all these acts being to defraud the complainant, and render it impossible for him to realize any portion of the amount to which he is entitled under the decree. By his demurrer the respondent admits these averments of the bill, and takes his stand upon the point that the court is without jurisdiction to entertain or determine a cause of the character of that which is set forth in the bill.

The case of *Mountford v. Taylor*, 6 Ves. Jun., 787, which has been cited

here, was a case similar to the one at bar. The bill stated that the judgments were obtained at a time when "the defendant was, ever since has been, and now is, seized for his own use of freehold estates for his life or some greater estate; that the plaintiffs sued out writs of *elegit* upon these judgments; but neither of them has been able to discover where the estates of the defendant are situate," and does not know what they are or where they are. But the complainant charges that in or about the year 1795, some years before, the defendant, upon taking a seat in the house of commons, took the oath as to his having the requisite amount of property to qualify him to act as a member of that body, and that "he also delivered to the clerk of the house of commons, or some other officer of the house, a schedule, containing the particulars of the estate, whereby he made out his qualifications; and the plaintiffs are unable to obtain the said schedule." They also state that if, as he pretends, he has since conveyed the estates of which his qualification was composed, "such conveyance was without consideration, and in trust for himself;" and the bill prayed for a discovery.

The defendant demurred as to the main statements recited in the bill; Mr. Mansfield and Mr. Penberton claiming, in his behalf, that the object of the bill was idle curiosity; that no creditor had a right to make these inquiries.

During the argument, the lord chancellor, throwing out suggestions, says: "It seems admitted that they have a right to come here for a discovery, where the property is, in order to make their judgments available. That certainly will not affect real property had before the judgment was obtained, if no longer under such circumstances that the creditor can follow it; but it does not follow that he cannot, merely because it does not remain in the ownership of the debtor; for there may be many cases in which he might. There is a material charge in this bill, that if there was any conveyance, it was without consideration."

There is no positive averment in the bill that there was a conveyance made by the defendant; but it alleges that, if there was a conveyance, it was made without consideration; and that, the lord chancellor says, is a material charge. He then proceeds to say: "First, in the common case will a bill for a discovery lie, with all this particularity, to know every estate he has sold and disposed of for three years? If so, he may go back forty years." He then remarks: "There is difficulty upon the objection, that this would extend to an estate parted with forty years ago, without consideration; and I am not quite clear that such a bill must not allege that at a given time the defendant was seized of given lands (not simply suggesting, as a fishing bill, that at some time or other he had some land); and that he conveyed these lands away fraudulently, to put them out of the reach of his creditor."

These remarks quoted were made by Lord Eldon during the argument; and he took the case under consideration, and on the 20th of March he overruled the demurrer, saying: "The bill is met by a defense, admitting that it is a proper bill; and the answer does not negative all that is material to be answered. With respect to the nature of the qualification, if he had said the property he gave into the house of commons was not liable to execution, the court ought to be content with that, without requiring from him more particularity. But the bill charges that the defendant delivered in a schedule of the particulars of the estates, whereby he made out his qualification, and that he has conveyed them without consideration, as evidence that he has lands liable to execution; as they may be unquestionably. Upon that I think he must answer."

In this case of *Mountford v. Taylor*, then, Lord Chancellor Eldon held that the conveyance of his estate by the defendant without consideration was fraud; and that a creditor, as well as anybody else, might avail himself of it. In their bill the complainants in the case declare that they do not know the character of defendant's estates, nor where they are situated; but that he had, upon taking his seat as a member of the house of commons, delivered to the clerk or other officer a verified schedule in which his estate was set forth, which schedule the plaintiffs are unable to obtain. All of the allegations of the bill with respect to the defendant's property are argumentative. The complainants further alleged, however, that the defendant had conveyed his estate, without consideration, and in trust for himself, and they were unable to find it.

These allegations of this creditor's bill are as indefinite as could possibly be; yet the lord chancellor sustains the bill; and his decision in that case, as well as the decisions in the cases of *Spader v. Hadden* and *Donavan v. Finn*, referred to, and numerous other cases cited in those decisions, sustain the ground that where the case presented is one of equitable jurisdiction, a creditor, as well as anybody else, is entitled to the aid of and redress from the court.

In the bill in the case at bar, it is alleged that the respondent has converted a certain portion of his property, to the amount of \$20,000, into cash, which he has concealed, with the intention of carrying it out of the United States; that he has other property, to the amount of \$90,000, which he has so arranged and concealed that he will be enabled to take it out of the United States; and that his express and declared purpose in so concealing and arranging his property, and in carrying out his intention of taking it away with him, is to fraudulently evade this complainant's execution.

§ 1824. *A bill alleging with reasonable certainty the existence of material facts is not a fishing bill. What is a fishing bill.*

This bill has been designated by the appellant's counsel a "fishing bill." What is meant by this term is indicated by Lord Eldon in the cited case of *Mountford v. Taylor*, in the previously quoted language — "not simply suggesting as a fishing bill, that at some time or other he had some land," which was a remark thrown out during the argument. Such a bill is one in which there are no allegations of a definite or positive character as to the defendant's having at any time owned property which could have been subject to execution upon the plaintiff's claim; or one asking for a discovery as to matters which cannot in any way affect the rights of the parties. It is evident, from the way he uses the expression, that it is to cases of that class that Lord Eldon refers. In that case it is alleged in the bill that at a certain time the defendant did have some property, which property he had since conveyed, if conveyed at all, without consideration, in trust for himself; and, although the complainants are unable to state where the property of the defendant is, the lord chancellor does not consider the bill a fishing bill, but overrules the demurrer and compels the defendant to answer with reference to that particular property.

The nature of a fishing bill is defined by Chancellor Kent (then a judge of the court of errors of New York) in the case of *Newkerk v. Willett*, 2 N. Y. Cases in Error, 296, in which he says: "The bill does not state sufficient equity to entitle the appellants to a discovery. It states generally that the respondent had made a demand upon one of the appellants, as executrix of Peter Schuyler, deceased, and that, as he did not produce any voucher, she had refused to pay him. It states further that he proposed an arbitration, which

she refused, and that finally he had brought a suit against the appellants in the supreme court. The bill states further that the appellants know nothing of the demand of their own knowledge, but that they believe it unjust, because the respondent took no measures to liquidate and settle it in the life-time of Peter Schuyler, and does not now produce any vouchers, and has been inconsistent in what he has from time to time said as to the nature and extent of his demand.

“This is the substance of the bill: it amounts to this: the respondent has sued us at law, and we do not know for what, and therefore we ask for a discovery beforehand, although we have reason to conclude he has sued us upon some groundless pretense. Such a bill shows no equity, no right to a discovery. It sets forth no matter material to a defense at law, and which can be proven, unless by the confession of the opposite party. It is, to use Lord Chancellor Hardwicke’s expression, a mere fishing bill, seeking generally a discovery of the grounds of the respondent’s demands, without stating any right to entitle them to it. Such a bill may be exhibited by any executor or administrator, and indeed by any defendant, who is not already in possession of the plaintiff’s proofs. But the court of chancery has wisely refused to sustain bills for discovery in such latitude, and unless the party calling for a discovery will state some matter of fact material to his defense, or which he wishes to substantiate by the confession of the defendant, the court will not enforce a discovery.”

It is with this same view, as I understand it, that Lord Eldon, in the case before cited, alludes to a discovery of matters running back forty years — matters which cannot, by any possibility, affect the rights of the parties; and a bill asking for such a discovery is a fishing bill. But as to a bill for a discovery of matters of such character and date that they can be immediately connected with the complainant’s cause, and which matters he could not discover or ascertain without the aid of the court, the bill also alleging that, since the accruing of complainant’s right, the respondent has conveyed away his estates, without consideration and in trust for himself, such a bill is not a fishing bill, because it sets forth matters material to the cause. A conveyance of the character alleged would be a fraud in law, and the complainant is entitled to a discovery.

In the present case, the charge of fraud is direct. In his bill, after setting forth that he has recovered judgment against the respondent for a large sum of money; that execution has issued, and a return of *nulla bona* has been made thereon, the complainant avers that a short time before the rendition of judgment, and during the pendency of the action, the respondent disposed of, and converted into cash, real property to the amount of \$20,000; that since the rendition of the judgment he has secretly transferred a large part of his property, and has secreted the remainder; that he has property to the value of \$90,000, which the complainant has been unable to reach by execution; that he intends and is about to convert into cash all his property, and to depart, taking it with him, beyond the jurisdiction of the court; and that all these acts and steps have been committed, taken and proposed with the declared purpose of so “fixing” his property that it cannot be seized to satisfy the judgment, and to defraud the complainant of the money due under it.

Those matters are material. Here is set forth the fraud which the complainant is seeking to unveil; and, if the alleged state of facts exists, he is entitled to apply the funds of the respondent, wherever they are, to the satis-

faction of the judgment. The fact that the complainant is unable to describe and locate the property and funds of the respondent ought not to make it impossible to bring his cause within the jurisdiction of a court of equity, for under existing laws it is possible for a party to hold property in such a manner that only by a discovery can another be enabled to locate or describe it. If in a case of this kind a complainant were not entitled to a discovery, it would be possible for a debtor to conceal his property, or to convert it into money and put it in his pocket, and so evade a judgment. The arm of the court of equity would certainly be very short if it could not reach the respondent in such a case, although the complainant would be unable to describe the property or identify the money. In the nature of things it is impossible to identify the money. But if this respondent has in his possession the \$20,000 which he is alleged to have received for that portion of his property which he has sold, and other property as well, he is bound to discover it, and yield it up, that it may be applied to the satisfaction of the judgment. If, as is averred in the bill, the respondent in this case has converted a portion of his property into money, and intends to carry that money and his other property beyond the jurisdiction of the court, then this bill is sufficient.

§ 1825. *Uses and object of the writ of ne exeat. It may be issued in a proper case without a prayer for it in the bill. When it may be issued.*

Another point is made in this case, with reference to the issuing of a writ of *ne exeat republica*. Respondent's counsel contends that the court has erred in directing in its decree that the writ should issue; that such a writ is only a provisional remedy, the right to which expires upon the determination of the suit and the entry of judgment.

The very object of this provisional remedy is to secure the presence of the party in order that the judgment may be executed — in order that he may not be enabled to evade it. This writ is not discharged any more than an attachment is discharged upon the entry of judgment. A writ of attachment is discharged upon the satisfaction of the judgment, or upon giving security; and the writ of *ne exeat* should continue in force until the judgment is satisfied, or until the writ is dissolved, or proper security given. *Mitchel v. Bunch*, 2 Paige, 606; S. C., 22 Am. Dec., 669; *McNamara v. Dwyer*, 32 Am. Dec., 631.

It is claimed by the respondent's counsel that that portion of the decree which directs that this writ shall issue is arbitrary; that no limit is placed upon the length of time it shall continue in force. I presume the court will have power to control that matter. The decree may possibly be too broad in that regard; and, if counsel desire it, it can be so modified as to obviate any objection upon that ground. That this writ may be issued even after judgment is established. See *Moore v. Hudson*, 6 Mad., 218; *Elliott v. Sinclair*, Jac., 545; *Collinson v. Wattleworth*, 18 Ves., 353; *Russell v. Ashby*, 5 Ves., 96.

According to Daniell's Chancery Practice, and many authorities, a prayer in the bill for a *ne exeat* is not necessary. 3 Dan. Ch. Pr., 1936; *Durham v. Jackson*, 1 Paige, 629; *Gilbert v. Colt*, 14 Am. Dec., 561, note. It is sufficient if the facts alleged in the bill, and established, show a proper case for the writ, and it may be granted in the decree under the prayer for general relief. Or the facts may be shown, and the writ applied for upon a petition presented in the case either before or after judgment or decree. The limitation of equity rule 21 only applies where the writ is asked for "pending the suit."

"And it is further ordered, adjudged, and decreed, that the writ of *ne exeat republica* of the United States of America issue out of and under the seal of

this court, to restrain the said Harris Lewis from departing out of the jurisdiction of this court." That is the form of that portion of the decree relating to this matter. I think it would have been better, and it certainly would have avoided criticism, if to this had been added — "until the satisfaction of the decree, or the further order of the court."

§ 1826. *Power of a district court to issue a writ of ne exeat.*

Respondent's counsel cites a case in 2 Wash., to show that a district court has no authority to issue a writ of *ne exeat*. In that case, however, the writ was issued by the judge, and not by the court. That case arose at a time when the jurisdiction of the district court was limited, and did not cover a case of the character of that now under consideration at all. There is a distinction between the judge and the court, a distinction recognized in the Revised Statutes. Section 717 reads:

"Writs of *ne exeat* may be granted by any justice of the supreme court, in cases where they might be granted by the supreme court; and by any circuit justice or circuit judge, in cases where they might be granted by the circuit court of which he is a judge. But no writ of *ne exeat* shall be granted unless . . . satisfactory proof is made to the court or judge granting the same, that the defendant designs quickly to depart from the United States."

By the Revised Statutes, section 716, it is provided that "the supreme court and the circuit and district courts shall have power to issue writs of *scire facias*. They shall also have power to issue all writs not specifically provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the usages and principles of law."

The writ of *ne exeat* is one of the writs necessary to the exercise of the present jurisdiction of the district court. The jurisdiction of that court has been enlarged since the adoption of these statutes, and since the date of the decision last referred to. In cases of the character of the one at bar, it has now concurrent jurisdiction with the circuit court. The authority of the district court to issue this writ is therefore unquestionable.

The decree of the district court must be affirmed, except that, if the appellant so elects, it may be modified in the respect indicated. (See §§ 1873-75, *infra*.)

MILLER v. SHERRY.

(2 Wallace, 237-251. 1864.)

Error to U. S. Circuit Court, Northern District of Illinois.

STATEMENT OF FACTS.—This was an action of ejectment. The plaintiff, Sherry, derived title from a sale of the premises made in pursuance of a decree rendered on a creditor's bill filed by W. & W. Lyon. The said Lyons filed their bill alleging a judgment (obtained in October, 1858), and execution returned *nulla bona* against Miller, and further alleging that he had conveyed the property in controversy, describing it, to his son-in-law, Williams, to defraud his creditors, and praying that the deed be set aside and the property sold to satisfy their judgment. A decree was rendered according to the prayer of the bill, and the property sold to Bushnell, from whom Sherry derived title. The bill by the Lyons was filed in February, 1859. Previous to this time, Mills & Bliss had filed their creditor's bill against Miller, founded on a judgment obtained in October, 1857, charging a variety of frauds in general, but without describing the property in controversy or any other property in

particular, and not making Williams a party. Afterwards, on the examination of Miller before a master, he disclosed the fact of his transfer to Williams, and then, in 1860, they filed an amended bill alleging specifically the fraudulent conveyance to Williams. Under the decree in this case the property was sold to one Benedict, reserving the homestead rights of Miller.

The following instructions were asked and refused: 1. That Mills & Bliss, by filing their bill against Miller, and service of process, obtained a lien upon all the property and effects of Miller; which lien had, by the decree and sale of the receiver, passed into a title in Benedict, which title related back to the service of process, and had become paramount to the title of the plaintiff. 2. That the defendant was entitled to a homestead right under the laws of the state of Illinois, in such cases made and provided, which he could set up as a defense in this case.

Opinion by MR. JUSTICE SWAYNE.

The proceedings under the bill filed by the Lyons appear to have been, in all respects, regular. W. & W. Lyon had obtained a judgment at law and issued an execution, upon which the return of *nulla bona* was made. This laid the foundation for a creditor's bill, and such a bill was filed. The necessary parties were brought before the court and answered.

§ 1827. *A sale and conveyance by a master in obedience to a decree is effectual, and no conveyance by the holder of the legal title is necessary.*

The court had full jurisdiction, both as to the parties and the property. The decree was regularly entered, and the sale and conveyance by the master to Bushnell were made in pursuance of it. The only objection taken to the proceedings is, that Williams, in whom was vested the legal title, was not ordered to convey, and did not convey. A conveyance by him was not necessary.

Where a court of equity has jurisdiction, as in this case, a sale and conveyance in obedience to a decree is as effectual to convey the title as the deed of a sheriff, made pursuant to a sale under an execution issued upon a judgment at law. When the object of the suit is to compel the conveyance of the legal title by the defendant, and the decree does not require a sale, the title will not pass until the deed is executed,—unless it be provided, as has been done in some of the states, by statute, that the decree itself shall operate as a conveyance. In all such cases the court has power to compel the defendant to convey. When the property is beyond the local jurisdiction of the court, and the defendant is before it, the court can compel him to convey, as it may direct, for any purpose within the sphere of its authority. This is an ordinary exercise of the remedial jurisdiction of those courts, and the power is one of the most valuable attributes of the equity system. The principle of those cases has no application here. The title derived by Bushnell from these proceedings must be deemed perfect, unless it be invalidated by that derived to Benedict from the sale and conveyance under the bill of Mills & Bliss.

The judgment obtained by Mills & Bliss was the elder one, but it was subsequent to the conveyance from Miller to Williams. It is not contended that the judgment was a lien on the premises. The legal title having passed from the judgment debtor before its rendition by a deed valid as between him and his grantee, it could not have that effect by operation of law. The questions to be considered arise wholly out of the chancery proceedings.

§ 1828. *Lien created by filing creditor's bill. Creditor's bill, to create a lis pendens, must describe property.*

The filing of a creditor's bill and the service of process creates a lien in

equity upon the effects of the judgment debtor. *Bayard v. Hoffman*, 4 Johns. Ch., 450; *Beck v. Burdett*, 1 Paige, 308; *Storm v. Waddel*, 2 Johns. Ch., 494; *Corning v. White*, 2 Paige, 567; *Edgell v. Haywood*, 3 Atk., 352; 1 Kent, 263. It has been aptly termed an "equitable levy." *Tilford v. Burnham*, 7 Dana, 110.

The original bill was in the form of a creditor's bill, as found in the appendix to Barbour's Chancery Practice. It contained nothing specific, except as to the transactions between Miller and Richardson. There was no other part of the bill upon which issue could have been taken as to any particular property. It was effectual for the purpose of creating a general lien upon the assets of Miller—as the means of discovery, and as the foundation for an injunction,—and for an order that he should convey to a receiver. If it became necessary to litigate as to any specific claim, other than that against Richardson, an amendment to the bill would have been indispensable. It did not create a *lis pendens*, operating as notice, as to any real estate. To have that effect, a bill must be so definite in the description that any one reading it can learn thereby what property is intended to be made the subject of litigation. In *Griffith v. Griffith*, 9 Paige, 317, it is said:

"To have made such a bill constructive notice to a purchaser from the defendant therein, it would have been necessary to allege therein that these particular lots, or that all the real estate of the defendant in the city of New York, had been purchased and paid for, either wholly or in part, with the funds of the infant complainant. Or some other charge of a similar nature should have been inserted in the bill, to enable purchasers, by an examination of the bill itself, to see that the complainant claimed the right to, or some equitable interest in, or lien on, the premises." It is evident that the premises in controversy were not in the mind of the pleader when this bill was drawn.

§ 1829. *To affect property by lis pendens by filing creditor's bill, the holder of the legal title must be made a party.*

There is another reason why the bill could not operate as constructive notice. Williams, who held the legal title, was not a party. "We apprehend that to affect a party as a purchaser *pendente lite*, it is necessary to show that the holder of the legal title was impleaded before the purchase which is to be set aside." *Carr v. Callaghan*, 3 Litt., 371. The principle applies only to those who acquire an interest from a defendant *pendente lite*. *Stuyvesant v. Hall*, 2 Barb. Ch., 151; *Fenwick v. Macey*, 2 B. Mon., 470; *Parks v. Jackson*, 11 Wend., 442. The title passed from Williams to Bushnell.

§ 1830. *Lis pendens by amended bill.*

The amended bill was undoubtedly sufficient, and it made Williams a party. But he was not served with process, and if he had been, this bill could have operated only from the time of the service. Where the question of *lis pendens* arises upon an amended bill, it is regarded as an original bill for that purpose. *Clarkson v. Morgan*, 6 B. Mon., 441. It was a gross irregularity to take a decree against Miller without Williams being before the court, and if the attention of the court had been called to the subject, the amended bill must have been dismissed. The decree against Miller as to the premises in controversy is a legal anomaly. But it is unnecessary to consider this subject, because, before the amended bill was filed, the proceedings under the bill of the Lyons had been brought to a close, and the title of Bushnell consummated. His rights could not be affected by anything that occurred subsequently. He had no *constructive notice* of the proceedings in the case of Mills & Bliss. Had he

and his alienee actual notice? This, also, is a material inquiry. *Parks v. Jackson*, 11 Wend., 442; *Roberts v. Jackson*, 1 id., 478. We have looked carefully through the record and find no evidence on the subject. Had the suit below been in equity, it would have been necessary for the defendant in error to deny notice to himself or to his grantor. The want of notice to either would have been sufficient. The form of the action rendered a denial unnecessary. The plaintiff having exhibited a title, apparently perfect, the burden was cast upon the defendant of proving everything upon which he relied to defeat it. As the case was developed on the trial in the court below, the title of the defendant in error properly prevailed.

§ 1831. *Homestead right cannot be asserted collaterally, after sale of premises under decree.*

2. In regard to the homestead right claimed by the plaintiff in error, there is no difficulty. The decree under which the sale was made to Bushnell expressly divested the defendant of all right and interest in the premises. It cannot be collaterally questioned. Until reversed, it is conclusive upon the parties, and the reversal would not affect a title acquired under it while it was in force.

We think that the learned judge who tried the case below was correct in refusing to give the instructions submitted by the plaintiff in error, and in giving those to which exception was taken.

Judgment affirmed with costs.

BOARD OF PUBLIC WORKS v. COLUMBIA COLLEGE.

(17 Wallace, 521-582. 1878.)

APPEAL from the Supreme Court of the District of Columbia.

STATEMENT OF FACTS.—Selden, Withers, Latham, Bayne and Whiting were partners in the banking business in Washington in 1853, and as such transacted business for the Board of Public Works of Virginia. In 1854 the firm made an assignment, being considerably indebted to the Board, which soon after sued the firm in New York, having process served upon Bayne and Latham. Whiting appeared to the action, and publication was made as to Selden and Withers, who did not appear. There was judgment against all the partners for over \$500,000. In 1855 Withers, out of his private means, conveyed to certain trustees real property, worth nominally \$250,000, to pay any balance that might remain due by the firm to the Board, and in 1858 the Board filed a bill in the circuit court of Alexandria county to have this trust enforced. Withers and Selden were served with process, publication being made as to the other partners. Withers resisted the bill on the ground that the cause of action was merged in the New York judgment, and that the assignees of the firm had enough assets to pay all the debts due to the Board, and that his individual trust property could not be sold until those assets were exhausted. There was a decree, however, against all the partners for \$513,000, and an order to sell the individual trust property. An appeal was asked from this decree, but refused because the decree was interlocutory. In 1861 Withers died, leaving a will, valid only as to personalty, under which, in due course of law, and with all prescribed notices, the personalty was administered and legacies paid to Columbia College, Elizabeth Madden and Attie Gulick. In 1867 the Board filed this bill against the executors of Withers, his heirs and legatees, to subject Withers' property, legacies included, to the payment of the

partnership debts. The legatees answered, and upon the hearing the bill was dismissed and the complainant appealed.

§ 1832. *An undisputed debt must appear before a court of equity will intervene.*

Opinion by MR. JUSTICE FIELD.

As preliminary to the inquiry, whether any grounds are disclosed in the case for the interposition of a court of equity, the existence of an undisputed debt by the deceased must appear. The existence of such a debt is affirmed upon the admission of the pleadings of the indebtedness, in 1854 and 1855, of the firm of Selden, Withers & Co., and upon the decree of the circuit court of Virginia, in June, 1860.

§ 1833. *A judgment in a state, obtained by process of publication, is no evidence of personal liability outside of that state.*

Whether the indebtedness of that firm was merged in the judgment of the supreme court of New York, and the personal claim against Withers was thus extinguished, as contended by counsel, it is unnecessary to determine. It is sufficient for the disposition of this case, that the judgment is not evidence of any personal liability of Withers, outside of New York. It was rendered in that state without service of process upon him, or his appearance in the action. Personal judgments thus rendered have no operation out of the limits of the state where rendered. Their effects are merely local. Out of the state they are nullities, not binding upon the non-resident defendant, nor establishing any claim against him. Such is the settled law of this country, asserted in repeated adjudications of this court and of the state courts.

§ 1834. *The records of a court are not entitled to credit in another state, if the court in question has not jurisdiction.*

The judgment in New York, it is true, is a joint judgment against all the partners, against those summoned by publication as well as those who were served with process or appeared, but this joint character cannot affect the question of its validity as respects those not served. The clause of the federal constitution which requires full faith and credit to be given in each state to the records and judicial proceedings of every other state applies to the records and proceedings of courts only so far as they have jurisdiction. Wherever they want jurisdiction the records are not entitled to credit. *D'Arcy v. Ketchum*, 11 How., 174; *Bates v. Delavan*, 5 Paige, 305; *Story on Conflict of Laws*, § 546.

The indebtedness of the firm of Selden, Withers & Co. to the complainant in 1854 is, it is true, admitted by the pleadings, but the admission is accompanied with such statements as to the assignment of the partnership property, and transfer of individual property of Withers for the payment of the indebtedness, and the disposition and use of such property, as to render it a matter of doubt whether, upon an accounting, any amount would remain due to the complainant. The existence of any present indebtedness is denied, and the case was brought to a hearing on the pleadings without any evidence. *Young v. Grundy*, 6 Cranch, 51.

§ 1835. *An interlocutory decree cannot establish the existence of a debt so as to give a court of equity jurisdiction to enforce it.*

Is the claim of the complainant against Withers established by the decree of the circuit court of Virginia, so as to authorize the present bill? The suit in this latter court was brought against all the partners, but personal service was made only upon two of them, Withers and Selden, and the case proceeded

against the others upon publication of citation. Withers, as already stated, insisted in his answer, among other things, upon the merger of the causes of action in the New York judgment; and that his individual property conveyed to trustees could not be subjected to sale until the trusts in the deed of assignment were executed; but the circuit court, without appearing to attach any weight to this defense, immediately rendered its decree against all the partners. Withers desired to appeal from this decree, but the court of appeals denied his application for that purpose, on the ground that the decree was merely interlocutory and not final, declaring, in its order, that it deemed it 'most proper that the case should be proceeded in further' before an appeal was allowed. One of the principal objects of the suit was to obtain a sale of the property conveyed by him to trustees, and the application of the proceeds to the debt of the firm of Selden, Withers & Co. to the complainant. The amount of individual property thus conveyed exceeded in nominal value, as already stated, \$250,000, and this was to be applied only to cover a deficiency remaining after the application to that debt of a portion of the partnership assets assigned in 1854. The court of appeals may have considered that the decree of the circuit court, as a personal judgment, was not to be treated as final, but only as interlocutory, until the deficiency mentioned was determined, and the property held as security for its payment had been sold and applied. At any rate, the complainant, relying upon the decree of the court as evidence of his demand against Withers, invoking for it full faith and credit under the clause of the constitution, cannot object to the character which the highest court of Virginia has given to it, or insist that it is entitled to any other consideration or weight. No greater effect can be given to any judgment of a court of one state in another state than is given to it in the state where rendered. Any other rule would contravene the policy of the provisions of the constitution and laws of the United States on that subject. *Suydam v. Barber*, 18 N. Y., 468.

If the decree was interlocutory, it is to be treated as only fixing provisionally the indebtedness to the complainant of the firm of Selden, Withers & Co., and, of course, the individual liability of Withers. The adjudication did not prevent a re-examination of the question of his liability, if an examination of the merits of his defense were ever made, or any subsequent modification of the terms of the interlocutory decree. The whole subject remained open, under the control of the court, and at the final hearing the provisions of the decree might have been enlarged or restricted, or otherwise modified.

It does not appear from the bill or the record annexed whether any proceedings for the enforcement of the interlocutory decree were subsequently taken; whether the property in Virginia or in Missouri, or any part of such property, was ever sold; or, if a sale was made, whether any of the proceeds were applied to the extinguishment of the amount adjudged due. If any inference upon this head can be drawn from the allegation of the bill that the amount remains wholly unsatisfied, it is that no such proceedings were ever taken.

§ 1836. *Rules regulating the jurisdiction of a court of equity to subject property to the payment of debts.*

The jurisdiction of a court of equity to reach the property of a debtor justly applicable to the payment of his debts, even when there is no specific lien on the property, is undoubted. It is a very ancient jurisdiction, but for its exercise the debt must be clear and undisputed, and there must exist some special circumstances requiring the interposition of the court to obtain possession of

and apply the property. Unless the suit relate to the estate of a deceased person, the debt must be established by some judicial proceeding, and it must generally be shown that legal means for its collection have been exhausted. In all cases we believe property pledged or conveyed for the payment of the debt must be first applied.

The rule requiring the existence of special circumstances bringing the case under some recognized head of equity jurisdiction should not only be insisted upon with rigor whenever the property sought to be reached constitutes, as here, assets of a deceased debtor which have already been subjected to administration and distribution, but some satisfactory excuse should be given for the failure of the creditor to present his claim, in the mode prescribed by law, to the representative of the estate, before distribution. *Williams v. Gibbes*, 17 How., 239, 254, 255; *Pharis v. Leachman*, 20 Ala., 662.

In England, courts of chancery took jurisdiction of bills against executors and administrators, for discovery and account of assets, and to reach property applicable to the payment of the debts of deceased persons, not merely from their general authority over trustees and trusts, but from the imperfect and defective power of the ecclesiastical courts. It was sufficient that a debt existed against the estate of a decedent, and that there was property which should be applied to its payment, to justify the interposition of the court; but when a distribution of the fund had been made, another creditor could not ask for a return of the moneys from the distributees or for a proportional part, if he had received notice of the original proceeding, and had been guilty of laches or unreasonable neglect. *Sawyer v. Birchmore*, 1 Keen, 391.

§ 1837. *A creditor, before invoking a court of equity to subject the property of a deceased debtor to the payment of his debt, should first apply to the proper court of probate.*

In this country, there are special courts established in all the states, having jurisdiction over estates of deceased persons, called probate courts, orphans' courts, or surrogate courts, possessing, with respect to personal assets, nearly all the powers formerly exercised by the court of chancery and the ecclesiastical courts in England. They are authorized to collect the assets of the deceased, to allow claims, to direct their payment and the distribution of the property to legatees or other parties entitled, and generally to do everything essential to the final settlement of the affairs of the deceased, and the claims of creditors against his estate. There is a special court of this kind in this district, called the orphans' court, which was competent to allow the complainants' demand, but the demand was never presented to it for allowance. That court could have directed the application of the assets of the estate, if the demand had been allowed, or, if rejected, had been established by legal proceedings. No application was made for its aid, nor was the demand brought to the attention of the supreme court of the district when the estate was before it for settlement, although publication was made by the auditor for the presentation of claims. No explanation is made or attempted of this neglect, and the only grounds disclosed by the bill for relief are fully met by the answers, and are not sustained by any proof.

We are of opinion, for the reasons stated, that the decree of the court below, dismissing the bill, was correct; and it is unnecessary to consider the objections to it founded upon the non-joinder of the surviving partners of Withers, and the statute of limitations.

Decree affirmed.

BASSETT v. ORR

(Circuit Court for Wisconsin: 7 Bissell, 296-302. 1876.)

STATEMENT OF FACTS.— The complainants obtained a judgment against defendant on the 15th of April, 1875, issued execution on the 16th, which was returned on the same day *nulla bona*, and on the 17th this action was commenced. A receiver was appointed on the 29th, and on November 6, 1875, an injunction was issued and served. The defendants pleaded that the judgment debtor owned property sufficient to satisfy the execution, but that the marshal made no attempt to find it.

Opinion by DYER, J.

To permit a judgment creditor to issue an execution upon his judgment, and to procure its immediate return, "no property found," when in fact no effort whatever had been made by the officer to find property, and when in fact the debtor had tangible, visible property from which the amount of the judgment could be realized, and then to suffer the creditor to make such proceedings the basis of a creditor's bill, would be a perversion of the plainest principles of equity practice applicable to the subject. Upon such a state of facts being shown, I should not hesitate to dismiss the bill.

In this case it is claimed:

I. That it is apparent on the face of the marshal's return, considered in connection with the dates of the entry of judgment, of the issuance of execution, of the return itself, and of the filing of this bill, that there was no *bona fide* attempt made by the officer to find property.

II. That upon the testimony the court should conclude that the marshal was directed by the creditor to return the execution, "nothing found," without any effort to discover property.

III. That to lay the basis for a creditor's bill the execution should not have been returned until the return day thereof, and that by its terms the officer had sixty days within which to look for property and to return the execution.

IV. That the judgment debtor owned visible property upon which the judgment was a lien, and from which the amount of the judgment could have been made at the time the execution was returned.

It is insisted either that the bill should be dismissed, or that all proceedings subsequent to the filing of the bill should be set aside, and the bill be entertained only in aid of the execution.

The testimony taken upon the issue formed by the bill and plea hardly warrants the conclusion that the execution was returned by the marshal, "no property found," under direction of the judgment creditor's attorneys so to make return. The only testimony upon that subject is that of Mr. Tenney, one of the attorneys, who testifies that he presumes the marshal was instructed to make such a return in case he found he could collect nothing, and that he supposes the marshal made his return as it was made because he was satisfied he could make nothing by levy.

§ 1838. *A marshal is not bound to hold an execution the sixty days it might run before making a return.*

I do not think the marshal was bound to hold the execution the sixty days it might run before making a return. In other words, the remedy at law might be exhausted before the expiration of the return day, and in that case the execution could be immediately returned. There are cases to the contrary in New York, but they arose and were decided upon ancient statutes of that

state. The cases cited upon the argument, *Smith v. Thompson*, 1 Walker's Ch. Rep., 1, and *First National Bank v. Gage*, 8 Ch. Leg. N., 370, are in antagonism upon the point. The practice sanctioned by the courts of this state is against the theory that a creditor's bill cannot be filed until after the return day of an execution, although the execution should be actually returned before that time. The test is, and I think should be, has the remedy at law been exhausted before the exhibiting of the bill; and I understand that in this court, under the established practice, such a bill may be presented, though the execution be in fact returned before the return day, if the bill is otherwise within the equity rules.

§ 1839. *The creditor's remedy under the execution must first be exhausted, before the latter is made a basis for a creditor's bill.*

As the basis for a creditor's bill, an execution upon the judgment should be in good faith issued, and should be returned unsatisfied by the officer after a reasonable and actual but ineffectual effort to find property. In other words, the remedy under the execution should first be exhausted. If the return of the officer on its face shows a failure in this respect, then there is no foundation for equity jurisdiction. As in the case of *In re Remington*, 7 Wis., 643, cited on the argument, where the officer made return by order of the attorney, and returned only that there was no personal property whereon to levy, which was held insufficient to support proceedings in the nature of a creditor's bill. If there be collusion between the officer and the party and a false return is made, proof of the fact is of course fatal to a bill. Here the return of the marshal is on its face complete and sufficient.

§ 1840. *A return indorsed upon an execution is presumed to be true; and the burden of showing it to be false is upon the defendant in the execution.*

The presumption is that the return is true. The presumption is that the officer performed his duty. That presumption is not overcome by the fact that he returned the process on the day he received it. We do not know but that on some other process, or by some other means, he had previously had occasion to investigate, and had acquired knowledge of the judgment debtor's property and situation. In any event we have to presume the return true until the contrary is shown, and the burden of showing the return false is upon the defendant. Unattacked and supported by this presumption, the return is a sufficient basis for a creditor's bill. Its falsity may however be shown by establishing the fact that the debtor had property liable to execution, and which could have been levied on to pay the debt. Such fact should be clearly and satisfactorily shown. In such event a creditor's bill could not be maintained. I do not regard it essential that there should be property sufficient to fully satisfy the execution in order to defeat the remedy in equity. If there be property sufficient to satisfy a considerable part of the debt, a creditor's bill ought not to be sustained until such property is exhausted.

The remaining question then is, does it clearly and satisfactorily appear from the testimony that the judgment debtor had tangible property and effects, real or personal, from which the debt or a considerable part of it could be realized. The defendant testifies that he owns a quantity of pine lands from which the timber has been cut off, and the amount and value of which he does not state, but which lands are incumbered by mortgage to the extent of between four and five thousand dollars. Then the firm of Hunter, Orr & Co. owned a saw-mill standing on leased land. The defendant Orr testified that the mill cost \$22,000. In November, 1875, there was rent unpaid for the

leased land amounting to about \$700, and also some taxes. The yearly rent agreed to be paid was \$600 or \$700. In April, 1875, the mill was let to the sons of the defendant Orr, his firm having previously discontinued business; but those lessees in November, 1875, had paid no rent for the use of the mill. There was a judgment in favor of one Somers against Orr, upon which there was originally due about \$5,200, but which had been reduced by levy and sale of property to about \$3,000; and for the payment of which the property of Orr seems to have been liable. Then Blanchard, Borland & Co., of Chicago, held a transfer of defendant's interest in the mill and leasehold as security for a balance due to them on account of advances. Mr. Blanchard testifies that the value of the mill was much affected by the fact that it stood on leased lands; that there was a large amount of the rental and taxes unpaid, and that the owner of the lands would not permit the removal of the mill. With permission to remove the mill and after paying all delinquent taxes and rents, and securing the payment of the rent for the term of the lease, he thinks the mill might have been sold for between \$3,000 and \$4,000. Viewing the property just as it stood in April, 1875, and without special reservations touching removal of the mill, and payment of taxes and rent, he does not think the property had any salable value. Considering all the evidence bearing upon the circumstances of the judgment debtor, the character, value and situation of his property and the incumbrances upon the same, it is by no means clear that any part of the complainants' judgment could have been realized by ordinary proceedings upon the execution.

The testimony taken as to property possessed by the defendant tends to the conclusion that there is slight basis, if any, so far as property is concerned, for a creditor's bill. The plea will be overruled as a plea, and as it presents the only issue in the case which the defendants seek to raise, it may stand as an answer to the bill, with the right to the parties of bringing forward all the merits of the case.

FRAZER & CHALMERS v. COLORADO DRESSING AND SMELTING COMPANY.

(Circuit Court for Colorado: 2 McCrary, 11-18. 1880.)

Opinion by HALLETT, J.

STATEMENT OF FACTS.—This is a creditor's bill, and a demurrer was put in upon the ground that there was no jurisdiction in equity in such matters, because the parties may now be compelled to testify under the act of congress; and also upon the ground that the code of the state gives special proceedings, having in view the same purpose, to reach any property of the judgment debtor, and subject it to execution under the judgment.

§ 1841. *A federal court has jurisdiction of a creditor's bill, although under the act of congress parties may be compelled to testify.*

As to the first ground, it is enough to say that this is not a bill for discovery only. It may be true as to bills for discovery, and especially where the discovery is sought in aid of an action at law, that there is no reason for entertaining them, since the statute allows parties to be examined, and all persons to be examined as witnesses in the cause. But this is not a bill of that character. It is true it seeks to discover what property and effects the company may have which may be subject to execution. But it also seeks to bring the property into a situation in which it may be reached by the execution under the judgment, or to subject the property itself, when it shall be found, to the

payment of the judgment. The purpose of the bill is something more than mere discovery. It is to reach the property and have it applied to the payment of the judgment. And it is one of the oldest heads of equity jurisdiction in proceedings of this kind, to secure to creditors the payment of their judgments, when the property of a debtor has been put in a situation in which it cannot be reached by execution at law.

§ 1842. *A federal court has jurisdiction of a creditor's bill although the code of the state gives for the like purposes special remedies.*

Now, as to the statute of the state which gives a remedy for reaching the property and effects of a judgment debtor, the examination of the debtor himself and all persons who may have knowledge as to the disposition of his effects, in a proceeding supplementary to the suit in which the judgment was obtained, it is only necessary to say that it is a special proceeding, which does not in any way affect the equity jurisdiction of this court.

There are many decisions of the supreme court to the effect, generally, that the authority and jurisdiction of the federal courts is not subject to the control of state legislation. And there are two decisions of circuit courts which I regard as directly in point in relation to such statutes as this. The first of these is the case of *Cropper v. Coburn*, reported in 2 Curtis Reports, 465. A statute of Massachusetts provided that when an attachment should be levied upon the interest of one of several copartners in the partnership effects, other partners should be at liberty to give to the officer a bond to pay to the attaching creditor the appraised value of the debtor's share of the property attached. Upon bill filed in the circuit court to restrain the officer and the plaintiff in the attachment suit from levying a writ on partnership effects, it was held that the equity jurisdiction of the court was not at all affected by the statute of the state.

And in *Byrd v. Badger*, McAl., 443, the precise question here presented arose in the circuit court for the district of California. That was a proceeding in the federal court under the statute of California, supplementary to execution. That statute is similar to our own, if not exactly the same, and it was held upon full consideration that the statute was of no force or effect in the federal courts. The demurrer to the bill will be overruled.

WALKER v. POWERS.

(14 Otto, 245-252. 1881.)

APPEAL from U. S. Circuit Court, Northern District of New York.

Opinion by MR. JUSTICE MILLER.

STATEMENT OF FACTS.—This is a suit in chancery by Walker and Whittemore, the general purpose of which is to declare null and void certain sales and conveyances of real estate in New York, owned by Nelson P. Stewart, and to subject it to the payment of his debts. At the time of the transactions mentioned in the bill he was a citizen of Michigan. He died there in the year 1863, and George K. Johnson was appointed administrator of his estate in 1874. No letters of administration were issued in New York.

The debt on which Walker counts was a simple-contract debt, which was allowed by the probate judge in Michigan. The foundation of Whittemore's claim for relief is two judgments. One was recovered by him against Stewart in a court of New York on the 20th of August, 1862, and docketed on the 28th of that month in Monroe county, where the land in controversy is sit-

uated; the other was rendered in favor of Elisha W. Chester, docketed about the same time, and assigned to Whittemore in 1872.

As regards the judgment in favor of Whittemore the bill alleges that he, after the death of Stewart, instituted a proceeding in the nature of a *scire facias* against the terre-tenant in the proper court, and obtained an order under which the property so frequently mentioned in the bill as "Congress Hall," a hotel in the city of Rochester, was sold to him on a bid amounting to the debt, interest and costs, and that he received the sheriff's deed for the property, on which he brought an action of ejectment which is now pending.

The bill then charges a variety of transactions connected with the sale of this and other real estate under judicial proceedings against Stewart in his life-time, and with conveyances made by him of the same, all of which are said to be fraudulent, and in pursuance of a conspiracy on the part of Stewart, the purchasers and others, to hinder and delay his creditors, and defeat them in the collection of their debts. The bill alleges that other large debts are held by numerous creditors, in behalf of whom, as well as of the complainants, the bill purports to be brought. Some of the real estate is alleged to be in the hands of innocent purchasers for value. Most of those charged with conspiracy are dead. The heirs or devisees of Stewart, though named, are not parties to the bill; nor, indeed, can they be made defendants, because they and the complainants are citizens of Michigan. The administrator lives in that state, and, though a creditor, as the bill alleges, to the amount of \$80,000, is not made a party, nor is any reason given why he did not take out administration in New York, as it would have been eminently proper for him to do.

The bill was dismissed on demurrer and this appeal is taken by the complainants.

§ 1843. *What is a satisfaction of a judgment.*

It will be perceived that Whittemore, the principal complainant, founds his right to relief on two totally distinct causes of action. In one he asserts that, by virtue of a judicial sale, he is the owner of Congress Hall and has a complete legal title thereto on which he is prosecuting an action of ejectment. The bill shows that, by the sale under which he became such owner, his judgment against Stewart was satisfied; and as the execution must be presumed to have been returned to the proper office with the sheriff's proceeding indorsed, the judgment stands satisfied by the record of the court in which it was rendered. He has made no attempt to set aside this satisfaction, but, on the contrary, he is by this bill insisting on the fruit of that satisfaction by endeavoring to remove the cloud on his title, created by the fraudulent proceedings of which he complains. In reference to that judgment he is no longer a creditor of Stewart, nor has he any debt chargeable on or provable against Stewart's estate. What interest founded on this judgment has he, then, in any other property which Stewart held in his life-time, or in the administration of the assets of his estate? How can he, on the foundation of that judgment, inquire into frauds in regard to other property than that which he bought? What interest apart from the judgment in favor of Chester has he in common with other creditors of Stewart, and how can he maintain any joint suit with them?

So far from being able to do this, or having any common interest with them, he asserts a right in conflict with their interests. If the claim of the defendants who are in possession of Congress Hall, the only property of much value

mentioned in the bill, should be declared void as against Stewart's creditors, then, while it is their interest to subject it to the general administration among all the creditors, we have Whittemore asserting that this result inures to his sole benefit, as he has already taken steps by which he has become the exclusive owner when the frauds are swept out of the way.

It is impossible to see, therefore, what interest founded on that judgment Whittemore has in a general administration of the assets of Stewart, or that he has any interest in common with Walker or the other creditors, or a right to call upon the defendants other than those setting up claim to Congress Hall. This view involves no hardship on Whittemore. He has satisfied his debt against Stewart's estate by the purchase of that property. The matters he now sets up can be litigated with the adverse claimants in a separate suit, which would concern him and them alone.

§ 1844. *The assignee of a judgment founded on contract cannot maintain a suit in a federal court if his assignor could not have done so.*

In reference to the judgment in favor of Chester, on which, as his assignee, Whittemore asks relief, it is urged as ground of demurrer that Chester being a citizen of the same state with Stewart, his assignee is incapable of prosecuting this suit in a federal court. It was brought in 1876, and the question here raised must be decided by a construction of the act of March 3, 1875, ch. 137. 18 Stat., pt. 3, p. 470.

The first section of that act, after declaring, in terms intended to be exhaustive, the jurisdiction of the circuit courts of the United States, and certain limitations on that jurisdiction, as to residence and service of process on defendants, adds this further restriction: "Nor shall any circuit or district court have cognizance of any suit founded on contract in favor of an assignee, unless a suit might have been prosecuted in such court to recover thereon, if no assignment had been made, except in cases of promissory notes, negotiable by the law merchant, and bills of exchange."

Since Whittemore cannot sustain this suit on the ground of his own judgment against Stewart, because that is satisfied by the sale of property, the only other ground on which he can succeed is as the owner of this judgment in favor of Chester. That judgment is, then, the foundation of his suit in the circuit court. It is a cause of action which he holds by assignment from a party who cannot sue in that court. Without this cause of action he has no standing in court, and has no right to ask the court to inquire into the other matters alleged in the bill. It is as much the foundation of his right to bring the present suit as if it were a bond and mortgage on which he was asking a decree of foreclosure. See *Sheldon v. Sill*, 8 How., 441.

§ 1845. *Quære: Whether a judgment is a contract.*

If, then, the judgment is a contract, it gives Whittemore no right to sue in the courts of the United States for New York. There is some conflict in the authorities as to whether a judgment *eo nomine* is a contract. In 1 Story on Contracts, sec. 2, they are divided into three classes, in the first of which judgments are mentioned with recognizances, statutes staple, etc. It is, however, permissible in all cases where justice requires it, to inquire into the nature of the demand on which the judgment was rendered. If rendered on a contract, the judgment is a contract, the nature and extent of the liability having been thereby judicially ascertained.

The bill in this case alleges that "the debt on which this judgment was recovered accrued in the year 1858." It was, therefore, recovered on a contract,

and the present suit is a suit to give a remedy on that contract, and any decree rendered in favor of the complainant would be intended to enable him to recover the money due on the contract.

The circuit court, if the judgment of Chester had been there recovered, might have jurisdiction of the case to remove obstructions to the enforcement of its own judgment, no matter who for the time being was its owner. But where a party comes for the first time in a court of the United States to obtain its aid in enforcing the judgment of a state court, he must have a case of which the former court can entertain original jurisdiction. *Christmas v. Russell*, 5 Wall., 290.

It remains to be seen whether the suit can be prosecuted further on the part of Walker. A very learned argument, with a review of the authorities, is made by counsel for the appellants to show that it is not essential to the relief sought that there should be a judgment and an execution returned *nulla bona*. We do not think it necessary to enter upon the consideration of that question as the case is presented to us.

§ 1846. *A bill is demurrable for multifariousness when there is a misjoinder of complainants, one having no standing in court or setting up antagonistic causes of action.*

If what we have already said of the standing of Whittemore is sound, the bill is liable to the objection of multifariousness — one of the points specified in the demurrer — on almost every ground on which that objection may be taken to a bill in chancery.

1. There is a misjoinder of parties complainant.

There are but two complainants. Whittemore, as we have seen, has no standing in the court, and is, therefore, improperly joined with Walker, if Walker has such a standing; and the defendants cannot be required, in litigating with Walker any right he may have against them, to contest with Whittemore, who on his own showing has no right in that court. It is true the difficulty could have been removed if Whittemore had by an amendment been dismissed from the case. This might have been done after the demurrer was sustained. But no such leave was asked, and the bill as it originally stood was dismissed.

2. The causes of action and the relief sought in regard to Congress Hall and the other property are distinct, in some respects antagonistic, and such as cannot properly be joined in the same suit. Whittemore seeks to have his title established in regard to Congress Hall, and the cloud on it created by the fraudulent sales and conveyances removed, so that he may be declared to be the owner of that property. In this matter no one is interested but himself and one of the defendants. The prayer of the bill is that the other property may be subjected to the payment of Stewart's debts; and in this Walker and all the other creditors of Stewart are interested, and Ten Eyck also as defendant.

A case bearing a strong analogy to the one before us is *Emans v. Emans*, 14 N. J. Eq., 114. After a partition of real estate among part owners, a controversy arose as to its fairness, which was submitted to arbitrators. They awarded that the defendant should convey to the complainant twenty-three and thirty one hundredths acres to equalize the partition. The bill prayed that the defendant might be decreed specifically to perform the award; if not, that the court should declare how much more and what lands he should convey to make the partition equal; and, lastly, for general relief. On demurrer

for multifariousness the court says: "The leading object of this bill is to enforce specific performance of an award of arbitrators. The submission to arbitration related to the fraud or unfairness of a partition of certain lands devised to the parties, and included the power of making a just partition. A new partition was in fact made. If the award cannot be enforced, the bill further asks that the court will relieve against the unfairness or fraud of the partition. Now, it is apparent that these are matters of a distinct character. The one relates to the validity of the submission and award and the power and propriety of enforcing a specific performance, and the other to the equity and fairness of the partition. The matters involve totally distinct questions, requiring different evidence, and leading to different decrees."

Another analogous case is *Sawyer v. Noble*, 55 Me., 227. Sawyer and Noble were partners. The bill charges Noble with many improper transactions justifying a dissolution of the partnership, and, among others, a fraudulent and pretended sale of the stock in trade and the good will of the business to Randall, his co-defendant. It prays that this sale may be set aside and the partnership dissolved, and an account and settlement be had between the complainant and Noble. The court says: "It is obvious that Randall is in no way interested in the partnership affairs of Sawyer, and that the settlement of the affairs of the firm and the rescission of a fraudulent sale are distinct and unconnected matters, and properly to be determined in separate suits."

§ 1847. *Multifariousness defined.*

By multifariousness "is meant the improperly joining in one bill distinct and independent matters, and thereby confounding them; as, for example, the uniting in one bill of several matters, perfectly distinct and unconnected, against one defendant, or the demand of several matters of a distinct and independent nature against several defendants in the same bill." Story, Eq. Pl., sec. 271. In Daniell's Chancery Practice, 335, it is said in explanation of this that "it may be that the plaintiffs and defendants are parties to the whole of the transactions which form the subject of the suit, and, nevertheless, those transactions may be so dissimilar that the court will not allow them to be joined together, but will require distinct records."

§ 1848. *Quære: Should heirs or devisees of a grantor be made parties to a bill charging that his land had been conveyed in fraud of his creditors.*

3. It seems to us, also, although of that we are not quite so sure, that if this real estate is to be subjected to the payment of Stewart's debts, Frederick S. Stewart, Helen W. McConnell, and Adeline M. Johnson, who are alleged to be his only heirs and the devisees in his unprobated will, should be parties to the bill. The mere allowance of the debt of Walker by the probate court is not conclusive evidence against them in a suit to reach the real estate of their ancestor and devisor.

The state where the lands sought to be reached are situate has, by statute, enabled her courts to entertain jurisdiction of necessary parties not within reach of process, and greatly modified the rules of practice and pleading. It is possible that this bill, or some part of it, might, by making additional parties, be sustained in one of her courts. But we are satisfied that the effort to prosecute it in the circuit court of the United States, with the misjoinder of some parties and the non-joinder of others,—with the connection of matters totally distinct in the right asserted and the relief sought,—and with the principal party complainant entitled to no relief there, is attended with insuperable difficulties, and that the bill was properly dismissed.

Decree affirmed.

JOHNSON v. STRAUS.

(Circuit Court for Virginia: 4 Hughes, 631-639. 1882.)

Opinion by HUGHES, J.

STATEMENT OF FACTS.—David Iseman and C. E. Straus were wholesale liquor dealers in Richmond, Virginia, under the firm name of Iseman & Straus. Their capital in trade originally put in was \$6,000, and wholly borrowed. They were, according to the first arrangement, to furnish equal amounts of capital; but in the result, Iseman put in \$4,000 and Straus \$2,000. Their business was commenced on or about February 1, 1881. On the 7th or 14th day of that month they reported to the agent of the mercantile agency of R. G. Dun & Co. as follows, as testified to from memorandum made at the time by T. Scarlett, Dun & Co.'s agent:

"February 14, 1881. New firm composed of David Iseman, formerly salesman for L. Stern & Bro., this city, and Chas. E. Straus, who formerly conducted the clothing business here. They state that they have a capital of \$6,000 to \$8,000 in their business, equally contributed; that Iseman has an interest in a farm in Louisa county, Virginia, worth about \$600, and has besides outside means of some \$2,500. Iseman formerly did business in Spottsylvania county, Virginia, where he owns a farm, but it does not stand in his name; consequently it is not liable for his debts. Refer to Planters' National Bank and L. Stern & Bro., Richmond, Va."

Ball, agent of Bradstreet's Mercantile Agency, reported as of the 3d February, 1881, from information derived from one of the firm, as follows: "C. E. Straus states, we are just commencing and have a cash capital of \$6,000 equally contributed; Iseman is worth \$3,000 or more; Straus borrowed \$2,000 and had \$1,000 of his own."

About a year afterwards, say February, 1882, these agents called again, and the firm reported their condition as about the same as before. Eight months later there appeared in the Richmond newspapers of the morning of September 27, 1882, the following announcement:

"RICHMOND, VA., September 25, 1882.

"*Dissolution.*—The copartnership heretofore existing between us under the style of Iseman & Straus is this day dissolved by mutual consent.

"C. E. Straus assumes the liabilities of the old concern and is authorized to collect all debts due it.

"DAVID ISEMAN,

"CHARLES E. STRAUS."

"I take this opportunity to inform my friends that I will continue the wholesale liquor business at the old stand of Iseman & Straus, 1302 Cary street, and solicit a continuance of their kind patronage.

"C. E. STRAUS."

There were no articles of dissolution executed by the partners. A paper signed by the two as above published was the only writing executed on the occasion of the dissolution. But it is shown by evidence that Straus executed his individual notes for \$4,000 indorsed by his mother to Iseman, as an inducement to Iseman's retirement from the firm. There was no formal transfer of the stock of goods held at the time of the dissolution, from the firm to C. E. Straus; who remained in custody and possession of the goods. There was no formal assignment of the debts due the concern from the firm to C. E. Straus; who did in fact take charge of all collections, and did collect, it seems, some \$1,100.

A few days after the dissolution, C. E. Straus wrote the following circular letter in manuscript to the creditors of the firm; those few passages being italicised by me, which indicate that there had been a transfer of property and effects of the firm to Straus, and that he regarded them as his own property held in common with his individual real estate and other means:

“Office of ISEMAN & STRAUS,
“WHOLESALE LIQUOR DEALERS, AND DISTILLERS' AGENTS, 1302 CARY STREET.
“RICHMOND, VA., Sept. 28, 1882.

“MESSRS. FRIEBERG & WORKUM:

“*Gents* — I have already notified you of the fact that the firm of Iseman & Straus dissolved on the 25th of September — *that I have taken the stock and debts due the concern* — that I am to pay off all the debts due by the concern — and that I propose to run the business in my own name. I deem it proper to state to you that the dissolution was caused by the failure of my former partner to attend closely and properly to his department of the business, and that owing to this neglect on his part, the business of the concern has become very much involved and has sustained heavy losses. The object of my letter is to ask your indulgence until I can get in such a condition as to pay off all creditors in full without being forced to close up *my business at a sacrifice to my creditors and myself*. Inclosed you will find a statement of *my liabilities and assets*; from which you will perceive that my liabilities amount to about \$29,000, and that *my real estate, stock and good debts* at their full value would not realize more than about \$23,000.

“Now, if I can succeed in securing from you and my other creditors an extension of six and twelve months, for which I propose to give my notes with legal interest added, then I will be able, by careful and judicious management of my business, to pay up in full.

“On the other hand, should my creditors insist on an immediate settlement, then I *would be forced to make a deed of assignment*, in which I would feel it my duty to *prefer* my accommodation indorsers to the amount of \$10,000. The net value, after paying the costs of selling under the deed of assignment and the preferred creditors, would pay only a small percentage of the other debts, and it is highly probable that *my real estate and stock* would be sold at a sacrifice, and that it would take from six to twelve months to collect all the good debts and distribute the money amongst the creditors.

“Under these circumstances I think you and the other creditors will be far more benefited by an extension than by forcing me to an immediate settlement. Please reply at once, as I must decide without delay what course to pursue.

Very Truly Yours,

“CHAS. E. STRAUS.

“STATEMENT.

<i>Liabilities.</i>	
Merchandise accounts.....	\$19,000 00
Accommodation indorsers.....	10,000 00
Total liabilities.....	\$29,000 00
<i>Assets.</i>	
Stock of goods on hand about.....	\$5,000 00
Good debts due I. & S., “.....	15,000 00
Real estate belonging to C. E. Straus.....	3,000 00
Total.....	\$23,000 00

“It is probable that something may be made out of about \$6,000 of bad and doubtful debts.”

One of the witnesses, H. B. Boudar, an expert in book-keeping, makes a statement drawn from the books of the concern, which shows that on the 1st February, 1882, the capital had been reduced from \$6,109.93 to \$618.04; but C. E. Straus makes a counter statement, claiming a capital at the date mentioned of \$3,326.59.

Statements and counter statements of plaintiffs' counsel and of C. E. Straus, respectively, show a deficit on the 2d October, 1882, between the assets and indebtedness of the firm, to the amount of \$9,000, disclosing a total loss of the capital, and positive insolvency, as admitted in the circular letter.

Upon this condition of facts the complainants, none of whom had obtained judgments against the firm, exhibited their bill in this court on the 2d October, 1882, eight days after the dissolution of the firm, charging actual and constructive fraud, praying the appointment of a receiver and for an injunction, and for the usual relief proper in such a condition of affairs. An order was at once given directing the marshal of this court forthwith to take possession of the goods in the storehouse 1302 Cary street, Richmond; temporarily restraining the defendants from interfering with the said goods and from making collections of the debts due the firm; and fixing a future day for hearing the prayer for a preliminary injunction. Since then full proofs have been taken by the parties to the cause; argument has been had as upon a final hearing; and the cause is by consent before me for a final decree.

The primary and principal question in controversy is, as to the competency of this court as a court of equity to entertain the bill exhibited in this cause, and to grant the relief for which it prays. That the firm of Iseman & Straus was insolvent on the day of dissolution is too plain for discussion and is virtually admitted, and the question of the competency of this court to entertain the bill and grant the relief sought depends upon the condition of the property and assets of the firm at the time the bill was filed, to wit, on the 2d October last.

The firm was confessedly and hopelessly insolvent. Iseman had retired from it, and had left Straus in custody of the goods with full power to collect the claims due from customers; and this had been advertised to the world in a public newspaper. Moreover, Iseman had accepted as a consideration for doing what he did, the notes of Straus satisfactorily indorsed, for \$4,000. Straus had written to all creditors a letter expressly stating and necessarily implying that the goods and all uncollected claims had become his separate property.

§ 1849. *Where a partnership is insolvent and its effects transferred to one of the two partners, a court of equity has power, under the code of Virginia, ch. 175, sec. 2, to administer its effects according to equity.*

If, in consequence of these transactions, there was a transfer from the firm to Straus, then the firm being insolvent and the rights of creditors imperiled, the transfer on the part of Iseman was voluntary, and on the part of the firm constructively fraudulent; and it became competent for a court of equity to avoid the transfer under section 2 of chapter 175 of the code of Virginia, and to take charge of and administer the effects according to the equities of the case. For, if there was a transfer, its effect was to produce a radical change in the character of the property; which ceased longer to be social effects liable primarily for the debts of the firm and only secondarily for those of its individual members; and became individual effects, liable primarily to

the debts of Straus, and secondarily to those of the firm. Collyer on Partnership (Perkins' ed. of 1853), sec. 174.

§ 1850. *Under what circumstances a creditor at large may institute suit to avoid an assignment of the estate of his debtor.*

A transfer having such an effect falls plainly within the contemplation of section 2 of chapter 175 of the code of Virginia, which declares: "That a creditor before obtaining judgment, or decree for his claim, may institute a suit to avoid a gift, conveyance, assignment, transfer of, or charge upon the estate of his debtor, which he might institute after obtaining such a judgment or decree."

If there was in this case such a transfer of the partnership property of the insolvent firm as this statute contemplates, then the effect of it was, to bring the present case within the ruling of the supreme court of appeals of Virginia in the case of *Wallace v. Treagle*, 27 Grat., 486-7, in which the court said: "Previous to section 2 of chapter 175 of the code, first enacted in the code of 1849, it was the settled rule of the courts, that a creditor at large could not resort to a court of equity to impeach any conveyance made by his debtor, on the ground of fraud. If real estate was the subject of the conveyance, a judgment was regarded as sufficient. If goods and chattels or any equitable interest therein, although incapable of being levied on, were embraced in the conveyance, the creditor was required to take out execution and have it levied on or returned, so as to show that his remedy at law failed. . . . Section 2 was intended to afford a remedy in such cases and to declare that a party creditor, who filed his bill to avoid a fraudulent conveyance, acquired a lien upon the property of the debtor conveyed in such void conveyance, if he obtained a decree setting it aside; and, in that event, the lien attaches from the day the bill is filed."

Proceeding still on the hypothesis that there was a transfer of the social effects in this case, to Straus, such as gave the complainants the right to proceed without judgment, the next question arising is, whether they had a right on general principles of equity to bring this bill. If A. and B. are partners and are pecuniarily embarrassed, and convey goods which they hold in common in payment of a debt due by B. individually, the transfer is voluntary and constructively fraudulent on the part of A. For A. was entitled to require that the whole value of the goods should be appropriated to the discharge of the joint debts, and he cannot forego this right in favor of B., or of his own separate creditors, without a manifest wrong to the creditors of the firm. See *White & Tudor's Leading Cases in Equity* (Hare & Wallace's ed.), part 1, p. 394.

§ 1851. *The law disables a debtor from making any voluntary settlement of his estate to stand in the way of existing debts.*

If a person or firm is indebted at the time of a voluntary transfer of property, it is presumed to be fraudulent in respect to debts antecedently due; and no circumstance will permit these debts to be affected by the transfer, or to repel the legal presumption of fraud; and this is so, without regard to the amount of the debts, or the extent of property. The law disables the debtor from making any voluntary settlement of his estate to stand in the way of existing debts. Some authorities hold that this doctrine is qualified in favor of third persons who come *bona fide* into possession of the property transferred. But this is the only qualification; and it does not apply in the case

at bar, where there are no innocent third persons whose rights are involved. See *Case v. Beauregard*, 99 U. S., 119.

§ 1852. *Rights of partnership creditors to have partnership assets applied to partnership debts. How enforced.*

From the right of the firm (and of its creditors) to the partnership assets results the duty of its members to see that they are appropriated to the payment of the joint debts. For this purpose each member of the firm has an equitable lien extending to the whole of the common stock; to which member's lien the partnership creditors may be subrogated as against the partners individually and their separate creditors. Leading C. Eq., 2 vol., part 1, p. 401, and cases there cited. Therefore if in the present suit there was a transfer of the effects of the firm to Straus, and that transfer be *avoided* or set aside as voluntary and constructively fraudulent, then the jurisdiction of equity to proceed with the cause is founded upon the right of subrogation just stated, which equity gives to creditors of the firm. The lien of partners and of creditors by subrogation upon the whole funds of the partnership, for the balance finally due to the partners respectively, seems incapable of being enforced in any other manner than by a court of equity through the instrumentality of a sale. Besides the creditors of the partnership have the right to have their debts paid out of the partnership funds before the private creditors of either of the partners. But this preference is at law generally disregarded; in equity it is worked out, as before indicated through the equity of the partners over the fund. 1 Story's Eq. Ju., sec. 675.

§ 1853. *When an account will be ordered and a receiver appointed.*

Where a dissolution of the firm has taken place an account will not only be decreed, but, if necessary, a manager or receiver will be appointed to close the partnership business and make sale of the partnership property; so that a final distribution may be made of the partnership effects. 1 Story, Eq. Ju., § 672.

§ 1854. *Equity jurisdiction of partnership not confined to cases of fraud.*

The jurisdiction of the court of equity, although it may attach on the ground of actual or constructive fraud, or accident or mistake, is not necessarily dependent upon them; but may be exercised on other distinct grounds in which the subject-matter is *per se* within the equitable jurisdiction. Among these are matters of account; and, as incident thereto, matters of partnership. 1 Story, Eq. Ju., § 441.

§ 1855. *Equity jurisdiction of matters of account.*

Cases of account between partners fall under the considerations which give to courts of equity concurrent jurisdiction with courts of law in matters of account. If the transfer of the partnership goods to Straus in the case at bar be set aside by this court, then Straus would be held to have been, before this suit was brought, in contemplation of equity, the trustee or agent of the members of the firm for the partnership creditors, to manage the fund in their respective interests. As such, if Straus was bound to keep the property of the firm distinct from his own, and if he mixed or was about to mix it up with his own, the whole would be taken to be the property of the firm; and a court of equity, through its original inherent and independent power as such, would have jurisdiction to enforce the right of the retiring partner and the social creditors to a proper administration of the fund. 1 Story, Eq. Ju., §§ 466-468, and 504

§ 1856. *In Virginia creditors at large of a partnership have a right to an injunction.*

It is not essential to the vindication of the equity of partnership creditors that the assets shall have passed from the hands of the firm into those of an assignee, and a chancellor may on proof of insolvency, and that there is good ground for believing that the partnership property has been, or will be, misappropriated, award an injunction at the instance of a judgment creditor, and appoint a receiver to wind up the business of the firm. *Collins v. Hood*, 4 McLean, 186; *Jones v. Lusk*, 2 Metc., 356; and numerous other cases cited in 2 Leading Cases in Equity, part 1, p. 404. In Virginia, Maryland, and some other states, this will be done at the instance of creditors at large. *Washburn v. The Bank of Bellows*, 19 Vt., 278; *Hubbard v. Curtis*, 8 Ia., 13; *Thompson v. Frist*, 15 Md., 24; *Sanders v. Young*, 31 Miss., 111; cited in 2 Leading Cases in Equity, part 1, p. 404; and the Illinois case of *Rapplege v. International Bank*, Virginia Law Journal for 1880, 307.

I have gone more largely into this question of the general equity jurisdiction in matters of account, partnerships, trust and constructive fraud, because on these grounds the court has abundant jurisdiction to entertain the present bill, and grant the relief it prays, without considering the question of actual fraud, so elaborately discussed by counsel on either side. The question of actual fraud has been entirely pretermitted by me, in arriving at conclusions in this case.

I am free, however, to say, that if it had been necessary to pass upon that question, I would not have felt justified in basing a decree on that ground, and do not think that actual fraud had been practiced. Nor would I be understood as implying, from what has been said on the general jurisdiction of equity in matters of trust, account, constructive fraud and partnership, that a court of equity could not entertain such a bill as this of complainants here; and on general grounds of equity jurisdiction, take possession of partnership goods recently transferred and still existing in specie, and readily found and identified, independently of section 2 of the one hundred and seventy-fifth chapter of the code of the state. It is unnecessary in the present suit to consider that question, the statute giving all needed authority.

§ 1857. *The effect of a transfer by one partner to another as to partnership creditors.*

It may be proper to inquire whether Iseman had power to make the transfer to Straus, which he is claimed to have made by complainants. I think this right was clear. In *Jones v. Lusk*, before cited, it was held that a sale by one of the partners to the others, of his interest in the firm, passes the right of property as between the partners, and against all the world except the partnership creditors, but can be impeached by the creditors by a bill in equity; and such is the teaching of all the authorities. It is a general principle that one partner may sell his interest as well to his copartner as to another purchaser; and if the sale be valid, it will vest the exclusive title in the purchaser. *Ex parte Ruffin*, 6 Ves., 119, 126; *Ex parte Williams*, 11 Ves., 3; Story on Partnership, sec. 510. If the consideration of the transfer be that the partner buying shall pay the debts of the firm, this will not, by mere force of the contract, raise a trust in favor of the creditors, inasmuch as they derive their lien from or through the partners, and as the retiring partner parts by the sale with his lien, and takes the personal security of the other to pay the debts, the

lien is lost through which the creditors may work out their equity as against the assets of the firm. 2 Leading Cases in Equity, part 1, p. 399.

In view of these general principles respecting the powers of a partner, it is clear that Iseman could have transferred his rights in the partnership effects to Straus; and that if the partners so intended to do, by their dissolution of September 25, 1882, they were competent to make the transfer. If they made it, then it was competent for this court, as a court of equity, to entertain a bill to set it aside with a view to a sale, and to a distribution of the proceeds according to the equities of the case. The only question, therefore, remaining to be considered is, whether there was such a transfer as, upon the principles that have been enunciated, should be set aside by this court, under the authority of section 2 of the one hundred and seventy-fifth chapter of the code of Virginia.

It may be conceded that there was no formal, express or explicit transfer; that there was no writing in the nature of a conveyance or assignment. If the effects of the firm had been realty instead of personalty, it might have been doubted whether, without such a conveyance, there was an effective transfer of title or property. But the effects were personalty, transferable by delivery. They were personalty which had been in the joint possession of the firm, and of which one partner relinquished his joint possession to the sole possession of the other partner. The retiring partner sold his interest in the effects of the concern for a consideration; that consideration being notes satisfactorily indorsed for \$4,000, and the undertaking of Straus that he would pay the debts of the firm.

Can it be pretended that Iseman, after having received the \$4,000 of consideration money, or its equivalent, and signed the agreement of dissolution, and retired from the joint custody of the goods, and relinquished the joint collection of the claims of the firm, for eight days, could have gone back to the storehouse and resumed his joint proprietorship of the goods and a joint control in the management of the business? I think it is perfectly clear that he could not have done these things; and that he could not have done them is itself a demonstration of the fact of transfer.

§ 1858. *A dissolution does not affect the rights of third persons, who have dealt with the firm, without their consent.*

It may be conceded that mere dissolution does not of itself operate a transfer of the social effects to a partner who, as successor to the firm, assumes the settlement of the partnership affairs. It may be conceded that an authority given to one partner by the other to close all the business transactions of the firm does not of itself operate as a transfer of partnership effects. But these are propositions applicable only to solvent partnerships.

It may be conceded that, in general, no dissolution of any kind affects, in the eye of equity, the rights of third parties who have had dealings with the partnership without their consent. None of these propositions conflict with counter-propositions in regard to insolvent partnerships like that of Iseman & Straus.

§ 1859. *What is necessary to convert joint partnership into separate property.*

In order to convert joint into separate property it is not necessary, in the case of goods in specie, that there should be a deed of assignment to the remaining partner. Delivery of the goods, coupled with due notice that the partnership is dissolved and that the remaining partner will pay the debts of the firm, is sufficient evidence of an agreement to change ownership. Collyer, section 895, edition of 1853. This principle was established by the case of *Ex*

parte Williams, 11 Ves., 3; and has been adopted as settled law by all courts and text-writers for nearly a century. In that case, Shepherd and Smith dissolved their partnership on the 5th of September, 1803, and advertised the fact in a newspaper on the 25th of the succeeding November, with a statement that all debts would be paid by Shepherd. Shepherd went into bankruptcy in December, having still on hand in specie property which had belonged to the firm. The question was whether this property had remained social effects, or had become the separate property of Shepherd by having passed as such to his assignee in bankruptcy; and it was determined by Lord Eldon that they were separate effects, and had passed to Shepherd's assignee. In that case there was evidence of a formal agreement that the property should pass to Shepherd; as there is evidence here that, for the consideration of notes for \$4,000, satisfactorily indorsed, and payment of the debts of the firm, Iseman sold his interest in the goods to Straus.

The case of *Ex parte Williams* rules the present case, and I will decree for the complainants.

There was a motion to dismiss on the ground that no one of the complainants had debts amounting to \$500, the jurisdictional amount.

Opinion by HUGHES, J.

There is no denial by the defendants, in their answer to the bill, that any of the sums claimed by the complainants to be due them respectively are just claims. Some of those which were not due at the filing of the bill in the afternoon of the 2d October, 1882, have since matured, and matured before the filing of the answer.

It is perfectly true, and it is well settled law, that if no one of the claims of any separate complainant, against the defendant in a cause, amounts to \$500, jurisdiction cannot be created by several complainants combining their respective claims into an aggregate until the whole reaches \$500. If that were the case at bar, the motion of defendants would be promptly granted, and the cause dismissed.

§ 1860. *Where the demands of a complainant which are due and those not due exceed \$500, the court will, in a proper case, take jurisdiction.*

But each one of the complainants here has an acknowledged claim exceeding \$500; and the only objection which can be charged against the jurisdiction of the court is, that part of the amounts due by the defendants were not actually payable at the time the bill was filed.

Ordinarily in equity, and probably always at law, this objection also would defeat the jurisdiction of a United States circuit court; but here insolvency was charged and is virtually confessed; the goods seized, which were the principal fund out of which the claims of complainants could be paid, had recently passed into the individual possession and become the individual property of one partner, and he, as the record and proofs show, the least responsible partner of the two,—most of the goods so transferred could yet be found in specie and identified, but there was danger every hour that they would disappear and become intangible,—and unless the court could act before other debts of defendants matured for payment, complainants would lose all remedy in a United States court.

I think the admitted fact of insolvency, the acknowledgment by defendants of the indebtedness charged in the bill, and the imminent peril of the goods, made a case for the interposition of this court as a court of equity, too strong

to be overcome by the technical objection that part of claims acknowledged to be due had not yet matured for payment. The reason for thus ruling is the stronger in the present case, as the motion under consideration was not made until after answer was filed, full proofs taken, elaborate argument of counsel at final hearing was had, and a decision formally rendered by the court on all the points raised in the case.

A question was raised whether the complainants had by filing their bill secured priority of payment, or whether there should be a distribution *pro rata*.

Opinion by HUGHES, J.

If the court had jurisdiction of this cause by virtue of the original, inherent jurisdiction of a court of equity, it would probably be its duty to distribute the fund in its hands *pro rata* among creditors; and this, on the favorite principle of chancery courts, that *equality is equity*. It might be its duty, moreover, to require that the bill of any creditor brought to create a charge upon the assets of a partnership should be a creditor's bill filed, on the part of the immediate complainant, for himself and all other creditors who might come into the suit.

§ 1861. *Under the Virginia Code, ch. 175, sec. 2, debts should be paid according to priorities, not pro rata.*

As I have already said, however, in the original opinion filed in this cause, the bill here is brought under authority of section 2 of chapter 175 of the code of Virginia. That section allows "a creditor," meaning any creditor, to file a bill on his own account alone, for the purposes indicated by the section, before obtaining judgment. It does not require this creditor to bring a general creditor's bill; and it fixes the rights of the creditor suing as to the position in which he shall stand among creditors, in the order of distribution. It declares that, if successful in his suit, he shall have "all the relief in respect to the estate of the defendant which he would be entitled to after judgment or decree for the claim" for which he sues.

The meaning of this language of the section may not originally have been free from ambiguity; indeed it was not; but it has been construed by the court of highest resort in Virginia to mean that such a bill operates as a lien from the day on which it is filed; and that it establishes for the complainant the right to be paid out of the fund which is the subject of suit, in preference to all creditors whose liens or claims are of equal dignity with his own.

The language of the supreme court of appeals of Virginia in *Wallace v. Treacle*, 27 Gratt., 487, in commenting upon this section is (the italics being that court's): "It is plain that by the very terms of this statute the creditor assailing successfully a fraudulent conveyance is placed in the same position, and is entitled to the *same relief*, as if he had already obtained a judgment or decree against his debtor. What is that position, and what is that relief? Plainly a *lien* upon the property of the debtor; just as if he had, at the filing of his bill, already obtained a judgment or decree. The statute places the creditor who assails a fraudulent conveyance, if he succeeds in vacating it, in the position of one already having obtained a judgment or decree, and his lien subsists from the time of filing his bill. It is plain that creditors filing a bill to set aside a fraudulent conveyance acquire a specific lien, and one entitled to priority over other creditors at large."

Such being the statute law under which this suit is brought, and such being

the clear and emphatic interpretation of that law by the court of last resort in the state, the question with me is, whether I should accept that interpretation of the statute, or distribute the fund in this cause on some other rule.

§ 1862. *Federal courts follow the statute law and distribute funds in their hands according to priorities.*

This question has often arisen in the courts, especially in the federal courts. It is well settled — indeed it is settled by statute (thirty-fourth section of the judiciary act of congress, 1 Stat. at Large, 92) — that the laws of the several states not in conflict with those of the United States shall be the rules of decision in “trials at common law” in the courts of the United States. And, therefore, the question before me is narrowed to the inquiry whether, in cases not at common law, or like the one at bar, cases in equity, statutes of the state affecting the rights of parties, and proceedings in court, furnish the rule of decision for federal courts of equity; and whether the interpretation put upon those statutes by appellate state courts must be adhered to and enforced by federal courts of equity.

We have an important precedent on this point in an early decision of this very court in an equity case. That was the case, tried in 1822, of *Coate v. Muse*, 1 Brock., 537, in which Chief Justice Marshall said: “It is always with much reluctance that I break the way in expounding the statute of a state; for the exposition of the acts of every legislature is, I think, the peculiar and appropriate duty of the tribunals created by that legislature. Although, if a case depending on a statute not yet construed by the appropriate tribunal, comes on to be tried, the judge is under the necessity of construing the statute, because it forms a part of the case, yet he will yield to this necessity only where it is real, and when the cause depends upon the statute. The reluctance with which he yields to it is increased when, as in this case, the language of the act is sufficiently ambiguous to admit of different constructions among intelligent gentlemen of the profession. In such a case he will be particularly anxious to avoid giving a first construction, and will avoid it, if the case can be otherwise decided.”

All this implies that, where the law of a state determines the rights of parties, and those rights come before a federal court, either in a case at law or in equity, for adjudication, that court is bound to accept such exposition of the meaning of the law as the state courts have given it, and ought not to give an exposition of its own, unless there has been no previous exposition of it by state courts. I see many decisions in apparent conflict with this principle, but none that are in real conflict. Where the state law fixes the rights of parties, and equity need not resort to its own principles for the determination of those rights, in such cases, it cannot do so, even though its own principles may seem more consonant with natural justice.

In the present case we are not in the dilemma deprecated by Judge Marshall. There has been an exposition of the precise meaning of the law on which this bill is founded given, fortunately, by the state’s court of last resort; and as this second section of the one hundred and seventy-fifth chapter of the code is one which determines rights and not merely prescribes a remedy, I feel bound to rule in conformity with the decision in *Wallace v. Treacle*. It is there decided that, when the complainant files such a bill as it authorizes, succeeds in his suit, he acquires a lien upon the property of the defendant from the date of the filing of the bill as against all junior lienors and creditors at large. I will decree accordingly.

DAY v. WASHBURN.

(24 Howard, 352-357. 1860.)

Opinion by MR. JUSTICE NELSON.

STATEMENT OF FACTS.— This is an appeal from a decree of the circuit court of the United States for the district of Indiana.

The bill was filed in the court below by two mercantile firms, creditors of Washburn, against him and the assignee of his property, for the purpose of setting aside the assignment as fraudulent against creditors, and that the property might be applied in satisfaction of the complainant's demands. These demands were simply contract debts not reduced to judgment.

The defendants demurred to the bill, and assigned, as the ground of the demurrer, the want of equity. The court overruled the demurrer, and the defendants answered separately, among other things denying all fraud in the assignment. Replications were filed to the answers.

In this stage of the case the other creditors of Washburn applied by petition to the court to be made parties to the bill, charging fraud in the assignment, and praying that it might be set aside, and the property and effects of the debtor be subjected to the payment of all his debts, and be divided equally among all the creditors. The court ordered that these petitioning creditors become co-complainants, and referred the case to a master to take an account of what was due to each of the complainants, which account was duly taken, and a report made to the court; and afterwards the defendant, Keith, was ordered to bring into court the amount of moneys admitted by him to be in his hands, made out of the assigned property, amounting to the sum of \$2,437; and then, at a subsequent day in the term, the court overruled a motion made, on behalf of the two firms who filed the bill, to have the moneys in court applied to the payment of their debts in preference to the other creditors; and adjudged the assignment fraudulent as to creditors, and directed that the whole fund be distributed ratably among all of them, according to their respective demands, and referred the case to a master to make the distribution; and on his report confirmed the same.

§ 1863. *A creditor filing a bill to set aside a fraudulent assignment, not having acquired a lien by judgment at law, is not entitled to priority of payment over other simple contract creditors coming in by petition and claiming pro rata payment.*

The case is before us on appeal by the two firms who filed the bill, alleging for error the refusal of the court to give them preference in the distribution of the assets. The proceedings in the case have not been conducted with much regularity, but the principles of equity governing the rights of the parties concerned are very well settled, and the application of them to the facts as presented will satisfactorily dispose of it.

The court of chancery does not give any specific lien to a creditor at large, against his debtor, further than he has acquired at law; for, as he did not trust the debtor on the faith of such lien, it would be unjust to give him a preference over other creditors, and thus defeat a *pro rata* distribution, which equity favors, unless prevented by the rules of law. It is only when he has obtained a judgment and execution in seeking to subject the property of his debtor in the hands of third persons, or to reach property not accessible to an execution, that a legal preference is acquired, which a court of chancery will enforce. 2 Johns. Ch., 283; 4 id., 691.

The two firms, therefore, who filed the bill, the appellants here, not having reduced their demands to judgment and execution before seeking relief against the fraudulent assignment of the debtor, are not in a situation to set up any claim to a preference over the other co-complainants, or to object to an equitable distribution of the assets among all the creditors. Indeed, the principle upon which the bill seems to have been drawn, and is now sought to be sustained, would preclude any preference in favor of the appellants — which is, that the debtor's property, in the hands of the assignee, constituted a fund for the benefit of creditors, which a court of equity only could reach, and hence that the creditor had a right to the interposition of the court, without first obtaining a judgment and execution. It is true, where a specific fund has been assigned or pledged for the benefit of creditors, and it is necessary to go into a court of chancery to make a distribution among them, the equitable lien of each creditor upon the fund lays a sufficient foundation for the interposition of the court. It will enforce this equitable lien thus arising out of the assignment or pledge for the benefit of the creditors, in the exercise of its own appropriate jurisdiction. But in all these cases, chancery, upon its own principles, distributes the fund *pro rata* among all the creditors, unless preference is given in the pledge or assignment of the fund. In the present case, as the assignment was made to Keith, in trust for the benefit of creditors, if the bill had been filed to enforce the trust, no judgment or execution would have been necessary, as preliminary steps to the interposition of the court; but in that case the appellants would not have been entitled to a preference, as none was given to them in the trust deed, but the contrary.

For this reason, doubtless, the bill was filed to set aside the deed as fraudulent, with a view to defeat the preferences given therein to other creditors. The objection that the demands of the appellants had not been reduced to judgment and execution before filing the bill would have been fatal to the relief sought, if taken in time by the defendants. It was waived, however, both as respected the appellants and the other co-complainants; and, as the court was left unembarrassed by the objection, it was right in proceeding to dispose of the property and effects of the debtor, and to make the proper application of them; and, as we have seen, as neither of the creditors had acquired a preference at law, the application in chancery, upon its own principles, was a ratable distribution among all the creditors as decreed by the court below. Decree affirmed.

CLAFLIN v. McDERMOTT.

(Circuit Court for New York: 12 Federal Reporter, 375-377. 1882.)

Opinion by WALLACE, J.

STATEMENT OF FACTS.— The bill in this case is filed to set aside the transfer of certain personal property made at San Francisco, California, by Kennedy & Durr, to McDermott, by means of collusive judgments and sales under executions issued thereon, the complainants being creditors of Kennedy & Durr, and having recovered judgment in a state court in California against Kennedy & Durr, upon which an execution has been returned unsatisfied. By a demurrer, the question is presented whether the bill can be maintained here, no judgment having been obtained or execution issued in this court, or in any court of the state.

§ 1864. *Ancillary actions.*

Actions like the present, in aid of the execution at law, are ancillary to the

original suit, and are, in effect, a continuance of the suit at law to obtain the fruit of the judgment or to remove obstacles to its enforcement. Because this is the nature of such an action, it has been decided that such a suit may be maintained in a federal court although all the parties reside in the state where it is brought, the judgment in the original suit having been recovered in the federal court in which the creditor's suit was brought. *Hatch v. Dorr*, 4 McLean, 112 (COURTS, §§ 636-37). It is, therefore, difficult to understand how such a suit can be maintained in any court which does not exercise an auxiliary jurisdiction over the court in which the original suit was brought. Authorities are found, however, upon both sides of the question which is thus presented.

In *Tarbell v. Griggs*, 3 Paige, 207, the court of chancery of this state refused jurisdiction of a creditor's bill filed to obtain satisfaction of a judgment obtained in the United States circuit court for the southern district of New York, upon which an execution had been returned unsatisfied. The judgment was treated as a foreign judgment, and as standing on the same footing with a judgment of the court of another state. In *Davis v. Bruns*, 23 Hun, 648, there was a similar adjudication. There the plaintiff brought his action in the supreme court of this state to set aside an alleged fraudulent transfer of real estate, having obtained a judgment against the grantor in the United States district court for the southern district of New York, and an execution on the judgment having been returned unsatisfied. In both of these cases it was held that the plaintiff's remedy at law had not been exhausted by the issuing and return of an execution upon a foreign judgment.

On the other hand, in *Wilkinson v. Yale*, 6 McLean, 16, a creditor's bill was maintained in the United States circuit court founded upon a judgment of a state court of the state in which the federal court was sitting. The decision was placed upon the power of the court to adopt a remedy given by the law of the state, when the remedy was one appropriate for the exercise of a court of equity; but it was also assumed that the bill could be maintained irrespective of the state statute.

§ 1865. *Force of a judgment of another state. Creditors at large.*

The cases in the courts of New York seem most consonant with principle. Obviously the complainants are merely creditors at large of the defendants in the California judgment. The judgment of another state has no force in this save what it derives from the laws of this state and the provision of the constitution of the United States which relates to its effect as evidence. It ranks here as a simple contract debt. It does not have the force and operation of a domestic judgment, except for the purposes of evidence, beyond the jurisdiction where it is obtained. *McElmoyle v. Cohen*, 13 Pet., 312. It will not be contended that a creditor at large can invoke the jurisdiction of equity to enforce his claim unless upon some of the recognized grounds of trust or administration of equitable assets. Unless some of these grounds exist the remedy of the creditor is at law; and equity will not assist him until that remedy is exhausted. The remedy at law cannot be exhausted by the recovery of a judgment in a foreign jurisdiction, and by fruitless efforts to enforce it there. Except as a binding adjudication between the parties upon the subject-matter of the suit, the judgment of one of our sister states has no operation here upon the rights or the remedies of the parties to it. It cannot be a foundation for a creditor's bill here any more than a judgment recovered in England or in Canada. It must be sued over here before it becomes a judgment for the purposes of any remedy here at law or in equity.

This conclusion is reached with less reluctance in view of the practical objections which would exist if foreign judgment creditors were permitted to resort to this jurisdiction to remove obstacles in the way of their legal remedies. These obstacles always exist in the jurisdiction where the judgment is obtained. Frequently their removal involves the consideration of the force and effect of remedies and rights created by local law, which are more appropriately adjudicated by the local tribunals. The present case affords an illustration in point. This court is asked to examine into a fraudulent perversion of the proceedings of a court of a distant state, and set aside transfers based upon these proceedings, when the actors, the transactions and the property are all within that state. Such a jurisdiction should not be willingly assumed. The demurrer is sustained.

ORENDORF v. BUDLONG.

(Circuit Court for Michigan: 12 Federal Reporter, 24-32. 1882.)

STATEMENT OF FACTS.—Proceeding to set aside fraudulent conveyances by a judgment debtor of his property made previous to a sale under execution of the same, at which complainants, who were judgment creditors, became the purchasers. Defendant, in possession through these alleged fraudulent conveyances, denies the fraud, and demurs to the sufficiency of the bill.

§ 1866. *A court of equity has concurrent jurisdiction with a court of law to set aside fraudulent conveyances.*

Opinion by BROWN, J.

There can be no doubt of the general jurisdiction of a court of equity to set aside fraudulent transfers of property at the instance of a judgment creditor. Such bills are constantly sustained, notwithstanding there may also be a remedy by ejectment, upon the ground that no remedy is full, adequate and complete which leaves the fraudulent deed outstanding as an apparent cloud upon the title. Never since the case of *Bean v. Smith*, 2 Mason, 252, decided by Mr. Justice Story in 1821, has the power of the federal courts to entertain bills of this description been questioned. *Bump, Fraud. Conv.*, 508; *Pratt v. Curtis*, 6 N. B. R., 139; *Buck v. Sherman*, 2 Doug. (Mich.), 176.

It was insisted, however, that this bill would not lie, because, under Comp. Laws, § 4628, it should have been filed within a year after the sale. The material parts of the section read as follows: "All the real estate of any debtor, including legal and equitable interests in lands acquired by parties to contracts for the sale and purchase of lands, whether in possession, reversion or remainder, including lands fraudulently conveyed with intent to defeat, delay or defraud his creditors, and the equities and rights of redemption hereinafter mentioned, shall be subject to the payment of his debts, liabilities and obligations, and may be levied upon and sold upon execution as hereinafter provided. . . . In case of a levy upon the equitable interest of a judgment debtor, the judgment creditor may, before sale, institute proceedings in aid of said execution to ascertain and determine the rights and equities of said judgment debtor in the premises so levied upon; and that in case of a sale of said premises, after having ascertained and determined the interest of said judgment debtor in the premises so levied upon and sold, he shall, within one year, institute proceedings to ascertain and determine the same, and to settle the rights of parties in interest therein."

§ 1867. *Jurisdiction of circuit court of United States as a court of equity unaffected by state laws.*

There are two sufficient answers to the complainants' proposition that these proceedings should have been taken within the year: 1. The jurisdiction of this court as a court of equity is uniform throughout the United States, and is unaffected by state laws. The Revised Statutes, § 913, declare the forms and modes of proceeding in suits of equity shall be according to the principles, rules and usages which belong to courts of equity, as contradistinguished from courts of common law. Under this provision, which is taken from the act of 1792, it has always been held that the jurisdiction and practice of the circuit courts in equity was uniform throughout the United States, and not subject to restriction or limitation by local statutes. *Robinson v. Campbell*, 3 Wheat., 212; *United States v. Howland*, 4 Wheat., 108; *Boyle v. Zacharie*, 6 Pet., 648, 658; *Noonan v. Lee*, 2 Black, 499. It is a natural corollary of this proposition that we are not bound by the decisions of the state courts upon questions of equity jurisprudence. *Neves v. Scott*, 13 How., 268.

§ 1868. *The interest of a creditor in the property of a debtor, fraudulently conveyed, is a legal and not an equitable asset, and hence the limitation of one year within which proceedings may be taken after the sale does not apply.*

2. The limitation of the section in question applies only to "equitable interests," while the interest of a creditor in the land of his debtor, fraudulently conveyed, is a legal and not an equitable asset. *Pulliam v. Taylor*, 50 Miss., 555. That this is the proper construction to be placed upon this statute is also evident by referring to the section of the Revised Statutes of 1846 from which it was taken. This chapter (chapter 79, § 1) provides "that all the real estate of a debtor, whether in possession, reversion or remainder, including lands fraudulently conveyed with intent to defeat, delay or defraud creditors, . . . shall be subject to the payment of his debts, and may be sold on execution." This chapter makes no reference to equitable interests, except the equity of redemption of a mortgagor; and in *Trask v. Green*, 9 Mich., 358, and *Maynard v. Hoskins*, id., 485, it was held that it did not reach the case of lands which a judgment debtor had purchased and caused to be conveyed by the vendor directly to a third person to defraud his creditors, and that such lands could only be reached by a creditor's bill, filed after the return of an execution unsatisfied.

To obviate in some measure the difficulty of reaching equitable interests, the statute was amended in 1867 by including legal and equitable interests in lands acquired by the parties to contracts for the sale and purchase of lands. It is obvious that the limitation of the one year within which proceedings may be taken after the sale applies only to those equitable interests, and perhaps those of a mortgagor, and not to the case of lands fraudulently conveyed. This was also the opinion of the supreme court of this state in *Cranson v. Smith*, 10 N. W. Rep., 194.

§ 1869. *Who may invoke equity to set aside fraudulent conveyances, and when.*

But the main defense to this case is that this bill should have been filed in aid of the execution and before the sale; the theory of the defendant being that if the judgment creditor waits until the land is sold, and he has obtained his deed, there is a complete and adequate remedy at law in an action of ejectment, and that he can no longer invoke the aid of a court in equity. In support of this proposition defendant relies upon the case of *Cranson v. Smith*,

above cited, recently decided by the supreme court of this state. This case is directly in point. Complainants have attempted to distinguish it from the case under consideration, in the fact that Markham's title was not taken and did not appear of record until after the sale on execution. But the deed from Budlong to his son was the one in controversy. This was taken long before the bill was filed. If this deed was valid, and George Budlong was a *bona fide* purchaser, then Markham's deed conveyed a perfect title to him, even though he had notice of the levy. On the other hand, if George Budlong was not a *bona fide* purchaser, Markham, having notice of the levy, could not take a good title from him. Complainants' case, then, must stand or fall with the view taken by this court of the correctness of the ruling in the case of Cranson v. Smith.

This case undoubtedly conflicts with the previous intimations of the supreme court upon the same question, although the point had never been directly decided. Thus in Cleland v. Taylor, 3 Mich., 201, which was an action of ejectment by a judgment creditor, who was also a purchaser at the sheriff's sale, to test the validity of a deed made by the judgment debtor, it was assumed, both by the court and counsel, that the right of the plaintiff to have the deed set aside in a court of chancery was unquestioned. So, in Messmore v. Haggard, 9 N. W. Rep., 853; which was a bill by a judgment creditor, who was also purchaser upon execution, to set aside a fraudulent mortgage made by the judgment debtor, it was held that the bill should have been filed before the sale, for the reason that if the judgment creditor could buy with a secret assurance that he was to have an unincumbered title, when others must suppose they were buying subject to the mortgage, this assurance gave him an advantage in bidding to the full amount of the mortgage, and practically put competition entirely out of the question. It was thought to be unfair to the other bidders and to the mortgagee to give him this advantage. "There can be no equity in permitting him to purchase the lands apparently subject to the mortgage, and then to have its lien annulled afterwards." But in delivering the opinion Mr. Justice Cooley draws a clear distinction between that case and one where the judgment debtor has made a fraudulent conveyance of all his interest in the land:

"In those cases," he says, "the judgment debtor had conveyed away his whole interest, and any offer to sell on an execution against him necessarily attacked his conveyance. The judgment debtor would understand this, and his grantee would understand it, and take his measures accordingly. So would all persons, who should be inclined to be bidders at the sale, understand it, and all would stand on an equality with the judgment creditor in making bids. No doubt it would be proper for the sheriff expressly to give notice at the sale that the validity of the debtor's conveyance was disputed, but as the offer to sell would be idle and meaningless if the conveyance was not contested, any such notice would be obviously unimportant."

But in Cranson v. Smith the reservation thus made by Mr. Justice Cooley (which seems to us unanswerable), of cases like the present where all bidders stand upon an equality, is expressly overruled. The reasons for his conclusion are stated as follows by Mr. Justice Marston: "At the time the levy and sale was made under the execution, complainant, the judgment creditor, had full and ample knowledge of the conveyance from John F. Smith to his wife, the deed having been duly recorded. The complainant did not then, although he had an undoubted right to, file his bill in aid of his execution, and, if the conveyance was fraudulent, have it set aside, thus restoring and revesting the legal

title in the judgment debtor, and thus enable intending purchasers to compete with him at the sale. He preferred to leave the matter not only in doubt as to the fraudulent character of the conveyance, but thereby to prevent any person from bidding against him, as purchasers under the levy made and interest sold could not have moved to have the conveyance declared void. The complainant could not thus acquire the title, and then come into a court of equity and ask to have the deed set aside."

§ 1870. *Purchaser under execution sale may move to have fraudulent conveyance declared void.*

But why cannot a purchaser under an execution sale move to have the conveyance declared void? We know of no reason. Clearly the authorities are in his favor. Indeed, the judgment creditor himself, if he purchases at an execution sale, must take proceedings as purchaser and not as judgment creditor, to attack the conveyance. His rights as creditor are merged in those of purchaser. *Bump, Fraud. Conv.*, 488; *Chandler v. Von Roeder*, 24 How., 224; *Cole v. White*, 24 Wend., 116; *Murphy v. Orr*, 32 Ill., 489; *Barr v. Hatch*, 8 Ohio, 527; *King v. Bailey*, 6 Mo., 575.

In *Sands v. Hildreth*, 14 Johns., 497, the court observes: "It has been contended that the respondent is not invested with the rights of Whitney and others, under whose judgment he became a purchaser at a public sale made by the sheriff of Kings county under executions on those judgments. The statute, it is urged, protects creditors only from fraudulent deeds, and not a person standing in the situation of respondent. This proposition is, in my judgment, without any foundation. All the respondent's right to the land in controversy is derived from and under the judgments under which he purchased. The judgments are his title; and he is placed, by the judicial sale which took place, precisely in the place of the creditors. If the title acquired under the sheriff's sale fails for want of title in the person against whom the execution issues, the purchaser is entitled to a restitution of the money paid. How can it, then, be pretended that the respondent is not clothed with all the rights of the judgment creditors if they are liable to refund all that has been advanced by the respondent on the failure of the title he bought? The idea itself is novel and unsupported by reason or authority."

And, even if the judgment creditor buys the land at less than its value, who is entitled to complain? Not the fraudulent transferee, for, as against the creditors of the grantor, his deed is as if it never had been written. Not the fraudulent grantor, because he has conveyed away his title by deed which is perfectly good as to himself and every one except his creditors. We know of no reason why the rule which demands that a complainant shall come into a court of equity with clean hands does not apply equally to a defense set up in that court which is not available in an action at law. Now, without deciding whether a fraudulent debtor or his fraudulent grantee is entitled to any surplus that may be realized at the sale over and above the judgment debt, it seems to us that neither of them ought to be heard in a court of equity to complain that the judgment creditor did not file his bill before the sale and have their deed set aside for fraud. "*Nemo allegans suam turpitudinem audiendus est.*" "He that hath committed iniquity shall not have equity."

Conceding the rule established in *Messmore v. Haggard* to be correct, it seems to us that the case of *Cranson v. Smith*, so far from being in affirmance of it, is a clear departure from it. We know of no authority which supports the principle announced in that case. None are cited in the opinion, and, so far

as our researches have extended, none can be found in the books. The leading case upon the subject is that of *Hildreth v. Sands*, 2 Johns. Ch., 35. This was a bill by a purchaser upon execution to set aside as fraudulent a deed of lands made prior to the judgment. In speaking of the defense which was held good in *Cranson v. Smith*, Chancellor Kent observes:

"If it [the statute of Elizabeth] protects the creditor it must protect his sale and the purchaser under his judgment. The creditor, on any other construction, would be deprived of the fruit of his judgment, and the execution would be nugatory. There can be no doubt but that the plaintiff, as a purchaser under *Whitney's* judgment, is entitled to all the relief that the creditor himself would have been entitled to, for he stands in his place and is armed with his rights; and though he be a purchaser at a very low price, yet it was a fair purchase in the regular course of law, and it was owing to the unwarrantable acts of the debtor himself in throwing a cloud over the title that his property was thus sacrificed. It does not become the parties to a fraudulent deed to complain of the plaintiff's cheap purchase. However it may be regretted that the property has yielded but a very small compensation to the creditors, this fact cannot interfere with the question of right. The auction price was an accidental thing, growing out of the peculiar circumstances of the case, and affects only the parties concerned; but whether such a fraudulent conveyance shall stand or fall is deeply interesting to the whole community."

On appeal to the court of errors this decree of the learned chancellor was affirmed. 14 Johns., 493.

§ 1871. — *authorities cited.*

In the following cases, also, it was directly decided that a bill of this description might be filed as well after as before the sale under a judgment: *Gallman v. Perrie*, 47 Miss., 131, 140; *Mays v. Rose*, 1 Freeman, Ch., 703; *Frakes v. Brown*, 2 Blackf., 295; *Kellogg v. Wood*, 4 Paige, 578; *Carpenter v. Simmons*, 1 Rob., 360; *Porter v. Parmley*, 14 Abb. (N. S.), 16; *Best v. Staple*, 61 N. Y., 71; *Barr v. Hatch*, 3 Ohio, 527. In the following cases bills of this description have been sustained, though the point was not discussed: *Pope v. Pope*, 40 Miss., 516; *Pepper v. Carter*, 11 Mo., 540; *Dargan v. Waring*, 11 Ala., 988; *White v. Williams*, 1 Paige, 508; *Fisher v. Lewis*, 69 Mo., 629.

It seems to us there can be no doubt of the power of this court to entertain a bill of this description. In so far as the merits are concerned, the testimony makes a clear case for the complainant. At the time of the deed to George Budlong, Philo was in default upon his bond, and a right of action had accrued. It was almost inevitable that a suit would be brought and a judgment obtained against him. In this situation of things he conveys to his son George, who was without means and dependent upon his father for support, and takes back a mortgage for the entire purchase money. This mortgage he assigns to Ranney, who was his brother-in-law, and a man without property, feeble in health, and partially, at least, dependent on his relatives for support. Ranney appears to have discharged this mortgage at the time of the sale to Markham, at Budlong's request, and nothing seems to have been paid him. There was no change in the possession or control of the property. Hill, who was working the mill under an arrangement with Philo, when the sale to George was made, testifies that George made no claim to the ownership or control. Philo went on as before, collected the earnings of the mill, settled with Hill for the profits up to June, 1876, when Hill went out. Philo then took the books

containing the accounts up to that time. During that period George worked a part of the time by the day in the mill. After the deed to George was made and recorded, Hill, having had his attention called to it, asked Philo about it, and whether he wanted him to run the mill any longer. Philo replied that he did. Hill then said: "I understand that you have sold the mill to George, and I suppose you want George to run it." Philo says: "I want you to run it. I own the mill as I have always owned it." Another witness testifies that in the fall of 1877, two years after the deed to George, Philo hired him to work in the mill and paid him for it, and also paid him for work done during 1876 and 1877.

We do not think that Markham can be considered a *bona fide* purchaser or entitled to complain of this decree. He was a near neighbor; lived next door to the Budlongs and near the mill for many years, and during all of these transactions. He knew that George was in indigent circumstances, and that Philo was embarrassed and becoming insolvent. He knew of the complainants' judgment, and had actual personal knowledge of the levy and sale of the mill property. The notice of sale was posted on his land and near his door. The witness Diehl saw the notice there October 18, 1877, went in, saw Markham, and called his attention to it, telling him that the mill was advertised. Another witness saw the notice of sale there along in November. Indeed, Markham admits in his answer that he knew of the levy and certificate on one description, and he could not have failed to know of the levy upon the description involved in this case, as they were together. After the sale and on the same day he met the witness Joslin, who had been present at the sale, and asked him to whom the mill property was sold and how much it brought. This was November 30, 1877. After this, and on December 26th, he took his deed, while the marshal's certificate of sale was on record. This of itself was notice to him. *Atwood v. Bearrs*, 45 Mich., 469.

§ 1872. *If a case is submitted upon demurrer and answer without taking proof to support the latter, further proof cannot be taken if demurrer is overruled.*

Nor do we think that the decree ought to be opened to let in Markham's defense. The case was put at issue by filing a replication August 28, 1880. The demurrer was never set down for hearing. On October 1st counsel on both sides signed a stipulation to proceed to take testimony. A commissioner was then agreed upon. Complainants' proofs were closed in November, and the time for taking of defendant's testimony was extended from time to time until the 7th of April, when an order for the closing of proofs was entered. Late in April defendant made an effort to take the testimony of one witness, but abandoned it, and consented to go to a hearing upon his demurrer, relying upon that as a defense. Rule 69 requires that "testimony in equity cases shall be taken within three months after the case is at issue," and we are clearly of the opinion that defendant has not made a case for the opening of proofs now. No request for further time was made, no request for postponement, and counsel deliberately consented to submit the case upon the demurrer. But an equally conclusive answer is found in the fact that the affidavits do not disclose any defense which would be available to Markham. They tend to show that he made a bargain for the land in 1877 at \$700, but the answer alleges that there was no money paid until December 26th (the day the deed was delivered), when the marshal's certificate of levy was on file, and Markham had actual notice that the property was sold upon execution.

The motion for the rehearing must therefore be denied.

SHAINWALD v. LEWIS.

(District Court for California: 7 Sawyer, 148-162. 1881.)

Opinion by HOFFMAN, J.

STATEMENT OF FACTS.—On the 5th day of November, 1880, a decree was entered in this court against the above-named respondent, by which he was adjudged to have obtained possession of the funds of the bankrupt firm of which the complainant is assignee, by fraud and collusion, and by means of fraudulent and collusive judgments against the firm founded on fictitious debts. He was, therefore, decreed to be a trustee for the complainant of all such funds, and was required to pay over to the complainant the amount thereof as ascertained by the decree. On this decree an execution was issued and returned unsatisfied.

A bill was thereupon filed by the complainant setting forth the previous proceedings in the cause, and averring that respondent had procured a homestead to be declared upon his land — had sold valuable real estate, and threatens, intends and is about to leave and depart the United States, and take and carry with him all his money and other property, with the intent, object, purpose and design of preventing the same from being levied upon or applied in satisfaction of said decree, and with intent to hinder, delay and defraud this complainant of the moneys and property to which he is entitled under said decree. That since the enrolling of said decree the respondent has secretly transferred a large part of his property to divers persons, and has secreted the remainder of his property with the intent and design aforesaid, and to prevent said property from being seized on execution or secured or applied to satisfy said decree. That the respondent has stated and declared to divers persons that he had so fixed his property that it could not be seized to satisfy said decree. That the respondent has property, debts and other equitable interests to the value of \$90,000, exclusive of all just prior claims thereto, which the complainant has been unable to reach by execution. That the action is not commenced by collusion with respondent or with any other person for the purpose of protecting the property or effects of the respondent against the claims of other creditors.

The bill contains the usual prayer for an injunction, for a receiver, and for other relief. Upon this bill an injunction was issued and a receiver appointed, to whom the respondent was ordered to make an assignment of all his property and effects. This he at first refused to do, and was committed for contempt.

At a subsequent day he executed the assignment, which, by order of the court, remained in the custody of the clerk until the hearing and decision of the present motion to vacate the order appointing a receiver, and for the execution of the assignment. That motion has accordingly been made and argued. It is based on the grounds:

1. That the bill of complaint herein does not disclose any equitable ground for the appointment either of a receiver or referee.
2. That upon the facts disclosed in the affidavits and papers filed herein, the appointment of a receiver or referee is unnecessary. The notice of motion states "that it is based upon the affidavits of the respondent herein, with copies of which you are herewith served, and upon all and singular the records, papers, files and proceedings in this suit."

§ 1873. *Upon a return of nulla bona to an execution in equity a creditor is entitled, upon a bill filed with appropriate allegations, to an injunction and the appointment of a receiver and an assignment from the debtor of his property, it appearing that he is fraudulently disposing of the same to evade the payment of his debts.*

At the hearing of the motion an amended bill was presented and read as an affidavit. It is unnecessary to detail at length its averments. It is sufficient to say that they corroborate the allegations of the bill, and of the affidavits in support of it, and state other facts tending to show the absolute necessity for the immediate appointment of a receiver to prevent the loss to the complainant of the property and assets of the respondent and of the trust funds invested by him in the goods, wares and merchandise contained in a certain store in the state of Nevada owned by him.

The amended bill further alleges the institution, in the state of Nevada, of a collusive suit by a pretended creditor of the respondent, founded on a fraudulent and fictitious indebtedness, with intent to have the proceeds of said trust funds in the state of Nevada seized and sold under execution, and with the design of hindering, delaying and defrauding the complainant.

If these allegations are true, or even partially true, a stronger case for the appointment of a receiver could not well be imagined. Unless this court can interpose in the most summary manner the complainant will be remediless, and its decree abortive.

The motion to set aside the order for the appointment of a receiver is not based on any denial of the facts alleged in the bills and affidavits, of which a summary has been given. It is rested on the denial of the jurisdiction of a court of equity to afford the relief prayed for.

It is contended that the jurisdiction exercised in the courts of chancery in New York to entertain what the counsel denominates "a fishing creditor's bill" is entirely the creature of the statutes of that state. That independently of those statutes, equity could only entertain a creditor's bill filed for the purpose of removing fraudulent impediments or obstructions to the service of an execution against real or personal property, or for the purpose of subjecting equitable assets to the operation of the execution when the same had been returned unsatisfied, and the legal remedy thereby shown to have been exhausted. But it is contended that in such cases the equitable assets must be described and indicated in the bill, or in a supplemental or amended bill if afterwards discovered.

It is also contended that the bill in this case must be considered precisely as if founded on an ordinary money judgment at law, and that no notice can be taken of the fact established by the original decree, that the demand arose out of a fraud and conspiracy of the grossest kind, and that the respondent has been adjudged a trustee of the funds thus fraudulently obtained and appropriated. All jurisdiction to arrest a fraudulent judgment debtor in the execution of an avowed purpose to transfer, secrete, and make way with his property, in order to defeat the claim of his judgment creditor, is denied unless the creditor can describe and indicate the secreted property. And, even in that case (unless the position of counsel is misapprehended), the property so described must be equitable assets which cannot be reached by an execution at law. But in this state equitable assets *can* be reached by an execution at law. The aid of equity to reach such assets when known would not be required, and the jurisdiction of the court to entertain creditors' bills

would be limited, if the position of counsel be correct, to bills of the first class above mentioned, viz., bills filed to remove obstructions or impediments to an execution.

§ 1874. — *cases reviewed.*

I think it can be shown that the contention of counsel, that the equity jurisdiction exercised by the court of chancery in New York was exclusively derived from the Revised Statutes of that state, is an erroneous view of the origin and foundation of that jurisdiction. The point was elaborately considered by the vice-chancellor in *Storm v. Waddell*, 2 Sandf. Ch., 510-512. In that case he observes: "The practice of filing bills in this court by unsatisfied judgment and execution creditors, which has become so well established and familiar, is usually referred to the Revised Statutes as its origin" (2 R. S., 173, 174). The statute is undoubtedly sufficient to sustain all the argument that was presented in support of the effect of such a suit; but, as I desire to refer to cases prior to the time when the Revised Statutes went into operation, I will advert briefly to the earlier history of this jurisdiction. "The power of the court of chancery to aid in removing fraudulent impediments in the way of levying on the personal property liable to execution, or selling the real estate of his debtor, is an old established ground of jurisdiction, which is not in question here. The bill in those cases was auxiliary to the carrying into effect the process of the law courts, and differed from our creditor's suit now under consideration, in this, that in the suit to set aside a fraudulent conveyance of land, so as to give effect to a judgment, the bill need not allege anything more than the recovery of the judgment; and where it was to remove an obstruction affecting movable property, it was only requisite to allege an execution issued to the county where the property was situated; while in the creditor's bill, against equitable interests and things in action, the creditor must show the issuing of an execution, and its regular return unsatisfied. In the case of *Spader v. Hadden*, 5 Johns. Ch., 280, Chancellor Kent, in 1821, sustained a creditor's suit of the description now in use against moneys in the hands of Hadden, transferred to him by the debtor — the transfer being fraudulent against creditors. This decree was affirmed by the court of errors in November, 1822 (20 Johns., 554). A majority of the court, with Chief Justice Spencer and Mr. Justice Woodworth (the latter delivered the prevailing opinion), concurred in holding that the case was one of acknowledged equitable cognizance, and the reasoning of the judge is applicable as well to the case of *funds being in the debtor's hands* as to the case decided. It is true that in *Donavan v. Fin*, Hopk., 59-77, decided in November, 1823, the chancellor omitted to follow the result of the decision in *Hadden v. Spader*, and viewed the latter as a case of trust and fraud. But I submit with great respect that there was much more in the decision than was acceded to it in *Donavan v. Fin*. The goods assigned in *Hadden v. Spader* were sold and converted into money five months before Spader recovered his judgment, so that there was no property on which his execution could have been a lien. It was, then, the plain case of a debtor having things in action in the hands of a third person, and equity deemed it unjust that either the one or the other should withhold them from the payment of his creditors.

"The doctrine of *Donavan v. Fin* has not been followed in any case since, nor, so far as I have seen, approved by more than two judges. There is abundant evidence that it was not deemed in accordance with the decision of the highest court, in *Hadden v. Spader*. And, aside from the books, I know

from my own practice that it was disregarded prior to the time of the Revised Statutes. In the following cases the contrary was decided, or opinions to that effect given: In *Weed v. Pierce*, 9 Cow., 722-727, decided by Chancellor Walworth when circuit judge, sitting in equity, December, 1827; *Beck v. Burdett*, 1 Paige, 305, January, 1829; *Chandler v. Pettit*, 1 id., 427 — affirmed on appeal in December, 1829, 3 Wend., 618, 621-625; and *Edmeston v. Lyde*, 1 Paige, 673, November, 1829. In *Wakeman v. Grover*, 4 Paige, 23, affirmed 11 Wend., 187, the bill was filed in 1828 to reach the things in action assigned, *as the goods of Grover & Gunn*, and the decree was made against both species of property without discrimination, although the case was most desperately contested throughout. The chancellor repeated the doctrine of the above cases, at page 33 of 4 Paige; and, as recently as in 1844, he reiterated it in *Farnham v. Campbell*, 10 Paige, 601. See, also, the reviser's notes, in introducing the provisions on the subject, which are contained in the Revised Statutes. 3 R. S., 669, 2d ed. I may, therefore, assume that by the law of this state, as settled more than twenty years before this case arose, an unsatisfied execution creditor had a right to file a bill in this court to compel payment of his debt out of the equitable interests and things in action of the judgment debtor. *Storm v. Waddell*, 2 Sandf. Ch., 510-512."

The authorities cited by the assistant vice-chancellor strongly support his reasoning; and I am justified in holding that, by the ancient usages of courts of equity, as understood in New York prior to the Revised Statutes, chancery "would assist a judgment creditor at law in discovering and reaching personal property which had been placed in other hands; and that it made no difference whether that property consisted of *choses in action*, or money, or stock." 2 Kent's Com., 561.

In *Donavan v. Fin*, the point decided was, that "where the subject of a suit is exclusively legal, equity has no jurisdiction to enforce or give a better remedy;" that is, to seize upon and apply to the payment of the debt equitable assets, which could not be reached by execution at law.

In *Pettit v. Chandler*, 3 Wend., 624, the same point arose incidentally, though it was not decided; but the chief justice said, "*his impressions were that, under the existing law* (1829), a defendant is *not* bound to answer as to property which never was within reach of an execution; that he could only be called on to respond as to such property as he has fraudulently withdrawn from the operation of an execution."

In *Hadden v. Spader*, Mr. Justice Woodworth held that a judgment creditor, after exhausting the remedies given by law, could reach the trust property of his debtor by the aid of a court of equity, and that he could resort to the debtor's *stocks and debts* due to him, *even when the stocks were not purchased or the debts created by means of the property fraudulently withdrawn from the judgment of the creditor*. To these views Chief Justice Spencer gave his explicit sanction.

Chancellor Sandford was of opinion, as we have seen, that the relief could only be given in cases which were themselves of equitable jurisdiction, involving fraud or trust, or seeking to subject to the satisfaction of a judgment property in itself liable to execution by removing a conveyance which operated as a fraudulent impediment to the execution.

In *Pettit v. Chandler*, the chief justice, Mr. J. Marcy and Mr. J. Sutherland declined to express any final opinion as to this contested boundary of jurisdiction, for the power to grant relief to the utmost extent it was pushed in the

case of *Hadden v. Spader* was about to become in a very few days a part of the system of jurisprudence of New York "by legislative recognition or adoption." This case was decided in December, 1829. The Revised Statutes of New York went into operation January 1, 1830.

The case at bar does not demand any attempt on my part to determine this disputed question as to the jurisdiction of courts of equity, upon which so eminent judges have differed, for the statute of this state permits all choses in action and equitable assets to be reached by execution of law. The objection, therefore, to the jurisdiction chiefly relied on by Chancellor Sandford in *Donavan v. Fin* cannot here be raised. The bill, moreover, in this case is not a bill to reach equitable assets alone. It is a bill for an injunction and receiver to prevent the defendant from secreting, conveying away and converting into money property which is justly subject to execution, including property which is in whole or in part the proceeds of the property fraudulently obtained and converted by him. It seeks to arrest and baffle the execution of an avowed purpose to evade the decree of this court, and to render it fruitless to the bankrupt's creditors, whom he has defrauded.

But the question upon which the conflict of opinion arose in New York seems, so far as the United States courts are concerned, to be authoritatively settled. In *Board of Public Works v. Columbia College*, 17 Wall., 530, the supreme court says: "The jurisdiction of a court of equity to reach the property of a debtor justly applicable to the payment of his debts, even where there is no specific lien on the property, is undoubted."

It is objected that, even if a court of equity has jurisdiction to reach assets of every description in aid of a judgment creditor, it can only do so where the assets are indicated in the bill, and that it has no authority, upon mere general allegations such as those contained in this bill, to enjoin the defendant or to compel an assignment of all his property to a receiver appointed by the court. It is contended that the mode of proceeding adopted in this case is peculiar to the state of New York, where it grew up under the rules framed by Chancellor Walworth, to carry into effect the provisions of the Revised Statutes of that state with regard to creditors' bills. But it would seem that Mr. J. McLean entertained bills similar to the bill in this case without hesitation. In *Lamon v. Clark*, 4 McLean, 18, the bill alleged that "the defendant had equitable things in action and other property which cannot be reached by execution, and that he also *had debts due to him by persons unknown*." These allegations are as general and unspecific as those contained in the bill under consideration, but the bill was nevertheless entertained.

It is asserted by counsel that this jurisdiction was taken under a statute of Michigan similar to that of New York. But the court expressly repudiated the notion that a state statute can confer jurisdiction in equity upon the courts of the United States, although the latter may adopt modes of proceeding and particular remedies when the cause is within their jurisdiction and the proceedings adopted are conformable to the general principles by which courts of equity are governed. And with respect to the case before it the court observes: "The jurisdiction is appropriate to chancery, and *may be exercised where there is no special statute*. Similar relief is given in England. 1 Vern., 398; 1 P. Wms., 445; 2 Dickens, 575; Ambl., 79-455; 20 Johns., 563; 2 Johns. Ch., 283-296; 4 id., 691."

In *Pettit v. Chandler*, before cited, the bill, after alleging judgment obtained, execution issued and return of *nulla bona*, proceeded to state that, "for

a long time before the recovery of the judgments, Pettit had transacted, in his own name, business to a large amount in New York, and was possessed of great property, and that he had not pretended or given out that he had become insolvent or had lost any property, but that just before the recovery of the judgments in favor of the complainant he had suddenly stopped doing business in his own name, with the avowed intention of preventing the complainant from obtaining satisfaction of his judgments; that he had so placed his property that none of it was left visible so as to be taken upon execution, with the intent to defraud the complainant; and it particularly charged that Pettit, at the filing of the second supplemental bill, *was possessed of real or personal property, or other property of some name or nature, to a large amount; that he was possessed of, or entitled to, public stocks, to stock in banks or other incorporated companies, and to rents in real estate; that he held bills of exchange, promissory notes and choses in action to a large amount; and that property, real or personal, was held by others in trust for him, and by colorable title.* The bill stated and enumerated particular acts of fraud which it charged upon the defendant, and concluded by praying a full answer and discovery, and that the defendant might be decreed to satisfy the judgments obtained against him, and that sufficient of his property be set apart for that purpose."

The striking similarity of these allegations to those of the bill under consideration cannot escape notice. The case came up on appeal from an order of the chancellor allowing exceptions to the answer. It was argued by eminent counsel, but it does not appear to have occurred to them, or to any member of the court, that the bill was demurrable, because it did not particularly set forth and describe the property which it alleged had been concealed or conveyed away in trust for the defendant under colorable title, and the discovery of which, and its appropriation in satisfaction of the complainant's judgment, was prayed for.

Mr. Justice Marcy, in delivering his judgment in this case, says: "Confining the jurisdiction of the court of chancery to the narrowest limits that have ever been assigned to it, power it certainly has, and exercises daily, of requiring answers to such allegations as the appellant in this case has wholly omitted to answer, or has answered imperfectly." Page 623. This case was decided in December, 1829.

In *Waddell v. Storm*, *ubi sup.*, the practice in cases of creditors' bills is stated as follows: "Upon filing the bill, an injunction is taken out and served with the subpoena to answer, restraining the debtor from parting with *any* of his property or effects until the further order of the court; and, for the better protection of the property and its conversion into money, a receiver is speedily appointed, who, under the order of the court, is vested *with all such property*, or with sufficient specific portions of it, to pay the complainant's debt and costs and all prior claims upon the same; and the debtor is compelled to assign and deliver such property to the receiver, under the direction of a master of the court."

In *Bloodgood v. Clark*, 4 Paige, 477, Chancellor Walworth says: "In these cases of creditors' bills, where the return of execution unsatisfied presupposes that the property of the debtor, if any he has, will be misapplied, and entitles the complainant to an injunction in the first instance, it seems to be almost *a matter of course* to appoint a receiver to collect and preserve the property pending the litigation, and where the sworn bill of the complainant shows that he has an equitable right to all the funds and property of the defendant to

satisfy his debt, and if the right of the complainant is not denied by the defendant in answer to the application for a receiver, there can be no good reason why the complainant should not have a receiver appointed to preserve the property from waste and loss. Indeed, this court has already declared that it is the duty of a complainant, who has obtained an injunction upon such a bill restraining the defendant from collecting his debts or disposing of property which might be liable to waste or deterioration, to apply to the court and have a receiver appointed without any unreasonable delay. See *Osborn v. Heyer*, 2 Paige, 343. It is no sufficient answer to such an application to say there may not be any property to protect, as the complainant proceeds at the peril of costs if there be no property, and if there is nothing for the receiver to take, the defendant cannot be injured by the appointment."

In *Edmeston v. Lyde*, the chancellor says: "The principle being established that every species of property belonging to a debtor may be reached and applied to the satisfaction of his debts, the powers of this court are perfectly adequate to carry that principle into full effect." 1 Paige, Ch., 641, decided in 1829. See, too, 25 Barb., 663.

The text-writers lay down the same principle *passim*. Thus Barbour says: "Upon a creditor's bill every species of property belonging to a debtor may be reached and applied to the satisfaction of his debts, and his debts, choses in action, and other equitable rights may be assigned or sold pending the decree of the court for that purpose." 2 Barb. Ch. Pr., 152. Under the practice of the New York courts of chancery it was held that the order of reference should authorize the master to appoint a receiver of all the property, equitable interests, things in action, and effects belonging to the debtor. . . . It should also require the defendant to assign to the receiver, under the direction of the master, *all* his property and effects." High on Rec., sec. 415; 1 Barb. Ch., 309-317; 1 Sandf., 723. But a discretionary power is sometimes exercised as to the amount of the debtor's property to be assigned. High on Rec., sec. 429. He was compelled, as we have seen, to assign even when he denied that he had any property. *Bloodgood v. Clark*, *supra*.

Until the statute of 1 and 2 Victoria, ch. 110, sec. 20, writs of execution were unknown to the English courts of chancery. Daniell's Ch. Pl. & Pr., 1042.

"The decrees of the court were enforced by process of contempt, and the party entitled to the benefit of the decree might obtain a writ of sequestration directing the commissioners therein named to sequester the personal property of the defendant, and the rents and profits of his real estate, until he had cleared his contempt. Originally, this process was merely used as a means of coercing the defendant by keeping him out of the possession of his property; and the practice of applying the money received by the sequestrators in satisfaction of the sum decreed to be paid, is of comparatively modern origin. This, however, as we shall see in the next section, has become the usual course of procedure, and the court will now, after a sequestration has been issued to enforce a decree for the payment of the money, order the sequestrators to apply what they have received by virtue of the sequestration in satisfaction of the duty to be performed." Daniell's Ch. Pl. & Pr., 1032, 1033.

The counsel for defendant cites no authority in support of his position, that the practice of entertaining "fishing" bills to reach assets not specifically described in the bill, and of appointing a receiver over all the property of the defendant, is entirely the creation of the New York Revised Statutes, and of

the rules framed under it by Chancellor Walworth. The provisions referred to were introduced into the Revised Statutes of New York chiefly to set at rest the *questio vexata*, which had been raised by the cases of *Hadden v. Spader* and *Donavan v. Fin*, already noticed. See Revisers' Notes, 3 R. S., 669. 2d ed.

Authority was given to compel, in aid of an unsatisfied judgment creditor, a discovery of any property, money or things in action, due to the debtor or held in trust for him, and to prevent the transfer of any such property, etc., and to decree satisfaction out of such property "*whether the same was originally liable to be taken in execution or not.*" The doctrine of *Hadden v. Spader* was thus explicitly recognized or adopted by legislation.

But the powers of the court of chancery were not otherwise enlarged. It was merely authorized to do with regard to assets not originally liable to execution what, it had always been conceded, it had the right to do with regard to stocks, debts, etc., purchased by means of property *fraudulently withdrawn* from execution. The fact, therefore, that Chancellor Walworth adopted, and, until the court of chancery was abolished, maintained the rules in question, is the strongest argument to show that the practice thus established was agreeable to the general principles and methods of equity procedure.

Certainly the authority to entertain "fishing" bills to reach undescribed assets, and to appoint a receiver of all the property of the defendant, is not in terms conferred by the statute. The appointment of a receiver of all the property of the defendant is in truth, as we have seen, in the nature, not of an attachment, but of a sequestration, which, by the ancient practice of the court of chancery in England, issued, as of course, upon the failure of the defendant to comply with the decree (*Daniell*, 1047, 1048), and the process of sequestration is still in use in England. *Daniell*, 1042. We have also seen that the court will now, where a sequestration has been ordered to enforce a decree for the payment of money, order the sequestrators to apply what they have received, by virtue of the sequestration, in satisfaction of the decree. When, therefore, the aid of equity was invoked in behalf of an unsatisfied judgment creditor, and it was settled that all his property, choses in action, debts due him, etc., could be reached, the order for the appointment of a receiver, and for the compulsory assignment to him by the defendant of all his property, was in entire accordance with the ancient usages of the court of chancery, when compelling obedience to its own decree.

§ 1875. *Quære: Whether, without filing a bill for the purpose, a writ of sequestration would issue upon petition in an original case.*

The counsel for the defendant insists with much earnestness that the bill under consideration is identical with an ordinary creditor's bill, and is to be treated precisely as if brought in aid of an unsatisfied judgment at law. But in such case chancery has no jurisdiction of the original demand. It can only interpose after the demand has been established at law, and after it has been shown by the return of an execution unsatisfied that the complainant is remediless at law. But, in the case at bar, the original suit was of equity cognizance. The decree was obtained in this court; and perhaps a writ of sequestration might have issued at once upon the failure of the defendant to comply with the decree, as it certainly could have done if the decree had been for the specific performance of some act. Equity, Rule 8, Sup. Ct. However this may be, no doubt can, I think, be entertained as to the power of the court to arrest and baffle the defendant, who has already been adjudged guilty of

a flagrant fraud in his attempt to consummate it and secure its fruits, in avowed defiance and contempt of the court.

Says Mr. Chancellor Walworth: "Where such a fraud has been actually committed by a debtor, where he has intentionally placed or even left that property, which ought to have been devoted to the payment of his honest debts, in the hands of a third person, with a view to evade the justice of the law, and this court, by its ordinary course of proceedings, can reach such property, without doing injustice to any, it does not deserve the name of a court of equity if it has not jurisdiction to afford relief to the injured creditor." *Wend v. Pierce*, 9 Cow., 724.

Still less would it deserve that name if it should refuse that relief in the only form in which it can be effectual — viz., by injunction and order for a receiver — on the ground that the defendant has so far carried out his threat to secrete and make away with his property that the complainant is unable to find it or describe it in his bill.

If this court refuses to interpose until, by bill of discovery or proceedings supplementary to execution, the creditor is able to specify and describe the character of the property, it, in effect, invites the defendant to frustrate its decree, by sending the property or its proceeds out of the jurisdiction, or by conveying it to innocent, or pretended innocent, purchasers, or otherwise disposing of it in such a way as to place it beyond the reach of the court.

Motion denied. (See §§ 1820–26, *supra*.)

HAGAN v. WALKER.

(14 Howard, 29–38. 1852.)

Opinion by MR. JUSTICE CURTIS.

STATEMENT OF FACTS.—John Hagan & Co. filed their bill in the district court of the United States for the northern district of Alabama, in which they state that in the year 1834 they recovered a judgment at law in that court against Leroy Pope, for upwards of \$7,000, which is wholly unsatisfied; that a writ of *fieri facias*, running against the lands, goods and body of the debtor, was regularly issued, and, on the 10th day of October, 1834, was returned *nulla bona*; and from that time to the filing of the bill, there has not been, in that district or elsewhere; any property of Leroy Pope, out of which the judgment debt could be collected, except certain property afterwards mentioned. The bill further alleges that, about a month before the complainants recovered their judgment at law, Leroy Pope, intending to defraud the complainants, and to hinder them from obtaining payment, made conveyances, both of real and personal estate, to a large amount, to his son, William H. Pope, who was a party to the fraud, and is made a defendant in the bill; that Leroy Pope died in the year 1844, and Samuel Breck, who was appointed his administrator, is also a party defendant. The complainants are averred to be citizens of Louisiana, and William H. Pope and the administrator citizens of Alabama. The defendants having demurred to the bill, it was dismissed by the district court, and the complainant, who is the surviving partner, appealed to this court.

The principal ground upon which the demurrer has been rested in this court is, that the bill does not show that the complainants are entitled to equitable relief. The argument is, that the jurisdiction of a court of equity, to aid a judgment creditor, by removing a fraudulent incumbrance on the property of

his debtor, is ancillary merely; that this aid is not given unless the creditor has obtained a lien at law upon the specific property sought for, if that be legal property upon which an execution could be levied; or if it be equitable assets, not liable to a levy by execution; that the creditor must have exhausted his legal remedy, by a return of *nulla bona* on his execution, and must also be in a condition to proceed at once at law to enforce his right, if the obstacle should be removed. That if his judgment has become ineffectual to entitle him to an execution, so that he could not levy, even if the assets were legal, and not subject to any fraudulent incumbrance, equity will not exert itself to subject equitable property to the payment of his judgment. And it is further argued, that, according to the local law of Alabama, governing these proceedings at law, the judgment creditors had lost their lien on the personal estate of the debtor, because they had suffered more than one term to elapse without issuing an *alias* execution; and upon the real estate, because more than ten years elapsed after the return of their last execution, and before this bill was filed; and that the lien, both upon the personal and real estate, was destroyed by the death of Leroy Pope, which suspended the right to issue an execution. That, by reason of his death and the lapse of more than ten years, the right to issue an execution being suspended, equity would not subject equitable assets to the payment of this judgment.

§ 1876. *The creditor of a deceased debtor can sustain a bill in equity against the administrator and a third party to subject property fraudulently withheld from the payment of the debts of the deceased.*

It does not distinctly appear whether the property sought to be reached by this bill is equitable or legal. There is reason to suppose, from some allegations in the bill, that a part or the whole of the property was conveyed by Leroy Pope, in 1831, to Louis M'Lane, as secretary of the treasury, to secure a debt due to the United States by a deed of trust, and this conveyance is not impeached. If it embraced the whole or any part of the property now in question, only an equitable estate therein was left in Leroy Pope. The bill is not distinct in its allegations on this subject; but we do not deem it necessary that it should be; because we are of opinion that this case is not to be treated as an application by a judgment creditor for the exercise of the ancillary jurisdiction of the court, to aid him in executing legal process, but comes under a head of original jurisdiction in equity. It is a bill by a creditor of a deceased debtor, against the administrator and a party who is fraudulently holding all the property of the deceased, which in equity should be applied to the payment of this debt, and the bill prays that the debt may be paid out of this fund. That a single creditor may maintain a bill against an administrator of a deceased debtor, for a discovery of assets and the payment of his debt, there can be no doubt. That, in some cases, he may join with the administrator a third person, who is in possession of property which is amenable to the payment of the debt, is also clear. The instances in which it has been actually held that such third person might be joined are chiefly cases of collusion between the administrator and the third person possessed of assets, insolvency of the administrator, and where the third person was the surviving partner of the deceased. *Utterson v. Mair*, 2 Ves. Jr., 95; *Alsager v. Rowley*, 6 Ves., 748; *Burroughs v. Elton*, 11 Ves., 29; *Gedge v. Traill*, 1 Russ. & M., 281, note; *Long v. Majestre*, 1 Johns. Ch., 306. But it will be found that the equitable right of the creditor to join a third person, and have a discovery and an ap-

propriation of assets held by him, has never been limited to these particular cases.

For, while it is generally agreed that some special case must be made, it is also declared in all the cases, that what is to constitute it has not been limited by any precise and rigid rule. In *Holland v. Prior*, 1 My. & K., 240, Lord Brougham applied the rule to the case of a representative of a deceased representative, without any suggestion of collusion between him and the present representative. In *Simpson v. Vaughn*, 2 Atk., 33, Lord Hardwicke said: "It has been said at the bar that you may make any person a defendant that you apprehend has possessed himself of assets upon which you have a lien. But this certainly cannot be laid down as a general rule; for it would be of dangerous consequence to insist that you can make any person a defendant who has assets, unless you can show to the court he denies that he has assets, or applies them improperly." Considering, then, that some special and sufficient reasons must be shown for proceeding against a third person, jointly with the administrator, the inquiry is, whether this bill does not contain those reasons; and we are of opinion it does.

§ 1877. *A court of equity has original jurisdiction to subject to the payment of debts property of the deceased fraudulently held by a third person under a conveyance valid on its face but void as to creditors, and it is not necessary to show a judgment lien on the property.*

It appears, from the statements in the bill, that William H. Pope is in possession of all the assets of the deceased debtor, both real and personal, holding them under conveyances made to him by the deceased, absolute in form, but accompanied by secret trusts in favor of the grantor, designed to defraud this particular creditor, and prevent him from obtaining payment of his judgment, and that this fraudulent design has thus far been successfully executed.

Now these conveyances are not only valid on their face, but they are really valid as between the parties; and though they are void as against creditors, and the property, both at law and in equity, is subject to the payment of the debts of the deceased, yet the embarrassments attending any attempt by the administrator to possess himself even of that part of these assets, which were personalty, at law would certainly be great, and, perhaps, insuperable. 2 Rand., 384; *Martin v. Root*, 17 Mass., 228. It is true he is the representative of creditors, as well as of the next of kin, and in the former capacity might be able to make good his claim to a sufficient amount of these personal assets to enable him to pay the debts. *Holland v. Cruft*, 20 Pick., 321. But the impracticability of taking an account of the debts at law, and proportioning the recovery to the amount required to pay them, would render a resort to equity indispensable to do entire justice between all parties, even if the assets were legal in their nature. If this bill had contained an allegation that the administrator had been requested to sue, and had refused, the case would be free from all doubt; and upon the facts averred in the bill, we do not think such a request necessary; because it does appear that about two years elapsed after the death of Leroy Pope before this bill was filed, and the administrator took no step to reduce these assets to possession; because when this bill was filed he resists it by a demurrer, relying on the statute of limitations; because it must be admitted to have been doubtful how far he had a remedy without the concurrence of any creditor; and chiefly because there is no danger of interfering with the due course of administrations, or taking from administrators

their proper control over suits for the recovery of assets, by holding that a creditor may file a bill against the administrator and the fraudulent grantee of deceased debtor, to subject the property fraudulently conveyed to the payment of the debt. It comes within the case put by Lord Hardwicke; for here this specific property is amenable to the claim of this creditor, and in the sense in which he employs the word, the creditor had a lien upon these assets; and it does appear to the court that the party holding them both denies that they are assets and applies them improperly, for he claims them as his own, and is endeavoring to defeat a just creditor by an assertion of a title invalid as against him.

In this view of the case it is not essential that the creditor cannot proceed at law until after a revival of the judgment by a *scire facias*. In *Burroughs v. Elton*, 11 Ves., 36-7, Lord Eldon had occasion to consider the force of this objection in a similar case. It was a bill to reach real assets in the hands of a surviving partner. The complainant's judgment was upwards of seventeen years old, and no step had been taken to revive it against the administrator or the heir. His decision, in accordance with two previous cases to which he refers, was that such a creditor could sustain the bill, though it might be necessary to direct him to proceed at law to revive his judgment.

It has been argued that the bill does not show that there are not other assets in the hands of the administrator sufficient to pay this debt, and contains no allegation that the administrator was ever requested to pay it. But the bill does expressly aver that aside from the property fraudulently conveyed there is not anywhere any property of Leroy Pope out of which the debt could be collected; and although it states that the fraudulent grantor and grantee both remained in possession, and took the crops jointly, and that these crops were of great value, yet, inasmuch as between themselves the crops belonged to the grantee, and as it was the object of the conveyances to prevent them from being applied to the benefit of creditors, we are of opinion there is no presumption that anything arising from this joint possession ever came to the hands of the administrator, and therefore that a demand on him would have been a vain act, which the creditor was not compelled to do.

§ 1878. *An incumbrance admitted by both parties does not impede the relief of the creditor. The property may be sold subject to the incumbrance, and in that case the incumbrancer is not a necessary party to the suit.*

One other ground on which the demurrer has been rested requires notice. The bill alleges that after the fraudulent conveyances to William H. Pope had been made he mortgaged the property to Virgil Maxcy, as solicitor of the treasury of the United States, to secure the debt of Leroy Pope which William H. Pope assumed to pay, and it avers that this debt has been in part paid by means described in the bill. Virgil Maxcy, and subsequently, when he went out of office, his successor, Charles B. Penrose, were named as parties to the bill, but they were out of the jurisdiction, no process was served on either of them, and neither ever appeared or answered. The bill prays that William H. Pope may be compelled to pay to the United States the balance due to them out of the property in question, and that the residue may be subjected to the payment of the complainant's debt, and for other and further relief.

Under the act of congress of the 23th of February, 1839 (5 Stat. at Large, 321, § 1), it does not defeat the jurisdiction of the court that a person named as defendant is not an inhabitant of, or found within, the district where the suit is brought; the court may still adjudicate between the parties who are prop-

erly before it, and the absent parties are not to be concluded or affected by the decree. It is obvious, however, that there may be cases in which the court cannot adjudicate between the parties who are regularly before it for the reason that it cannot bind those who are absent. Where no relief can be given without taking an account between an absent party and one before the court, though the defect of parties may not defeat the jurisdiction, strictly speaking, yet the court will make no decree in favor of the complainant.

The case before us is not one of this character; for although the whole of the relief specially prayed for cannot be granted in the particular mode there indicated, because the United States not being a party, no account can be taken of the debt due to them from Leroy Pope or William H. Pope, yet, subject to the incumbrance of this debt, and without affecting it in any manner, the property may be appropriated to the payment of the complainant's debt.

It is true that in *Finley v. The Bank of the United States*, 11 Wheat., 306, which was a bill to foreclose a mortgage by sale, Chief Justice Marshall says: "It cannot be doubted that the prior mortgagee ought regularly to have been a party defendant, and that, had the existence of his mortgage been known to the court, no decree ought to have been pronounced in the cause until he was introduced into it." But it could not have been intended by this to say that a prior incumbrancer was absolutely a necessary party, without whose presence no decree of sale could be made, because in that very case the court refused to treat the decree as erroneous, after it had been executed.

In *Delabere v. Norwood*, 3 Swanst., 144, n., in a bill to obtain payment of an annuity charged on land, prior annuitants were held not to be necessary parties. In *Rose v. Page*, 2 Sim., 471, the same rule was applied to a prior mortgagee; and in *Wakeman v. Grover*, 4 Paige, 23, and *Rundell v. Marquis of Donegal*, 1 Hogan, 308, and *Post v. Mackall*, 3 Bland, 495, to prior judgment creditors; and in *Parker v. Fuller*, 1 Russ. & My., 656, persons having incumbrances on real property, which the bill sought to subject to the payment of debts of the deceased owner, were held not to be necessary parties to the bill. See, also, *Hoxie v. Carr*, 1 Sumn., 173; *Calvert on Parties*, 128. On the other hand, there are cases in which it has been declared that all incumbrancers are necessary parties. Many are collected in *Story's Eq. Pl.*, 178, n. But we consider the true rule to be that, where it is the object of the bill to procure a sale of the land, and the prior incumbrancer holds the legal title, and his debt is payable, it is proper to make him a party in order that a sale may be made of the whole title. In this sense, and for this purpose, he may be correctly said to be a necessary party, that is, necessary to such a decree. But it is in the power of the court to order a sale subject to the prior incumbrance, a power which it will exercise in fit cases. And when the prior incumbrancer is not subject to the jurisdiction of the court, or cannot be joined without defeating its jurisdiction, and the validity of the incumbrance is admitted, it is fit to dispense with his being made a party. To such a case the forty-seventh rule for the equity practice of the circuit courts of the United States is applicable, and by force of it this cause may proceed without making the United States, or the solicitor of the treasury, a party to the decree.

The decree of the district court must be reversed and the case remanded with directions to overrule the demurrer and order the defendants, other than the representative of the United States, to answer the bill.

MARSH v. BURROUGHS.

(Circuit Court for Georgia: 1 Woods, 463-474. 1871.)

Opinion by BRADLEY, J.

STATEMENT OF FACTS.—This bill is filed by certain billholders of the Merchants' & Planters' Bank of Savannah, who have obtained judgments against the bank for the amount of bills held by them against certain stockholders of the bank, who have not paid in full their subscriptions of stock, seeking a decree against the defendants to the amount of their unpaid subscriptions, for the payment of the said judgment.

The bank was chartered by an act of the assembly of the state of Georgia, approved February 13, 1854, by which certain persons therein named, their associates and successors, were incorporated by the name of the Merchants' & Planters' Bank, to be located at Savannah, with the usual powers given to such institutions. By the second section of the charter it was declared that the capital of the bank should be two millions of dollars, to be divided into twenty thousand shares of \$100 each, and that so soon as ten per cent. of said capital was subscribed and paid in in specie or specie funds, it should be the duty of the commissioners named in the act to call a meeting and organize the bank by the election of directors. The directors were empowered to appoint a president and other officers. By the seventh section the president and directors, after the first instalment on subscriptions to the amount of \$200,000 had been paid in, were empowered to call in further instalments of not over twenty per cent. at any one time by giving at least sixty days' notice of said call. On failure to pay up a call the shares might be forfeited.

By the ninth section it was declared that the total amount of the debts should not, at any time, exceed three times the amount of the capital stock actually paid in, over and above the amount of specie actually deposited in the vaults for safe keeping. By the fifteenth section it was declared that the persons and property of the stockholders should at all times be liable, pledged and bound for the redemption of bills and notes at any time issued, in proportion to the number of shares that each individual and corporation might hold and possess.

The bill alleges that the capital stock of the bank was all duly subscribed and the bank duly organized shortly after its incorporation, and that it went into operation, issued bills, received deposits and carried on a general banking business; that the complainants severally became lawful owners and holders of the bills of the bank, to wit: Scott, Zerega & Co., to the amount of \$62,500, which were presented to the president and cashier in March, 1867, and were not paid, and the other complainants other amounts, which were presented at or about the same time with like result; that thereupon the complainants separately instituted actions at law on their bills against the bank, and on the 25th of November, 1867, recovered judgments as follows: Scott, Zerega & Co., for \$71,789.35; Frisbee & Roberts, for \$33,134.75; Wm. N. Marsh, for \$57,600.63; George W. Hatch, for \$81,271.20; Levi H. B. Scott, for \$120,789.36; and that executions were issued in all the judgments and returned "*nulla bona*" on the 23d of May, 1868.

The bill alleges that the bank had become insolvent, and had assigned its assets to Hiram Roberts, the president, in trust for the benefit of its creditors; but that the assets assigned would not pay more than ten cents on the dollar of its indebtedness, which amounted to a million of dollars or thereabouts.

As an excuse for not joining other complainants the bill alleges that the circulation of the bank was held in every state of the Union by innumerable unknown persons; and as an excuse for not making all the stockholders defendants, it alleges that there are twenty thousand shares of stock held by a great number of stockholders residing in different states — some insolvent, some dead, etc.

The bill then alleges that the defendants are stockholders, and states the number of shares held by each, and the amount paid thereon, and the amount still unpaid, and claims that the unpaid stock is a trust fund applicable to the payment of the debts of the bank, inasmuch as the debts cannot be paid by the assets. The bill prays that this may be so decreed, and that the defendants may be required to pay to the complainants, or into court, or in some other manner, the several amounts so in their hands respectively, and that the same may be applied to the payment and satisfaction of the bills held by the complainants.

By an amended bill they allege that they purchased the bills prior to January 1, 1867, in a fair course of trade, for a valuable consideration, and without any notice that they had been used in aid of the rebellion or for any other illegal purpose. The principal facts stated in the bill are not disputed. The defendants, by their answers and in argument, set up various grounds of defense, which I will proceed to examine.

§ 1879. *A judgment creditor with a return of nulla bona may file a bill to subject assets that by reason of fraud or trust cannot be reached by execution.*

1. It is objected that the bill is defective for want of parties, both complainant and defendant; that it should have been filed by, or in behalf of, all the creditors, because all are interested in the funds — and against all the stockholders, because all are bound to contribute *pro rata*. As to the complainants, it has long been settled that a judgment creditor who has exhausted his legal remedy, by execution returned "*nulla bona*," may alone, or with other judgment creditors, file a bill against persons holding property of the debtor, which, on account of fraud or the existence of a trust, cannot be reached by execution. 2 Kent's Com., 443 and notes; McDermott *et al.* v. Strong, 4 Johns. Ch., 687; Spader v. Davis, 5 id., 280; Lentilhon v. Moffatt, 1 Edw. Ch., 451; Dix v. Briggs, 9 Paige, 595; Storm v. Waddell, 2 Sandf. Ch., 494; Ogilvie v. Knox Ins. Co., 22 How., 380 (Corp., §§ 189-91); Dunphy v. Kleinschmidt, 11 Wall., 610.

§ 1880. *Where a fund should be divided among a class of persons, the decree must be so framed as to bring in all parties entitled to distribution.*

Where a case exists in which a fund can only be divided satisfactorily among a certain class of persons, it is necessary to frame the decree in such a manner as that all those persons may be brought in for their distributive shares; but even then the bill may often be filed by any one of them on his own behalf.

§ 1881. *When a decree will be entered on behalf of all parties entitled.*

It is only when it appears to the court by the subsequent pleadings or otherwise that a distribution must be made (as where an executor pleads want of sufficient assets), that a decree will be made for the benefit of all. In this case what law compels an equal distribution of the fund sought to be reached amongst all the creditors? The assets in the hands of the assignee are subjected to such a law, because they have been granted to him in trust for all creditors equally. But it is conceded that the unpaid capital stock is not subject to the assignment. If subjected to the demands of the complainants as judgment creditors, it will be exonerated, *pro tanto*, from all further demands.

§ 1882. *A judgment creditor with a return of nulla bona can pursue any equitable interest of his debtor wherever it may be found.*

As to the non-joinder of necessary defendants the same authorities above quoted may be cited. A judgment creditor, who has exhausted his legal remedy, may pursue in a court of equity any equitable interest, trust or demand of his debtor, in whosoever hands it may be. And if the party thus reached has a remedy over against other parties for contribution or indemnity, it will be no defense to the primary suit against him that they are not parties. If a creditor were to be stayed until all such parties could be made to contribute their proportionate shares of the liability, he might never get his money.

§ 1883. *If a debtor corporation does not call in unpaid subscriptions the court will do it for the benefit of creditors.*

2. It is contended that the unpaid subscriptions of capital stock are not assets for the payment of debts, either legal or equitable; that they exist merely as possibilities; that they are not a debt due, having never been called in; that no one can call them in but the directors; and in them it is a mere discretionary power, which cannot be exercised either by the assignee, the receiver, or the court itself, and cannot be assigned; that said unpaid subscriptions are no part of the capital stock of the bank; and that the real capital stock is what has been called in, namely \$535,000, and not \$2,000,000.

§ 1884. *It is the right of a corporation to call in unpaid subscriptions.*

This position may be somewhat plausible, but it is not sound. It is not a mere power vested in the bank to make further calls. It is a right; and where a debtor has such a right and does not choose to exercise it, equity, at the instance of creditors, will exercise it for him. When a stockholder subscribes stock, and his subscription is accepted, it is not only the right of the bank to call in the money, but it is the right of the stockholder to pay it. The mode of calling it in prescribed by the charter is a mere form of remedy given to the bank to enforce the subscription, usually followed by forfeiture for non-payment, if the bank so choose. But the stockholder is not obliged to wait until a call is made upon him. He may pay in at any time; and if the business of the bank were very profitable, no doubt he would avail himself of the opportunity. Such a right cannot be described as a mere power on the part of the bank, to be exercised or not, as it chooses, and dependent for its existence on the personal discretion of the directors.

§ 1885. *Unpaid subscriptions are corporate property.*

The same objections were made in the case of the Planters' & Mechanics' Bank of Columbus, and were overruled by the supreme court of this state in *Hightower v. Thornton* and others, 8 Georgia, 486, and it was there held that unpaid subscriptions to the capital stock of a company are corporate property, constituting a trust fund, which can be reached by the creditors in a court of equity; and that the amount subscribed, and not the sums actually paid in, is the capital stock of a company. As to the position that the equity of the creditor is a mere right to sue, and is not therefore assignable, and could not be assigned to complainants, it is sufficient to say that the equity is attendant upon the legal right vested in the holder of the bills as such. It goes with that as an incident, and does not belong to that class of mere rights of action which become separated from the thing out of which they grew, and attach to the person only—as the right to sue for a trespass committed, and the like.

3. The next point made is, that if the unpaid subscriptions are indeed assets

for the payment of debts, then they have been assigned, and are in the receiver's hands, and must be collected and administered by him for the equal benefit of all the creditors under the trust of the assignment.

But an examination of the assignment will show that it does not assume to convey these subscriptions; but, on the contrary, specifically assigns those things which are set out in a schedule annexed to the assignment, and does not contain any general words sufficiently comprehensive to cover stock subscriptions. And as the assignment is a common law instrument, deriving no extraneous efficacy from the statute law of Georgia, except the general statute which gives assignability to bonds, specialties and other contracts in writing for the payment of money, or any article of property, judgments and executions (Code, article 2725), it cannot be construed to reach the claims in question. Besides, the attitude of the bank, its directors and stockholders, from the first, has been inconsistent with the idea that these unpaid subscriptions were embraced in the assignment. It is just what they always have opposed and denied.

4. Another point quite strenuously urged by the defendants is, that the bills held by the complainants were issued directly to the Confederate States government, and to the state of Georgia during the rebellion, and in aid thereof. The answers severally allege this fact, and the only evidence offered by complainants to rebut it is proof that they purchased the bills in open market, in regular course for value paid, without any notice or suspicion that they were issued for any illegal purpose. The defendants, therefore, rely on article V. section XVI, subdivision I, of the constitution of 1868, which not only nullifies all contracts made during the rebellion, in aid thereof, but all bonds, deeds, promissory notes, bills or other evidences of debt, made in connection with such contracts, or as the consideration therefor, or in furtherance thereof: and declares that when the defendant will make a plea, supported by his affidavit, that he has good reason to believe that the obligation or evidence of the indebtedness on which the suit is predicated, or some part thereof, has been given or used for the illegal purpose aforesaid, the burden of proof shall be upon the plaintiff to satisfy the court and jury that it is not founded upon, or in any way connected with, any such illegal contract, and has not been used in aid of the rebellion; and the date of the bill, etc., shall not be evidence that it has or has not, since its date, been issued, transferred or used in aid of the rebellion.

§ 1886. *Stockholders of a bank cannot go behind a judgment against the bank and question the original cause of action.*

Now, in reference to this point, it is to be observed that it does not fairly arise in the case. The bill of complaint is founded on certain judgments and executions in favor of the complainants, which were recovered in 1867. Had any such defense, as is indicated by the answers, existed, it should have been made to the actions at law; for, although the constitution did not then exist, yet it would have been a good defense to have shown that the bills were issued in aid of the rebellion, and that the plaintiffs knew it, or had reason to know it. Not being set up then it cannot be set up now. The stockholders of the bank cannot ask to go behind the judgments rendered against the bank, and question the original cause of action, unless they can show collusion between the plaintiffs and the bank, entered into for the purpose of defrauding the stockholders.

§ 1887. *The constitution of Georgia of 1868 has not the force and effect of an act of congress as to the power to impair the obligations of contracts.*

But even if the question were open I could not yield to the force of the defendants' argument. They contend that the constitution of 1868 has all the force and effect of an act of congress, and, therefore, is not obnoxious to that clause of the constitution of the United States which declares that no state shall pass any law impairing the obligation of a contract; that the constitution of 1868 has the force and effect of an act of congress, they insist, because it was adopted under the reconstruction acts, under military supervision, and not by the free consent and express will of the people of Georgia, and because, after its adoption by the convention, it was revised by congress and certain parts were struck out — or, at least, congress made it a condition of admission that they should be struck out — and that the legislature should ratify the fourteenth amendment to the constitution of the United States (see act of June 25, 1868, 15 Statutes at Large, 73); and that this was, in effect, an approval and adoption by congress of the parts not excepted to.

I cannot concur in this view. What was the precise *status* of Georgia after the war, and before its readmission into the Union, with all the normal relations of a state, will, perhaps, never be defined to the satisfaction of all. But that some sort of rehabilitation was necessary in order that Georgia might occupy her old position in the Union — that the adoption of a new constitution was one of the necessary things to be done, and that an act of the national authority, admitting Georgia to the representation and *status* of a state in harmonious relations with the Union, was also a necessary thing to be done — seem to be propositions that can hardly admit of a doubt. This conceded, how can it be said that the adoption of the constitution of 1868 was not the act of the people of Georgia? The courts cannot do otherwise than regard it as such. This is a political question in which the courts must follow the action of the political department of the government. To adopt any other course would be to introduce the greatest confusion. Congress, as was its right, regulated the elective franchise. There was no other legal authority to do it. The executive had no such authority. The state government of Georgia was a mere provisional one, and could not legally do it. No interference with the freedom of elections was interposed; on the contrary, the general government took measures to prevent any such interference. All that congress had to do, in relation to the constitution, when the state applied for readmission, was to impose certain conditions, to wit: That certain unwise clauses should be left out of the constitution, and that the legislature should ratify the fourteenth amendment. This was done. But Georgia was not compelled to do it. She could do as she pleased. It was at her own option. How can this possibly make the constitution an act of congress, or tantamount to such an act?

§ 1888. *A provision in a state constitution which impairs the obligation of contracts is void.*

Then, is a provision in a state constitution which impairs the obligation of a contract void? I have no doubt on the subject. A state can no more pass a law violating a contract, by means of a convention, than it can by means of a legislature; and a constitution adopted by a state, either after its admission or with a view to its admission or readmission into the Union, must be regarded as a law of the state, and amenable to the prohibitory clauses of the constitution of the United States.

§ 1889. *The part of the constitution of 1868 of Georgia, which throws the burden upon the plaintiff to show that bills were never used in aid of the rebellion, is void.*

Then, looking at the constitution of 1868, does the clause relied on impair the obligation of a contract? The first part of the clause, which declares void all contracts made in aid of the rebellion, only expresses what would be the law without any declaration on the subject. The second part, which avoids the instruments in whosoever hands they may come, when applied to such instruments as bank bills, is more questionable. But the final portion, which throws the burden of proof on the plaintiff to show that the bills have never been used in aid of the rebellion, if only the defendant will swear that he has reason to believe that they were so used, imposes upon the plaintiff an impossibility, and is tantamount to destroying the contract on the simple oath of the defendant as to his belief. I cannot think that such a provision is constitutional.

§ 1890. *That holders of unpaid stock may have redeemed their shares of the bills of the bank does not relieve them from liability for unpaid subscriptions.*

5. But the defendants make still another point, namely: that they have severally redeemed their shares of the bills of the bank, and have them ready to show as offsets to their liability as stockholders. This part of the answer relates only to the personal liability of all stockholders for the debts of the bank, under the fifteenth section of the charter, and not to their liability for unpaid subscriptions to stock. But, supposing the answer was right in form, could the defendants set up this defense to the bill? They do not show how they procured the bills. They have not recovered judgment on them. They may be unable to do so. The bills they hold may be open to the very objections they raise against the bills held by the complainants. They would not be permitted to pay up their subscriptions, if called on by the bank, in its old, depreciated currency. The most they can do with these bills, it seems to me, is to present them to the receiver for their *pro rata* share of the assets of the bank; or, if they can recover judgment on them, to pursue the course which has been pursued by the complainants, if it is competent for them to sue other stockholders when they themselves are owing the bank.

For these reasons, I think a decree must be made in favor of the complainants, the form of which, on reflection, I think should be that the defendants should severally pay to the complainants the amounts due by them for unpaid stock, so far as may be necessary to satisfy the amount of the complainants' judgments, interest and costs. It was suggested that those who had paid the least percentage on their stock should be first called upon, but I think all are equally liable to pay what they have not paid on their subscriptions; and, although the directors might be required to pursue that order, I do not think the court is bound to follow the directions marked out for the directors. It was also suggested that the decree should be based on a settlement and distribution of the fund in the hands of the receiver, and should make the defendants liable only for such balance as might be due to the complainants after receiving their share of that fund; but this would postpone the complainants indefinitely, and it seems to be generally conceded that the assets in the receiver's hands are not sufficient to pay the other creditors. Decree for the complainants.

HOWE v. COBB.

(Circuit Court for Michigan: 3 McLean, 270-272. 1843.)

Opinion of the COURT.

STATEMENT OF FACTS.—This was a creditor's bill, "setting up a fraudulent assignment to defendant Hill, by reason of which the execution issued on the judgment obtained by the plaintiff against Cobb was returned *nulla*."

One of the defendants demurred, and assigned the following cause of demurrer: That the *fi. fa.* issued on the above judgment was returned before the return day named in the writ, and was, consequently, insufficient to sustain the bill.

§ 1891. *Under the Michigan statute a creditor's bill may be filed upon the return of an execution nulla bona before the return day named in the execution.*

This proceeding is under a statute of Michigan of 1838, Revised Laws, 365, twenty-fifth section, which provides that, "whenever an execution against the property of the defendant shall have been issued on a judgment at law, and shall have been returned unsatisfied in whole or in part, the party suing out such execution may file a bill in chancery against such defendant and every other person to compel the discovery of property, or things in action due to him or held in trust for him," etc.

In *Smith v. Thompson*, Walker, 1, Chancellor Manning held that an execution returned by the sheriff the 17th May, and which, on its face, was returnable the 18th, was insufficient to authorize the filing of a creditor's bill. And in the cases of *Thayer v. Swift* and *Stafford v. Hulbert*, it was also held, previously, "that a judgment creditor's bill could not be sustained, where the execution was returned unsatisfied before the return day named in the writ; although the bill was not filed until after the return day."

§ 1892. *The fact that the defendant in the execution had property liable to execution may be shown in defense against a creditor's bill.*

In the case under consideration, the execution was returned, a very short time before the return day in the writ, *nulla bona*. The marshal, in making the return, acted under a legal responsibility, and is liable to an action for a false return. Indeed his return becomes a matter of record, and is conclusive as between the parties to the judgment and the officer, except in an action for a false return. The above statute requires that the execution shall have been returned unsatisfied, before a creditor's bill can be filed; and the only question is, whether the return before the day named in the writ authorizes this proceeding. We are inclined to think that where the marshal has, under his responsibility, returned the execution, being liable for a false return, a bill may be filed by the creditor. The object of the statute clearly was, that before the bill was filed there should be record evidence of the defendant's inability to pay the judgment; and this is shown by the return in this case. We are not prepared to say that the assignees, as charged in the bill, may not allege in their answer, and prove on the hearing, that the defendant in the judgment has property, of which the whole or a part of the judgment might be levied.

It is insisted that this court will follow, as has often been ruled, the settled construction of a state statute. This is admitted, but the point before us is more a question of practice than of construction. It arises upon general principles, as at what time an execution may be returned by the marshal or sheriff. Upon the whole, we think that from the character of the proceeding and the rights involved, a very technical rule on this subject is neither called for nor

justified. The bill was filed before the return day, but the process, we understand, was not served until afterwards. The demurrer to the bill is overruled.

BUCK *v.* PIEDMONT & ARLINGTON LIFE INSURANCE COMPANY.

(Circuit Court for Virginia: 4 Hughes, 415-421. 1880.)

Opinion by HUGHES, J.

STATEMENT OF FACTS.—The defendant in this cause, the Piedmont & Arlington Life Insurance Company, is avowedly insolvent; and on the 30th day of November, ultimo, its president, vice-president and secretary, by order of its board of directors, and without previous authority from stockholders, made a deed of assignment, by which it granted, set over and assigned to its vice-president, Angus R. Blakey, all its bonds, bills, notes, choses in action, and evidences of debt of every description; all its judgments, decrees and liens, its mortgages, deeds of trust and securities; all its office furniture in Richmond, including desks, tables, carpets, stoves, iron safe and other apparatus; and all its lands, lots, tenements and parcels of real property lying in the states of Virginia, West Virginia, Tennessee, South Carolina, Arkansas, Texas and Florida, in trust for certain purposes set out in the trust deed, which describes in detail the lands conveyed.

The deed gives the trustee power to sell, dispose of, and convey the said effects for cash or on such credits as he may choose, and with the proceeds to pay, first, two classes of preferred creditors, one class prior to the other; and afterwards to secure to the policy-holders of the company and beneficiaries under policies issued by it, the equitable value of their policies as of the date of the deed, discriminating the policy-holders in the states of Kentucky, California and Maryland from those in other states of the Union; and preferring those policy-holders who may be "satisfied" with the equitable values ascertained by the trustee, over those who may be "not satisfied." By this deed the directors put the affairs of the company in liquidation, and by necessary effect terminated the existence of their corporation as a life insurance company.

On the 11th day of this month the complainants, who are non-residents, exhibited their bill in this court, in which they charge that the defendant company is insolvent; that its deed of 30th ultimo is fraudulent, and was intended to hinder and delay creditors, and was made without authority of the stockholders; and they pray, amongst other things, for the appointment of a receiver, and for the setting aside of the trust deed as null and void. A rule was made by this court on the 11th instant, calling upon the defendant company and the said Blakey, trustee, to show cause here, on the 20th instant, why a receiver should not be appointed.

The company and Blakey appeared on the 20th instant, and, in the form of two pleas, denied the jurisdiction of this court to entertain this suit. One of the pleas set out, as defeating this jurisdiction, in substance, the fact that the said Blakey had, on the 3d instant, set on foot a suit in the chancery court of Richmond, asking the aid of that court in administering his trust, involving the subject-matter of the suit here; but it has been shown that the bill of Blakey has not yet been filed in the said state court. The other plea to the jurisdiction of this court set out the fact, in substance, that one C. B. Maury had, on the 3d instant, set on foot a suit in the said chancery court of Rich-

mond, and exhibited his bill there against the defendant company and Blakey, the trustee, for purposes similar to those sought by the proceedings in this court. It has been shown that in neither of the two suits in the chancery court of Richmond has the cause proceeded to issue; that those suits are still at rules; that that court has not appointed a receiver, or taken custody of the *res* — that is to say, the effects of the defendant company — or made any order by which it took cognizance, or assumed jurisdiction of the controversy between the parties to the respective suits; and that the parties there are not the same as the parties to the suit here. It has been shown that the nature and objects of the suits in the chancery court of Richmond are different from those of the suit here. The Maury bill is filed in his own name alone, although he asks for all proper accounts, for a receiver, and that all creditors may be ascertained, the fund collected and distributed, and the deed set aside. It asks for a personal decree for the amount Maury has paid the company, on the ground that it has forfeited its contract by refusing to give him a paid-up policy in exchange for his original policy. It makes the company and trustee alone parties defendant, although leave is asked to make all the directors and stockholders parties hereafter, when their names shall be ascertained.

The Blakey bill, a copy of which is filed in this court (though the original is not yet filed in the chancery court of Richmond), asks the assistance of the court to carry into effect the provisions of the trust deed. On the other hand, the suit in this court asks in the name of the complainants and of all creditors who may come in, for the special and general relief usually asked in creditors' bills; that the trust deed shall be set aside; that the funds be collected and distributed, and that a receiver be appointed; and it makes the company, the trustee, and the stockholders, all parties defendant.

§ 1893. *Jurisdiction of federal court of a creditor's bill against an insolvent corporation. Proceedings in a state court at the instance of a trustee and of a creditor do not oust such jurisdiction.*

I overruled the objections raised by the two pleas, on the following grounds, viz.: That non-resident citizens had a constitutional right to sue this company in this court; that this company had policies distributed in many states of the Union, whose holders could not hear of its bankruptcy for a considerable time after its avowal here; and that the individual action of one of its officers, and of one of its creditors who happened to be resident on the spot, in taking the mere incipient steps of a suit in a state court, within a few days after the avowal of the company's bankruptcy, and before it could be known at a distance — more especially in the absence of any action of the state court assuming jurisdiction of the controversy or of the *res* — could not defeat the constitutional right of non-residents to sue in this court. And in consideration of the fact that the defendant company's transactions embraced many states, making a United States court the more appropriate tribunal for the adjudication of its affairs, I decided that this suit must go on here.

The pleas to the jurisdiction being thus disposed of, I am now to pass upon the application of complainants for the immediate appointment of a receiver.

§ 1894. *What acts amount to an extinction of a corporation.*

The defendant company is confessedly insolvent. Being a life insurance company, insolvency and an assignment of all its effects in liquidation is final and irretrievable death to its corporate existence. It is incapable of taking care of its own effects, and has itself confessed the fact by assigning them to a trustee. That trustee has confessed his inability to administer the property

in accordance with the deed, by taking steps to obtain the aid of a court of chancery in the task. By the insolvency, by the act of the defendant company in making an assignment in liquidation, and by the act of the trustee in invoking the aid of a court, the defendants in the suit here have exhibited all the conditions requisite for authorizing a court to appoint a receiver. It is useless to contend that courts should observe extreme caution in entering upon the appointment of receivers. Such caution is only necessary where the defendant company's insolvency is denied; where the company is in the full exercise of its franchises and use of its property; and where the act of the court would abruptly and harshly arrest it in its course of action, and wrest its property from its use and control. It is true that, in such a case, a court should consider well the consequences of its action, and adopt the extreme recourse only when the facts of the case most clearly justify the measure.

But this defendant company is already extinct; its franchises are already forfeited and abandoned; its property already put, by its own act, out of its own use and possession, and committed to liquidation. Having thus itself made a case for a receiver, and actually anticipated a court in appointing one, this court is relieved from the painful inquiries and delicate responsibility usually devolved upon courts in passing upon applications for receivers; and, therefore, I am confronted with but a single question, which is, Whether or not this court will allow the defendant company to appoint its receiver for it?

§ 1895. *Insolvency of a life insurance company prima facie evidence of fraud.*

This is an insolvent life insurance company, a company which has approached thousands of men and women in the land and said: "If, out of your annual earnings and savings, you will pay me annual premiums of money during your natural lives, I will, at your death, pay to your widows and children certain thousands of dollars for their support." Having received these premiums for twelve or fifteen years, down to a few weeks past, it now reveals to the world that it cannot comply with the solemn obligations which it had undertaken. I think that the mere fact of the failure of a life insurance company is *prima facie* proof that its operations have been conducted in a fraudulent manner; and if the failure is not explained by some great casualty, such as a wide-spread pestilence, or sudden financial convulsion, or physical calamity, I think it is *per se* proof of fraud. I will not pretend to say that it creates the presumption of moral turpitude in the managers of the company, but it certainly does of constructive fraud; that is to say, of that financial imbecility or recklessness, or extravagance, or that gross negligence which is equivalent in its consequences to fraud, and which a court is bound to regard as constructive fraud.

§ 1896. *What will authorize the appointment of a receiver.*

Would the court be justified in allowing a trustee appointed by such a company, in the very deed in which it avowed its insolvency, to remain in the custody of its effects and to administer them? Could the court expect to attract and retain the confidence of the public and of its suitors if it should sanction such an act? I think not. The insolvency and abnegation of the company left its effects in the legal and rightful custody of no one, and the court must at once provide for the emergency by appointing a receiver.

§ 1897. *Who is an unsuitable person for a receiver.*

It has not been the policy or practice of this court, in appointing receivers for insolvent companies, to appoint any one who had been officially and re-

sponsibly connected with the mismanagement which brought his company's affairs to ruin; and, for that reason, I cannot appoint Mr. Blakey as receiver here, in whose personal integrity I would otherwise have the utmost confidence, and whose high character I most cheerfully acknowledge.

WINANS v. THE MCKEAN RAILROAD & NAVIGATION COMPANY.

(Circuit Court for New York: 6 Blatchford, 215-225. 1868.)

Opinion by HALL, J.

STATEMENT OF FACTS.—The bill sets forth, in substance, that the plaintiff is a citizen of the state of New York, and the defendant a corporation created under and by virtue of the laws of the state of Pennsylvania; that heretofore the plaintiff, being a citizen of New York, commenced an action in the supreme court of that state, against the defendant, for the same cause of action afterward stated in the bill; that thereupon the defendant, by the means and in the mode prescribed by law, and duly set forth in the bill, removed the case to this court for trial, in pursuance of the act of congress; that afterward, and at the next term of this court, the defendant filed, in this court, a copy of the process served upon it in this action, in said supreme court, and entered its appearance in the said action so removed to this court for trial; that the defendant was, on the 10th of August, 1858, and still is, a corporation created under and by virtue of the laws of Pennsylvania, and is a citizen of that state, and that the defendant has its principal office and place of business in the city of New York. The bill then proceeds to state the regular recovery of a judgment in favor of the plaintiff, against the defendant, in the supreme court of the state of New York, for more than \$9,900, for money lent; that such judgment was recovered in September, 1865, and duly docketed; that executions were issued thereon, and duly returned wholly uncollected, and that the judgment remains wholly unpaid. The allegations in respect to such judgment and executions, and the return of such executions, are, in fact, those which are ordinarily required in a judgment creditor's suit, prosecuted for the purpose of reaching the equitable assets of the debtor. The bill then further states, that, since the recovery of such judgment, the plaintiff has made diligent efforts to have such judgment prosecuted, and to commence an action for the recovery thereof, in Pennsylvania; that he has not been able to find any of the officers of the defendant upon whom to serve process in that state, or any property belonging to the defendant, in that state, to attach, so as to commence an action therein; that all of the directors of the company reside in the city of New York, and all, or nearly all, of the stockholders thereof reside in that city; that the defendant has no office or officer anywhere in the state of Pennsylvania, and is not engaged in any business in that state, and has no property of any kind therein, and has no property in the state of New York, or elsewhere, subject to levy and sale on execution; that the only property or means which the defendant has is the demand of the defendant against its stockholders for the portion of their subscriptions remaining unpaid; and that the defendant has subscriptions to its stock remaining unpaid, and which have never been called for or required to be paid by the defendant, or its directors, much more than sufficient to pay the judgment of the plaintiff. The bill then, without setting out any of the provisions of the defendant's charter, or of the laws under which it was incorporated, or anything in regard to the terms, or legal effect, of the alleged subscriptions which have not been

paid in full, or whether the parties who made such subscriptions are still stockholders in the corporation, and, in short, without setting out anything beyond the fact of there being such unpaid subscriptions, to show that the corporation has a present, or any future, right of action to recover the unpaid balance of such subscriptions, and without making any of the persons whose subscriptions are unpaid, parties to the bill, proceeds to pray for a sequestration of the property, rights and franchises of the defendant, and for the appointment of a receiver, with the usual powers to receive the property, rights and franchises of the defendant, and to collect and receive from the stockholders of the defendant the amount of their subscriptions unpaid, or sufficient thereof to satisfy the plaintiff's judgment, with interest and costs; and that such receiver may be directed, by the judgment of this court, to pay over to the plaintiff the amount of such judgment, interest and costs. It also contains the prayer for general relief.

To this bill the defendant demurs, and assigns as causes of demurrer: (1) That it appears, by the bill, that the defendant is a citizen of the state of Pennsylvania, and that all of its property and effects are within that state, and that the property and effects sought to be reached by, and through, this action, are in that state, and that none of the same are in the state of New York. (2) That it does not appear that the defendant has any property or effects whatever, to be used, or applied, in or towards the satisfaction of the judgment mentioned and described in the bill. (3) That it does not appear that the defendant holds against its stockholders, or any of them, any demand for any portion of their subscriptions, or that any portion thereof is unpaid, or that any portion thereof is collectible. (4) That the plaintiff has not, in and by his bill, made and stated such a case as does, or ought to, entitle him to any such discovery, or relief, as is sought, and prayed for, from and against the defendant. There is also a fifth formal cause of demurrer assigned, but it is only a reiteration, in a different form, of the substance of the cause of demurrer fourthly assigned.

§ 1898. *Where a suit is brought in a state court and duly removed under the twelfth section of the judiciary act, the jurisdiction of this court is not dependent on the eleventh section of the act.*

As it was conceded on the argument, and is substantially stated in the bill, that this suit was first instituted in a state court and removed to this court for trial, according to the provisions of the twelfth section of the judiciary act, it is unnecessary to discuss the questions presented by the cause of demurrer firstly assigned, or to examine the numerous cases cited on the argument to show that this court has no jurisdiction of this case by reason of the character and citizenship, or legal domicile or locality, of the defendant. If this question of jurisdiction depended upon the provisions of the eleventh section of the judiciary act, most of the cases cited would be pertinent; but as it depends wholly upon the provisions of the twelfth section, a sufficient authority for holding that the demurrer cannot be sustained upon the grounds stated is furnished by the cases of *Bliven v. The New England Screw Co.*, 3 Blatch., 111; *Barney v. The Globe Bank*, 5 id., 107; *Sayles v. The Northwestern Ins. Co.*, 2 Curt., 212; *Clarke v. The New Jersey Steam Nav. Co.*, 1 Story, 531.

§ 1899. *What a voluntary appearance of a defendant waives as to jurisdiction.*

But, even in a case within the eleventh section of the judiciary act, a defendant who is not found, or served with process, in the district in which the suit is brought, waives his right to object to the jurisdiction upon that ground, by

voluntarily appearing in the suit, as the defendant did in this case, by entering his appearance in this court, as alleged in the bill. The immunity which, under the eleventh section of the judiciary act, is, in certain cases, secured to a defendant not so found or served with process, is a personal privilege which he may always waive; and he does waive it by entering his appearance. *Toland v. Sprague*, 12 Pet., 300; *Clarke v. The New Jersey Steam Nav. Co.*, 1 Story, 531 and 540; *Flanders v. The Etna Ins. Co.*, 3 Mason, 158; *Harrison v. Rowan*, 1 Pet. C. C., 489; *Gracie v. Palmer*, 8 Wheat., 699; *Logan v. Patrick*, 5 Cranch, 288; *Irvine v. Lowry*, 14 Pet., 293 (COVERS, §§ 1207-9).

The objection that the property and effects of the defendant which it is the object of the bill to reach are in the state of Pennsylvania, and all the objections stated in the second, third and fourth causes of demurrer assigned, may, perhaps, be properly considered together; or else, as having such direct and close connection as to justify the omission to consider each separately and in its order.

§ 1900. *What is a sufficient statement in a bill of the amount and value of the defendant's property sought to be reached by the bill.*

The bill alleges, in substance, that the defendant has no property of any kind in Pennsylvania, and that the only property or means which it has is its demand against its stockholders for the proportion of their subscriptions remaining unpaid; but it alleges that the defendant has subscriptions to its stock remaining unpaid much more than sufficient to pay the plaintiff's debt. Taken together, these allegations can hardly be said to show that the defendant is without means to pay the plaintiff's debt. The alleged sufficiency of these unpaid subscriptions would seem to require that their value as well as their amount should be more than equal to the plaintiff's debt; and it must be admitted that the allegation of value would have been more clearly appropriate and sufficient, if the value of these subscriptions, or their amount, and the pecuniary responsibility of such subscribers, had been directly alleged, and not been left to be inferred from the somewhat indefinite statement just referred to. The question is not free from doubt, but I am inclined to think that the bill is sufficient in so far as this statement of amount and value is concerned, and shall therefore proceed to consider the more serious questions still remaining for discussion.

The right to require payment of these amounts of unpaid stock, if it can be considered as the property or effects of the defendant, must belong to the defendant as a Pennsylvania corporation, and, as a chose in action, must be considered as property of the defendant in Pennsylvania, where and where only the body corporate exists. If it is, as yet, a mere right of the corporation, by a resolution of its board of directors or managers, to call for the payment of the balance unpaid, by instalments or otherwise, it is a right which can be made the basis of an action at law against the stockholders only, upon and by means of the proper action of a Pennsylvania corporation; and, probably, this action cannot be enforced by this court, for want of power to compel the directors or managers of this foreign corporation to make the necessary calls for such payment. If the proper calls have been made, or if a suit at law could now be sustained by the corporation, without any such call having been made to enforce payment, such a right of action follows the locality of the corporation or creditor, and, so far as locality is concerned, must be considered as assets of the defendant in Pennsylvania, and not within the jurisdiction of this court —

and this whether the written subscription, or other evidence of such subscription, be within this district or in Pennsylvania.

§ 1901. *Where there has been a general appearance, the fact that a defendant foreign corporation has no property within the district will not defeat the jurisdiction of the court.*

But I am inclined to the opinion that the fact that the defendant has no real or personal property, choses in action or equitable interests, in this district, is not, of itself, an objection to the jurisdiction of this court or a sufficient defense to the present bill. The actual appearance of a foreign corporation as a defendant gives to this court the same right to grant a proper decree upon the case made that it would have the right to make under like circumstances against a natural person proceeded against for the same cause of action; and the case of *Mitchell v. Bunch*, 2 Paige, 606, cited and relied upon by the defendant, as well as several English cases there cited by Chancellor Walworth, would seem to authorize this court to make a decree in a judgment creditor's suit, requiring the defendant to transfer to a receiver real and personal estate, situated in a foreign country, and choses in action belonging to him, though he might be a resident of a foreign country, in order to secure their application to the satisfaction of the judgment of the plaintiff in such suit. It is not, ordinarily, a sufficient defense to an action at law or a suit in equity that the plaintiff will not be able to enforce the judgment or decree to which he would otherwise be entitled; but, in a judgment creditor's suit brought to enforce the payment of such creditor's demand out of the equitable interests and assets of the defendant which are not subject to execution at law, the precise ground of relief is, that the court of equity can enforce the remedy sought, while it cannot be obtained in a common law court; and, in such suits, a court of equity ought not to allow the parties to go through a long course of expensive and, perhaps, vexatious litigation, when it is apparent that it must be fruitless in its result. This makes it necessary to consider the more important questions which relate to the actual merits of this case, and the extent of the relief which can be afforded to the plaintiff under his bill as now framed, through the action of a receiver or otherwise.

§ 1902. *The liability of the unpaid capital stock as a trust fund for the debts of the corporation.*

It is very clear that the capital stock of the corporation defendant, and any unpaid portions of such capital stock, must be considered, in equity, as a trust fund, specifically charged with the payment of the debts of the corporation. *Mann v. Pentz*, 3 Comst., 415, 422; *Spear v. Grant*, 16 Mass., 9; *Wood v. Dummer*, 3 Mason, 308; *Briggs v. Penniman*, 8 Cow., 387; *Slee v. Bloom*, 19 Johns., 456, 474; *Hume v. Winyaw Co.*, 4 Am. Law Mag., 92; *Ward v. Griswoldville Manuf'g Co.*, 16 Conn., 593; *Nathan v. Whitlock*, 9 Paige, 152; *Dayton v. Borst*, 31 N. Y., 435. This being so, it must necessarily follow that a court of equity, upon a bill properly framed, in a suit brought by and against all proper parties, would grant the equitable relief to which the plaintiff might be entitled. See cases just cited. This brings us to the questions whether, in this case, the proper parties are before the court, and whether the bill states a case which entitles the plaintiff to the relief, or any portion of the relief, prayed for in the bill.

§ 1903. *Liability of stockholders for unpaid balance on subscriptions.*

The case of *Mann v. Pentz*, *ubi supra*, apparently decides that the allega-

tions of the bill in this case would be insufficient to authorize a decree against any single stockholder of a railroad corporation created by the legislature of this state, who might have been made a party to such a bill; and that any receiver who might be appointed in such a suit would have no right, in any event, to prosecute, either at law or in equity, an individual stockholder, for the recovery of the sum unpaid upon his stock. If that case stood alone, it would create very serious doubts, whether a receiver appointed in this case could maintain any action at law or suit in equity, for the purpose of enforcing payment of the amount still unpaid upon subscriptions to the capital stock of the defendant; and it might well be doubted whether the liability of a stockholder upon his unpaid subscriptions could be enforced in the courts of this state, except by a suit in equity, in behalf, or for the benefit, of all the creditors of the corporation, and against all the stockholders in default. The stockholder's liability to creditors of the corporation was apparently considered, in that case, as a statutory liability only, and it was said that the stockholder could only be made liable to the corporation by regular calls, in pursuance of its charter; but the subsequent case of *Dayton v. Borst*, 31 N. Y., 435, seems to be opposed to the case of *Mann v. Pentz*, on these points (unless there is a difference between the two cases by reason of the fact that one was a New York corporation and the other a corporation of New Jersey), and to maintain the right of a receiver, with the ordinary powers of a receiver appointed under the bill of a judgment creditor, to recover the balance unpaid upon subscriptions to the capital stock of the corporation of which he has been made receiver, without any previous call being made by the corporation. The thirteenth section of the act creating the corporation in which the defendant in *Mann v. Pentz* was a stockholder provided for calls upon the stockholders, and notice thereof, and for the forfeiture of stock in case the calls thereon were not paid; and it may have been properly considered by the judges who decided the two cases referred to, that this thirteenth section, in effect, required calls to be made before any action could be brought for the recovery of the amount unpaid upon the subscriptions of its stockholders, although I confess that my own first impression was, that the provision referred to required such calls, and notice thereof, only in cases where a forfeiture of the stock was contemplated. The rights of the parties were also considered to depend upon the New York statutes in reference to insolvent corporations, and these facts may, perhaps, distinguish the case from that of *Dayton v. Borst*. The cases of *Mann v. Pentz* and *Wood v. Dummer* were cited by Judge Davies, in delivering the opinion of the court in *Dayton v. Borst*, and there is nothing in his opinion showing that the court intended expressly to overrule the decision in *Mann v. Pentz*. Nevertheless, the two cases appear to me to be irreconcilably in conflict, unless the case of *Mann v. Pentz* proceeded upon the ground that, under such thirteenth section, there could be no liability against the stockholder, unless a call had been made in pursuance of that section, or upon the ground that the statute of New York had provided a different remedy against delinquent stockholders; and the later case, in which the plaintiff was the receiver of a foreign corporation, "with power" (as is stated) "to sue for, collect, receive and take into possession, all the goods, rights and credits" of such corporation, shows that a receiver with these powers (such as are ordinarily conferred upon receivers under judgment creditors' bills) had a right to sue for the unpaid balance of subscriptions, and that, when there was nothing to the contrary appearing in the case, the receiver might recover the amount, without showing

anything more than the fact that the defendant had become a stockholder, and had failed to pay the full amount of his stock.

The case of *Dayton v. Borst* seems to be full authority for the position that a receiver appointed in this suit would, under the case made by the bill, be entitled to recover the unpaid balances due from the stockholders of the defendant, to such extent as would enable him to pay the plaintiff's demand; and, as the question is one of state law, and the decision in *Dayton v. Borst* was made by the highest court of the state, without the express dissent of any of its judges, I shall rule the demurrer in this case on the authority of that decision, as the latest exposition of the law of this state upon the questions involved in its determination.

I confess that a bill framed according to the views expressed in the cases of *Wood v. Dummer* and *Mann v. Pentz*, and making the corporation, and its delinquent stockholders, parties defendants, seems to me a more appropriate form of proceeding in the case of a domestic corporation; and no insuperable objection to adopting that form of proceeding in the case of a foreign corporation, at least so far as to make stockholders in default parties defendants in a state court, now occurs to me, or has been suggested by the counsel. The equitable attachment of the demand of the corporation against such defaulting stockholders, thus made defendants, would be an important consideration in favor of such a form of proceeding; but, as it has not been adopted in this case, it is not necessary now to decide whether such a bill could be maintained upon the case stated by the plaintiff.

The demurrer is overruled, but with leave to the defendant to answer, within thirty days after notice of the order overruling the demurrer, on the payment of costs.

SEDAM v. WILLIAMS.

(Circuit Court for Michigan: 4 McLean, 51-56. 1845.)

Opinion of the Court.

STATEMENT OF FACTS.—The bill in this case states that Williams and Hodges were partners, and that B. O. Williams purchased goods of plaintiff in his own individual name for the firm. That Williams sold out the goods to Hodges, who agreed, out of the proceeds thereof, to pay the debts of B. O. Williams, contracted in the purchase of the goods, including plaintiff's debt. That Hodges gave a bond in the penalty of \$60,000, and a mortgage, to secure the payment of said debts. The bill is filed in behalf of the creditors of the late firm, to foreclose the mortgage, etc. A judgment was obtained by the complainants against B. O. Williams.

The defendants demurred to the bill, and assigned various grounds as cause of demurrer, which will be considered.

§ 1904. *Where a judgment has been obtained against one of two partners on a joint promise, an action at law against the other partner cannot be maintained.*

It is first alleged that the complainants cannot sustain their bill on the ground of the copartnership. 1st. Because the judgment against B. O. Williams has not taken away the legal remedy of the complainants against Hodges and Williams, as copartners. *Sheehy v. Mandeville*, 6 Cranch, 253 (*BILLS AND NOTES*, §§ 1406-7). 2d. Admitting the legal remedy against Hodges to be extinguished by the judgment, the complainants are not entitled to any relief in

equity against Hodges on that account. It was through their own negligence, and not any fraud on the part of Hodges, or either of the other defendants, that they lost their remedy at law against him, and equity will not give relief in such a case. *Pinny v. Martin*, 4 John. Ch., 566.

The first ground was undoubtedly sustained in the case cited from 6 Cranch. That case has not been overruled by the supreme court; but it would seem to be impossible to sustain it on general principles. That a judgment against one of two joint promisors, or persons equally bound to pay the debt sued for, both being sued, merges the debt, is a principle sustained generally, except in the above case. Had the note been joint and several, and the suit been commenced against one only, and a judgment obtained against him, another action might be brought against the co-promisor. But, whether the case of *Mandeville* be law or not, the bill is not objectionable on that ground.

§ 1905. *If a remedy at law has been lost otherwise than by negligence, equity will relieve.*

On the second ground, it is supposed that if the right at law against Hodges be extinguished, by the judgment against Williams, that is no ground on which chancery can give relief. It may be admitted, as ruled in the case of *Pinny v. Martin*, that where a party has lost his remedy at law by negligence, chancery will not aid him. But the remedy sought against Hodges did not exist as against Williams. The bill seeks to foreclose the mortgage given by Hodges, and subject the property covered by it to the payment of the debts of the firm. This, if not a new liability, is a new security for the payment of those debts, and it can only be applied, as intended by the parties, by a court of equity. No procedure at law against Williams and Hodges could effectuate this object.

§ 1906. *When a partner becomes a trustee for the creditors.*

It is contended that the bill cannot be sustained on the ground that Hodges is a trustee for the creditors of the copartnership. In support of this position it is insisted that no case can be found in which a court of equity has declared a debtor to be a trustee for his own creditors, and sought to charge him with the payment of his debts in this new character aside from his legal liability. Hodges, it is said, was equally bound with Williams for the payment of complainants' debt, when he purchased out Williams' interest in the copartnership, and when he afterwards gave the bond and mortgage. That the judgment was not obtained against Williams until nearly two years after the bond and mortgage were executed.

It is true that Hodges was equally liable with Williams for the payment of the debts of the partnership. But by his contract with Williams he bound himself, out of the proceeds of the goods received, to pay the debts of the firm. Does not this constitute a trust? If Hodges were about to appropriate the goods in any other manner, and for any other purpose, than to pay the debts of the partnership, could not Williams restrain him by injunction? Could not the creditors of the firm restrain him? It was upon the condition of the faithful application of the proceeds of the goods to the payment of these debts that the goods were placed under the control of Hodges. The mortgage was given to secure the faithful performance of this contract. And those who are beneficially interested in the contract may enforce the mortgage. *Bleeker v. Bingham*, 3 Paige's Ch., 249; 1 John. Ch., 82; 3 John. Ch., 261; 2 Story's Eq., sec. 1041 to 1044.

As the bond and mortgage were intended to secure the payment of certain

moneys to the complainants and other creditors of Williams, and not directly to him, he may be considered in equity as a trustee of the bond and mortgage for the complainants and others. It was held in the case of *Hick v. Kinmar*, 3 Swanst., 417, that a person not a party to a contract, nor privy to it, but for whose benefit a third person had entered into it, could file a bill in equity for a specific execution of it. 7 Cranch, 69; 1 John. Ch., 129; 7 Paige, 627.

§ 1907. *It is not material whether a bill is in form a creditor's bill if it presents a case calling for equitable relief.*

It is insisted that the bill cannot be sustained as a creditor's bill, as it does not show that the remedy at law has been exhausted. An execution on the judgment against Williams was returned no property found, as required. As to the character of this bill it is not material, if it embody principles which show that the complainants are entitled to relief. It is not, technically, a creditor's bill. On the supposition that this is a creditor's bill, it is objected that it cannot be sustained against the defendants Hodges and Gardner D. Williams. And the decision of Chancellor Sandford is cited in *Donovan v. Finn*, Hop. C., 85, where he says "the court has no power to compel the debtor of a judgment debtor to make payment to the judgment creditor in satisfaction of the judgment." And it is argued that Hodges is a debtor to B. O. Williams to the extent of the bond and mortgage, but the defendant, Gardner D. Williams, is not a debtor of B. O. Williams in any amount.

§ 1908. *When a debtor may be decreed to pay his creditor's debt.*

Whether a debtor of a judgment debtor can be decreed to pay the judgment creditor must depend upon the character of the contract out of which the indebtedness arises. If the debtor bound himself to pay the judgment creditor, he would be decreed to pay him. Or if the contract to that effect were made with the judgment debtor, the principle stated in the above case will admit of qualification.

§ 1909. *What makes a bill multifarious.*

The complainants' bill is alleged to be multifarious, as it seeks to have the judgment at law satisfied out of a chose in action, the bond and mortgage; and also asks a foreclosure of the mortgage. *Cooper's Eq.*, 182-3; *Swift v. Ecford*, 6 Paige, 22; *Salbridge v. Hyde*, 1 Jac., 151.

It is a matter of difficulty to lay down any rule by which a bill shall be considered multifarious. But we think the present bill is not subject to this objection. The claim of the complainants and the other creditors can be satisfied out of the mortgage only by a foreclosure and a sale of the premises.

The bill prays a foreclosure of the mortgage, except lot 96 and a part of lot 97; and this, it is said, is good on demurrer. A bill, it is said, must apply to the whole, and not to a part, of the mortgaged premises, because it would multiply litigation. *Cooper's Eq.*, 184; *Mitford's Pl.*, 183.

It may be that the mortgagor had no title to lot 96, and a part of lot 97. It is true that a party would not be permitted to file several bills to foreclose different parts of the same mortgage. That would be an abuse which the court would correct. In the general, such a procedure might be favorable to the mortgagor; especially if the property would be likely to sell for more than the mortgage debt. The bill shows that the above lots have been sold under a prior mortgage.

§ 1910. *Who are improper parties complainant.*

It is objected that the bill is filed by the complainants on behalf of themselves and all other judgment creditors of the defendant B. O. Williams, when

it does not appear from the bill that there are any other judgment creditors. And it is said to be good ground of demurrer to the whole bill, that a person who has no interest in the controversy, and has no equity as against the defendant, is improperly joined as a party complainant. *Clarkson v. De Peyster*, 3 Paige, 336; *King of Spain v. Machado*, 4 Russ., 225; 3 Cond. Eng. Ch. Rep., 643.

This may be good law, but its application to the case is not perceived. The argument used is, "if a complainant who has an interest in a suit cannot unite with him one who has no interest, it would seem to follow that he could not file a bill in behalf of himself and others, without showing there are others interested in the subject-matter of the suit." The bill, by the general designation of judgment creditors of the firm, leaves no uncertainty as to the persons who may come in and claim a due proportion, under the sale of the premises. Where parties are very numerous, a part of the persons in interest may prosecute for the benefit of the whole. In their decree, the court will make the proper distribution of the money.

§ 1911. *Allegations of citizenship.*

The objection that the citizenship of the defendants is not sufficiently alleged is not sustainable. In the bill they are alleged to be residents, but in the subpoena they are stated to be citizens. The demurrer is overruled, and the defendants are required to answer, etc.

§ 1912. *Equitable jurisdiction — Fraudulent conveyances.*—Equity has jurisdiction of a bill filed by a judgment creditor against his debtor and others for the purpose of setting aside conveyances made by the debtor in fraud of his creditors. Adequate and complete relief cannot be obtained at law in such a case. *Bean v. Smith*, 2 Mason, 252. This, too, whether execution has been issued on the judgment or not. *McCalmont v. Lawrence*, 1 Blatch., 232.

§ 1913. The relief granted in chancery suits by judgment creditors to avoid fraudulent conveyances by their debtors is founded upon the fraud attempted against a lien already attached to the land, or because of the assignment, with fraudulent intent, to prevent the lien from attaching; and equity consequently gives the full remedy which could have been obtained through the lien by execution, but without referring the matter to the action or process of a court of law. For chancery, having acquired jurisdiction of the subject-matter, because of the fraud, will apply the property fraudulently conveyed to the satisfaction of the prosecuting creditor, pursuant to its own modes of proceeding. The action of chancery upon the fraudulent grantor or assignee is only to the extent of supplying a remedy to the suitor creditor; as to all other parties, the assignment remains as if no proceedings had been taken. *McCalmont v. Lawrence*, 1 Blatch., 232.

§ 1914. A bill by a judgment creditor, charging that the debtor has put his property beyond the reach of the ordinary process of law, and by the assistance of a third person has disposed of it in such a manner that judgment creditors cannot find it to satisfy their claims, or, if found, is held by such third person under cover of an assignment which gives him the *prima facie* legal title, and further that this is a fraudulent contrivance to hinder and delay the judgment creditor in the recovery of his debt, is in effect a creditor's bill. And in Montana, under the provisions of whose organic law the territorial legislature can pass no law which shall deprive the supreme and district courts of the territory of their chancery or common law jurisdiction, such a case must be tried as a chancery case by modes of proceeding known to courts of equity. If such a case is conducted according to the common law, and a decree rendered on the verdict of a jury as a judgment at law is rendered, and not on the conscience and judgment of the chancellor, and a decree in the nature of a judgment for damages is rendered against the person alleged to have taken the fraudulent assignment, when it should be a decree for an account, the proceedings are erroneous and the decree must be reversed. *Dunphy v. Kleinsmith*, 11 Wall., 610.

§ 1915. The act of the legislature of Illinois of 1877, regulating the making of assignments for the benefit of creditors, and clothing the assignee with power to execute the trust under the direction of the county court, does not deprive courts of equity of jurisdiction to entertain creditors' bills, and set aside fraudulent conveyances. It does not repeal any portion of the chancery act of that state authorizing such equitable remedies. *Strong v. Goldman*,* 8 Biss., 552.

§ 1916. — **fraudulent redemption from foreclosure.**—The property of a debtor which had been levied on under the judgment of a creditor was sold under a foreclosure of a mortgage made prior to the judgment, and the judgment creditor, to protect his interest therein, became the purchaser. After this was done the judgment debtor confessed a judgment in favor of a third person and the latter came in and redeemed from the decree of foreclosure. The judgment creditor filed a bill alleging that this judgment confessed was fraudulent and for the benefit of the debtor. *Held*, that a court of equity had jurisdiction of the case to determine the rights of the parties. *Currie v. Jordan*,* 4 Biss., 518.

§ 1917. — **judgment and execution, when necessary.**—If a judgment creditor wants relief in equity as to a chattel, he must show that he has taken out execution at law, and pursued it to every available extent, before he can resort to a court of equity for relief. This is necessary in order to show a lien upon the chattel. But if the aid is sought as to real estate, it is enough to show a judgment creating a lien upon the land. *United States v. Sturges*, 1 Paine, 525; *Stewart v. Fagan*,* 2 Woods, 215.

§ 1918. A suit in equity commenced for the satisfaction of judgments, before any attempt has been made for their collection at law by the issue of execution thereon, cannot be sustained. Equity exercises its jurisdiction in favor of a judgment creditor only where the remedy afforded him at law is ineffectual to reach the property of the debtor, or the enforcement of the legal remedy is obstructed by some incumbrance upon the debtor's property, or some fraudulent transfer of it. *Jones v. Green*,* 1 Wall., 390.

§ 1919. Where a decree in admiralty for the payment of money has been obtained, and an execution issued upon it against the goods and chattels of the defendant, and a return of the writ by the marshal, with an indorsement of *nulla bona*, the creditor may file a bill in a court of chancery for relief, and he will be entitled to the aid of the court to discover and apply the debtor's property to the payment of his debt. Neglecting to sue out a *ca. sa.* against the body of the defendant is no obstacle to relief in equity. *Ward v. Chamberlain*,* 9 Am. L. Reg., 171.

§ 1920. It seems that judgment and execution are not always necessary to entitle a person to relief in chancery—as in case of stocks and other property which cannot be reached by execution; also in cases of trusts. *Wilkinson v. Yale*,* 6 McL., 16.

§ 1921. It is not necessary to aver in a creditor's bill that the marshal searched for property. His return, under his official sanction, of no property found, is all that the law requires. *Suydam v. Beals*,* 4 McL., 12.

§ 1922. The issuing of a second and third execution does not operate against the right of a judgment creditor to maintain a creditor's bill. *Ibid.*

§ 1923. Under the statutes of Michigan, it is no objection to the maintenance of a creditor's bill that the return of *nulla bona* was made before the return day of the writ, provided the bill is not filed until after that day. *Ibid.*

§ 1924. It is not the province of a court of chancery, upon a creditor's bill, to correct errors of legal procedure. Hence no objection can be made to the regularity of the judgment at law. *Ibid.*

§ 1925. — **testamentary disposition.**—Admitting that there is a just and sound policy peculiarly appropriate to the jurisdiction of courts of equity to protect creditors against frauds upon their rights, the court, in this case, disclaims the acceptance of the limitations which the English court of chancery has placed upon the power of the owner of property to dispose of it by testamentary provisions so that it will not be subject to the debts of the object of the testator's bounty. *Nichols v. Eaton*, 1 Otto, 716.

§ 1926. — **partnership accounting.**—It is generally true that a creditor's bill to subject his debtor's interest in property to the payment of the debt must show that all remedy at law has been exhausted, and must generally aver that the judgment has been recovered for the debt; that execution has been issued, and has been returned *nulla bona*. But whenever a creditor has a trust in his favor, or a lien on property for the debt due him, he may go into equity without exhausting legal processes and remedies. So where a bill, filed without any prior legal proceedings, averred that partnership property on which the plaintiff had a lien had been fraudulently conveyed by the debtor partnership to a third person, and that the partners were insolvent at the time of the conveyance and had remained so, and that a judgment against them would afford the plaintiff no relief, it was held that the bill amply asserted the remedilessness of the plaintiff at law, and that it was a proper case for equity jurisdiction. *Case v. Beauregard*, 11 Otto, 688.

§ 1927. — **administration of decedent's estate.**—The administration of the assets of a deceased person is a well-established head of equity jurisdiction, and creditors of a deceased person may maintain a bill in equity to reach property belonging to his estate and have it applied in payment of their claims, without first obtaining judgments at law. *Offutt v. King*,* 1 MacArth., 812.

§ 1928. — to affect sale of reversion.— A bill in equity lies by a judgment creditor to procure a sale of a reversion expectant upon a life estate to satisfy the judgment against the reversioner. That the debtor has the right to the profits of other lands, which profits by the levy of an *elegit* will pay the debt within a reasonable time, will not prevent the court from ordering a sale of the reversion, the acceleration of a tardy remedy being the ground on which the aid of equity is granted. *Burton v. Smith*, 13 Pet., 464.

§ 1929. Federal jurisdiction.— A creditor's bill may be maintained in the federal courts upon a judgment rendered in a state court. The basis of the procedure is the fraud or trust alleged, which can only be effectively reached in a court of equity. *Wilkinson v. Yale*,* 6 McL., 16.

§ 1930. One who has obtained a judgment at law against an insolvent corporation in a state court and had his execution returned *nulla bona* may maintain a bill in equity in a federal court, provided the citizenship of the parties permits, to subject to the payment of his judgment unpaid subscriptions to the capital stock. *Putnam v. New Albany*,* 4 Biss., 365. See BONDS, §§ 1184-86; CORP., §§ 182-86.

§ 1931. The circuit court of the United States has jurisdiction, under the act of September 24, 1789, of a creditor's bill founded on a judgment recovered by the United States, where the amount in dispute exceeds \$500. *United States v. Stiner*, 8 Blatch., 550.

§ 1932. A judgment creditor may proceed by ancillary proceedings in any other court of concurrent jurisdiction with the court rendering the judgment to remove clouds from titles to any property which is deemed to be subject to the lien of the judgment. If the complainant has several judgments against the debtor, he may proceed to remove clouds from the title to the same property in two different jurisdictions, proceeding upon different judgments in each. It is not material that the proceedings involve the same questions, provided they do not involve the same subject-matter. Thus it is no objection to the maintenance of such a bill in a federal court that proceedings by the same complainant are pending in a state court, in aid of other judgments, to set aside the same fraudulent conveyance and subject the property to the lien of the judgments. Especially will this rule obtain where the two series of judgments were rendered at different times. *Scottish American Mortgage Co. v. Follansbee*,* 9 Biss., 482.

§ 1933. It cannot be successfully objected to a creditor's bill in a federal court that there is an adequate remedy at law, because the law of the state in whose court the judgment was rendered and in which the federal court is sitting gives a remedy similar to that by creditor's bill by "proceedings supplementary to execution." Such a remedy is merely cumulative and does not take away the old remedy by creditor's bill. *Putnam v. New Albany*,* 4 Biss., 365. See BONDS, §§ 1184-86; CORP., §§ 182-86.

§ 1934. A creditor's bill in aid of an execution at law is not an original bill, but a continuation of the suit at law. The jurisdiction of a federal court having attached in the suit at law, its jurisdiction of the creditor's bill is not defeated by a change of the residence of the parties. *Hatch v. Dorr*, 4 McL., 112 (COURTS, §§ 636-37).

§ 1935. The principle that a creditor's bill filed on the chancery side of the court, to enforce a judgment on the law side, is not an original bill, but is ancillary to the judgment at law, and a mere continuation of that proceeding, will not give the circuit court jurisdiction of a creditor's bill filed in that court to enforce a decree in admiralty in the district court, where citizenship does not give the circuit court jurisdiction. *Winter v. Swinburne*, 8 Fed. R., 49 (COURTS, §§ 648-50).

§ 1936. Fraud must be shown.— Wm. B. Hatch being indebted to his brother, Gideon Hatch, makes a conveyance to him, absolute on its face, of a certain tract of land. The plaintiff is a judgment creditor of Wm. B. Hatch, and has levied an execution upon part of this land, and files this bill to set aside the conveyance as fraudulent. The answer denies the fraud, sets forth the debt it was made to secure, admits it to be only a mortgage, and admits the right of the plaintiff to satisfaction subject to his claim. *Held*: Fraud not being shown, the mortgagee will be protected, his claim to be first satisfied out of that portion not levied on, and any balance due to be satisfied out of the remainder; the plaintiff to make his debt out of the part levied on, subject to the above condition. *Chickering v. Hatch*,* 3 Sumn., 474.

§ 1937. When it appears that an insolvent debtor has divested himself of all his property in his endeavors to adjust his debts by an assignment for the benefit of his creditors, and that there has been no concealment of his assets and no attempt to appropriate any part of them to his own benefit or to the benefit of his family, a creditor's bill filed against him should be dismissed. *Myers v. Fenn*,* 5 Wall., 205.

§ 1938. To enforce lien of bonds.— Where the holder of bonds secured by a lien brings a bill in equity to enforce it, and brings the suit in behalf of himself and all others interested in the same issue of bonds, the bill must be treated as in the nature of a creditor's bill, and the decree must make provision for all other holders of the bonds, and declare the equality of the lien. *Trustees of Wabash & Erie Canal Co. v. Beers*,* 2 Black, 448.

§ 1939. In a proceeding to enforce the lien of a railroad mortgage the decree sustaining the mortgage is not conclusive as to the *bona fide* capacity in which the bonds are held. It only establishes the debt and entitles the individual bondholder to go into the master's office and establish the character of his claim. *Galveston Railroad v. Cowdrey*, 11 Wall., 459 (Conv., §§ 1297-1304).

§ 1940. Against municipal corporation.—Where a county is made subject to suit by a statute which provides that, when a judgment is recovered, the board of supervisors shall levy and collect the amount as other county charges, a creditor's bill will lie against the county to subject bonds and mortgages to the payment of a judgment, when they cannot be reached by *mandamus*, and execution on the judgment has been returned *nulla bona*. *Lyell v. Board of Supervisors of St. Clair County*, 8 McL., 580.

§ 1941. A county subscribed for stock in a certain railroad company and agreed to pay therefor with its bonds. A contractor who had done work for the company, the latter having become insolvent, and the county having imposed new and burdensome conditions upon the issue of the bonds, filed a bill in equity praying that the company might be decreed to assign its claim for the bonds to the complainant, and that the county commissioners might be decreed to issue them. There having been no assignment, legal or equitable, to the complainant by the company of its claim against the county, the complainant having no lien upon the fund which he was trying to reach, and there being no privity between the complainant and the county, it was held the bill was a common creditor's bill, which could not be sustained without a prior judgment at law establishing the measure and validity of the demand. *Smith v. Railroad Co.*,* 9 Otto, 398.

§ 1942. It is a well settled principle, that, where there is any fund to which a creditor has the right to resort for the enforcement of his contract, it will be followed by a court of equity. And the holders of the bonds of a municipal corporation may enforce the payment of the bonds in equity, where the legislature has, since their issue, legislated the corporation out of existence and erected another in its stead, so that there is no person upon whom service could be made in an action at law on the bonds, and no corporation in existence for the purpose of maintaining a suit at law. The real estate, which could have been resorted to for the payment of the bonds if the corporation had not been destroyed, being still there, and the power of taxation existing in the new corporation, the contract still exists, and equity will enforce it. *Beckwith v. City of Racine*, 7 Biss., 142.

§ 1943. Against delinquent stockholders.—The capital stock of a corporation, and any unpaid portions of such capital stock, being considered in equity as a trust fund specifically charged with the payment of the debts of the corporation, a court of equity, upon a bill properly framed, in a suit brought by and against all proper parties, will grant the equitable relief to which the creditors are entitled. *Winans v. McKean Railroad & Navigation Co.*, 6 Blatch., 215.

§ 1944. A judgment creditor of a corporation, after execution returned unsatisfied, may maintain an action in his own behalf and in behalf of such other creditors of the corporation as may unite to become parties thereto in a court of equity, against the corporation and its delinquent stockholders, and have a decree that an account of the debts and assets of the corporation be taken, and that the stockholders pay in and account for so much as may be due from them respectively to the corporation on account of their capital stock, as will be sufficient to pay the debts of the complainant and those joining with him. *Holmes v. Sherwood*, 3 McC., 405 (Corp., §§ 390-94).

§ 1945. Where, by the charter of a corporation, the stockholders are "liable and held bound . . . for any sum not exceeding twice the amount . . . of their . . . shares," it is held that this provision is for a proportionate liability by all the stockholders, and that, as the liability is not to any individual creditor, but for contribution to a fund, out of which all the creditors are to be paid alike, the appropriate remedy is by suit in equity by or for all creditors to enforce the contribution. *Terry v. Little*, 11 Otto, 216 (Corp., §§ 382-83).

§ 1946. To reach patent right.—A bill in equity lies by a judgment creditor to subject to the payment of his debt the interest of the judgment debtor in a patent right as patentee. *Ager v. Murray*, 15 Otto, 126.

§ 1947. What property can be reached.—A deed of trust provided that the trustee should permit the *cestui que trust* to enjoy the issues, rents and profits arising from the estate during his life; and that he should hold the trust, after the decease of the *cestui que trust*, for his wife and children, until the children should become of age; and that he should in the meantime apply the rents, issues and profits to the support, maintenance and education of the children. The deed also gave the *cestui que trust* and his wife a right to sell the property for the benefit of the children at any time prior to their coming of age. It was held, on a bill in equity by a judgment creditor of the *cestui que trust*, that he and his wife had no interest in the property which a court of equity could subject to the payment of the debt. *Starr v. Keefer*,* 1 MacArth., 166.

§ 1948. On a creditor's bill filed to reach certain assets of a judgment debtor which he had pledged to a national bank as security for a loan, the debtor having made an assignment of all his property for the benefit of his creditors before the passage of the bankrupt act of 1867, which assignment had not been impeached, it was held that the assets pledged had passed to the trustees under the assignment, and could not be reached by such a proceeding, although the loan to the bank for which the pledge was made might be void. *Stewart v. National Union Bank of Maryland*, 2 Abb., 424.

§ 1949. Where a judgment debtor had, in fraud of his creditors, conveyed certain land to one T., who further conveyed it to the son of the judgment debtor, the son being also a participator in the fraud, it was held that, though a court of equity would not interfere as between the judgment debtor and his son and T., it would interpose in behalf of creditors to reach the money advanced by the judgment debtor for the conveyance of the land to his son by T. *Odenheimer v. Hanson*, 4 McL., 487.

§ 1950. Where a debtor made a mortgage to his wife, and she became the purchaser under the foreclosure of the same, it was held that a judgment creditor, who was no party to such proceedings, was not precluded thereby from maintaining a creditor's bill to have the conveyance declared fraudulent. *Scottish American Mortgage Co. v. Follansbee*,* 9 Biss., 482.

§ 1951. As affected by bankruptcy.—By the institution and diligent prosecution of a suit by a creditor's bill, without collusion with the defendant, and in good faith, the complainant acquires a lien on the property of the defendant, which is not divested by a decree of bankruptcy entered upon a petition filed by or against the defendant subsequently to the full commencement of the suit. *Ex parte General Assignees*,* 1 N. Y. Leg. Obs., 115.

§ 1952. Process issued upon the filing of a creditor's bill to subject an equitable interest to the payment of a judgment, if served on the defendant before he files a petition in bankruptcy, constitutes a lien which is protected by the bankrupt law. *Clarke v. Rist*, 3 McL., 494.

§ 1953. Appointment of receiver.—Where, upon a creditor's bill, a receiver has been appointed, to whom a conveyance of the debtor's property has been made, and the debtor has become a bankrupt upon proceedings subsequently commenced, the creditor's bill creates no lien on the property, and application by the assignee in bankruptcy for the possession thereof must be made to the court of chancery. *Ex parte Waddell*,* 1 N. Y. Leg. Obs., 58.

§ 1954. On a creditor's bill praying for the appointment of a receiver for the purpose of bringing suits and generally investigating the affairs of the debtor, and taking possession of any equitable assets which he may have, the denial by the debtor and those charged as having colluded with him that they have ever had any such fraudulent dealings as ought to be set aside, or have in their possession any assets which they ought to surrender, will not prevent the granting of the relief, where the fact remains unchallenged that the debtor has made disposition of an immense amount of his estate without accounting for the proceeds of it, and has left much of his indebtedness unpaid. *Strong v. Goldman*,* 8 Biss., 552.

§ 1955. An order for the appointment of a receiver in a creditor's suit divests the defendant of all interest in the goods liable to execution, and creates a lien in favor of the complainants in the bill which cannot be displaced by subsequent proceedings in bankruptcy or a subsequent attachment, though they are prior to the appointment of the receiver. *Perego v. Bonesteel*,* 5 Biss., 66.

§ 1956. Conflicting liens.—A creditor held a double relation to a fund. He had, in common with certain persons, a debt which was a first and paramount lien on it; and he had, in common with certain other persons, a debt which was no lien, or, if any lien, only secondary and of very little value. In common with all those who held the prior lien he refused to surrender it. In common with those who held the other debts he surrendered his, and united with them in such arrangements as were supposed to be for their mutual benefit. There was no concealment as to the existence of his prior lien or the debt which it secured. On the contrary, the matters were all of public record. There was no evidence that this creditor used undue persuasion to get others to release their debts, or made improper representations. It was held that it was not in any manner inequitable for him to enforce his prior lien, which he had not surrendered. *Trustees of Wabash & Erie Canal Co. v. Beers*,* 2 Black, 448.

§ 1957. Parties to creditor's bill.—The judgment creditor who first institutes a suit in chancery to avoid a fraudulent conveyance by his debtor is entitled to relief, without regard to other creditors standing in the same right, but who have not made themselves joint parties with him. *McCalmont v. Lawrence*, 1 Blatch., 232.

§ 1958. The practice of permitting judgment creditors to come in and make themselves parties to the bill, and thereby obtain the benefit, assuming at the same time their portion of the costs and expenses of litigation, is well settled; and where parties thus join, and such joinder is acquiesced in by all parties, it will be considered proper, though no order permitting them to do so was made. *Myers v. Fenn*,* 5 Wall., 205.

§ 1959. **Creditor's acquiescence in conveyance as a defense.**—A creditor who, with full knowledge, acquiesces in a voluntary assignment which directs a payment which would be improper, and receives a dividend from the assignee upon his claim, cannot attack the assignment by means of a creditor's bill upon that ground. *Wilkinson v. Yale*,* 6 McL., 16.

V. RELIEF AGAINST JUDGMENTS.

SUMMARY—*Granting new trials, and setting aside judgments for fraud, etc.*, § 1960.—*Neglect of counsel*, § 1961.—*Failure to take advantage of legal defense*, § 1962.—*Grounds of interference*, §§ 1963, 1968, 1978.—*No relief where the fraud alleged was passed upon in the action at law*, § 1964.—*Writs of audita querela and injunctions*, § 1965.—*No relief for false return where there was an appearance*, § 1966.—*Failure to urge valid defense at law*, § 1967.—*Deprived of right by fraud, accident or mistake*, §§ 1968, 1978.—*Relief of sureties*, § 1969.—*Contract in violation of law*, § 1970.—*Where a party elects a separate action instead of pleading his set-off*, § 1971.—*Surprise*, § 1972.—*Reliance on oral promises as a defense to a note*, § 1973.—*Refusal to receive plea puis darrein continuance*, § 1974.—*Additional parties before the court*, § 1975.—*Setting aside decree of state court*, § 1976.—*Fraud of trustee; decree of foreclosure set aside*, § 1977.—*Default and motion for new trial overruled*, § 1979.—*Newly discovered evidence*, §§ 1980, 1992.—*Judgment on insurance policy recovered by fraud*, §§ 1981, 1990, 1992.—*Practice where the bill prays for an injunction and for general relief*, § 1982.—*Nature of the fraud for which equity will relieve*, §§ 1981, 1983.—*Decree of confirmation; lapse of time and death of parties*, § 1984.—*Relief in cases other than of fraud and collusion*, § 1985.—*Judgment on a note alleged to have been given for more than was due*, § 1986.—*Failure to plead illegality of consideration in defense to suit on note*, § 1987.—*Illegal contract; parties in pari delicto*, § 1988.—*Setting up ignorance and fraud*, § 1989.—*Cumulative evidence of fraud*, § 1991.—*Overvaluation of subject of insurance*, § 1993.—*Purchaser in possession of property alleging fraud in sale*, § 1994.—*Judgment founded on fraud and perjury; negligence*, § 1995.—*Judgment affecting real property enjoined in part*, § 1996.—*Proceedings of inferior boards or tribunals*, § 1997.

§ 1960. The practice of courts of law to entertain motions for new trial, and the dislike of one court unnecessarily to interfere with the proceedings in another, has caused an almost total disuse of the jurisdiction of equity to grant new trials in actions at law; but courts of equity still entertain bills to set aside judgments obtained by fraud, accident or mistake. *Metcalf v. Williams*, §§ 1998-2001.

§ 1961. Equity will not relieve one who had his day in court, from a judgment rendered against him, because it was rendered by the neglect of his counsel. That the attorney is insolvent and unable to respond in damages for his neglect will not give the court jurisdiction. *Rogers v. Parker*, §§ 2002-4.

§ 1962. One who has failed to take advantage of a legal defense cannot enjoin the execution of the judgment at law which he might have prevented. *Sample v. Barnes*, §§ 2005-6.

§ 1963. Equity does not interfere with judgments at law unless the complainant has an equitable defense of which he could not avail himself at law, because it did not amount to a legal defense, or had a good defense at law which he was prevented from availing himself of by fraud or accident, unmixed with negligence of himself or his agents. *Hendrickson v. Hinkley*, §§ 2007-9.

§ 1964. There can be no relief in equity against a judgment at law upon a note, upon the ground of fraud in the sale, which was the consideration of the note, where such fraud was pleaded in the action at law as a defense to the note, and the jury found against the defendant in the action; and where upward of six years elapsed after the sale and before the suit was brought, during which the vendee, not pretending any ignorance of the fraud during any considerable period of that time, did not offer to rescind the contract or return or offer to return the property. *Ibid.*

§ 1965. Formerly the law gave a remedy by a writ of *audita querela*, where a party who had a good defense was too late in making it in the ordinary forms of law; and courts of equity usually grant an injunction against a judgment, upon the same principle. *Humphreys v. Leggett*, §§ 2010-12.

§ 1966. Equity will not relieve the defendant from a judgment at law recovered after he appeared and pleaded, on the ground that the marshal returned the original writ executed on him when as a fact it had not been executed. *Walker v. Robbins*, § 2018.

§ 1967. Whenever a valid defense shall have existed at law, a party who has neglected to use it cannot set it up by bill in chancery to enjoin the judgment. Thus parties against whom judgment has been rendered on a note cannot enjoin the judgment for want of consideration of the note, when they have failed to make the defense in the suit at law. *Ibid.*

§ 1968. Where a party has been deprived of his right by fraud, accident or mistake, and has no remedy at law, a court of equity will grant relief. The complainant brought this bill to set aside a judgment rendered against him, on a check drawn by him, in the circuit court of the United States for the eastern district of Virginia. The circumstances relied on were that he did not owe the money, the check being that of a certain corporation of which he was president, and a surprise upon the complainant, who was misled by certain proceedings which took place in court. He had employed counsel to appear and plead to the action. On appearing at the clerk's office, the counsel were informed that it was usual to file pleas in open court. When the court came on at Richmond, the counsel called the attention of the judge to the case, and stated that they desired to have entered a plea of *nil debet*, and that some preliminary matters would have to be disposed of before reaching the merits. The judge informed them that he had ordered all cases against persons in complainant's district to be tried at Alexandria, and the counsel thereupon said that they would wait until the term began at Alexandria to dispose of the said preliminary questions. On appearing at Alexandria to try the cause the counsel were informed that the plea of *nil debet* had not been noted by the clerk, and that judgment had already been rendered at Richmond as in a case in which no plea had been filed. They moved to reinstate the cause, but the judge, doubting his authority to do this after the term, denied the motion. It was decided that the complainant was entitled to relief in equity without regard to the correctness of the ruling of the judge denying his motion to reinstate the cause. *Metcalf v. Williams*, §§ 1998-2001.

§ 1969. The sureties upon the bond of a United States collector, against whom judgment has been rendered on the bond, cannot claim the interference of a court of equity to enjoin the collection of the judgment, because the collector surrendered the moneys of the United States to a commander of the Confederate forces, in obedience to his order, without force being used or threatened. *Rogers v. Parker*, §§ 2002-4.

§ 1970. Defendant imported and sold in Mississippi, contrary to and in violation of her constitution and laws, a number of slaves, taking in payment a bill of exchange indorsed by complainant with knowledge of the facts. The bill not being paid another was given with complainant as indorser, and upon this second bill judgment was had against complainant, who now seeks to have all the undertakings growing out of said sale of negroes declared void and the judgment against him perpetually enjoined, on the ground that the sale of the negroes was in violation of the constitution and laws of Mississippi. *Held*, that complainant could obtain no relief from a court of equity. *Sample v. Barnes*, §§ 2005-6.

§ 1971. Whatever may be the limits of the original jurisdiction of courts of equity in matters of set-off where a party sued at law has a right to set off his claim or resort to his separate action, and he deliberately elects the last, he cannot come into a court of equity, seeking relief from the judgment at law and ask to be permitted to make a different determination, and to be restored to the right which he has voluntarily waived. Similar considerations are fatal to relief against the judgment upon the ground that defendant resides out of the state, and that therefore he should have the aid of a court of equity to subject the judgment at law to the payment of his claim. When a party has waived his legal remedy equity will not interfere. *Hendrickson v. Hinckley*, §§ 2007-9.

§ 1972. Defendants against whom judgments had been rendered at law on certain notes filed a bill in equity against the plaintiffs in the judgment and one of the defendants, for relief against said judgments, alleging that, on the trial, letters from the common defendant, containing admissions adverse to the defense, were read in evidence, and that such defendant was not truly informed concerning the subjects on which he wrote, and that until the letters were produced at the trial the complainants were not aware of their existence, and so were surprised. It was held that all the defendants in the original action being interested in the purchase and ownership of the property for which the notes were given, and there being no allegation of collusion between the common defendant and the plaintiffs in the original action, the complainants could not be allowed to allege the surprise; and also that if there was surprise, a motion for delay or for a new trial afforded a complete remedy at law. *Ibid.*

§ 1973. A bill in equity to restrain the execution of a judgment upon a note cannot be sustained on the ground of promises alleged to have been made by the agent of the respondent concerning the time and mode of payment of the notes when they were given, since these promises could not be availed of in any court as a defense to the note. To allow them such effect would be to alter written contracts by parol evidence, which cannot be done in equity any more than at law, in the absence of fraud or mistake. *Ibid.*

§ 1974. After the commencement of a suit against a surety on a sheriff's bond, and after the case was sent back from the supreme court to the circuit court of the United States with directions that judgment be entered against the surety, he offered to plead payment of his bond *pais darrein continuance*, the whole penalty of the bond having been collected under state process by levy and sale of the surety's property after the institution of the suit and before the obtaining of the judgment; but the lower court refused to hear it, on the ground that the mandate of the supreme court was imperative to enter judgment for the plaintiff. *Held*, that the surety was entitled to an injunction against the judgment. *Humphreys v. Leggett*, §§ 2010-12.

§ 1975. Where, in a direct proceeding to set aside a decree of another court, there are parties before the court other than those who were before the court in which the decree was rendered, and it is charged that the decree was fraudulent, the court can entertain jurisdiction, and, if the fraud is proved, can prevent all parties who are before it from enforcing the decree, and from obtaining any advantage from a sale made under it. The court acts upon the decree and sale through the parties who are before it and not directly upon the decree. *Sahlgard v. Kennedy*, §§ 2014-15.

§ 1976. A federal court may maintain a bill to set aside a decree of a state court on the ground that it was obtained by fraud, where the proceeding is not merely tantamount to a motion to set aside a judgment for irregularity, or to a writ of error, or to a bill of review or an appeal. *Ibid*.

§ 1977. If a trustee in a deed of trust to secure creditors combines with a part of the creditors secured by the deed to aid them in purchasing the trust property at a foreclosure sale to the exclusion of the others, such trustee also having in his possession as agent the evidences of debt belonging to the creditors with whom he has combined, and the property through the act of the trustee passes into the possession of those creditors at a price much less than its value, such a purchase cannot be considered equitable; and a bill in equity to set aside a decree of foreclosure and a sale, charging such facts, is not demurrable, but states sufficient equities to demand an answer. *Ibid*.

§ 1978. A court of equity will not relieve against a judgment at law except in cases where the injured party has had a verdict or judgment rendered against him in consequence of accident, or mistake, or fraud of the other party, without any fault of his own, and has no remedy, or has, without his fault, lost his remedy at law. *Railroad Co. v. Neal*, §§ 2016-18.

§ 1979. After a judgment at law upon an inquest of damages taken upon default, and a motion to set aside the judgment and grant a new trial made and overruled, a court of equity will not entertain a bill for relief against the judgment, though it is asked upon the grounds urged for a new trial, viz., that the defendants were prevented from making an existing valid defense by the misapprehension of their attorney, and upon the further ground that they did not have a full and fair hearing upon the motion because of the indisposition of their attorney. *Ibid*.

§ 1980. Newly-discovered evidence, to afford a ground for equitable relief against a judgment at law, must be sufficient to prove fraud and injustice in the judgment; and it must also appear that the complainant has used due diligence to procure the testimony for the trial. *Trefz v. Knickerbocker Life Ins. Co.*, §§ 2019-20.

§ 1981. Equity has jurisdiction to grant relief against a judgment at law on the ground of fraud, whether the fraud was in the transaction or the instrument on which the action arose, or in the trial and manner of obtaining the judgment. It has jurisdiction to relieve against a judgment on insurance policies, on the ground that they were obtained by the fraud of the beneficiary and the assured; that the fraud was unknown to the complainant at the time of the trial, although it was suspected and due efforts made to find evidence of it; and that it was known and concealed by the beneficiary on the trial, so that a verdict was fraudulently obtained in her favor. *Ibid*.

§ 1982. Where the specific prayer of an equity bill is that a judgment at law may be set aside for fraud, and also for an injunction and general relief, it is the practice in equity, unless the case discloses some defense peculiar to courts of equity and which would be unavailable at law, to decline to go farther than to set aside the judgment and leave the parties to a new trial in the original forum. This is especially so where the prayer of the bill is for an injunction. Bills of this sort are usually called bills for new trial. *Ibid*.

§ 1983. The acts for which a court of equity will on account of fraud set aside or annul a decree or judgment, between the same parties, rendered by a court of competent jurisdiction, have relation to frauds extrinsic or collateral to the matter tried by the first court, and not to a fraud in the matter on which the decree was rendered. It was so decided where a decree of a board of land commissioners and also one of the district court, both confirming a claim under a Mexican grant, were sought to be set aside on the ground that the grant or concession

on which the confirmation was made was false and fraudulent, and supported by the depositions of perjured witnesses, the validity of the grant or concession being the only thing controverted in the proceedings before the commissioners and the district court. *United States v. Throckmorton*, §§ 2021-26.

§ 1984. A bill was filed in equity to set aside a decree of a board of land commissioners, and also one of the district court, both confirming a claim under a Mexican grant, the ground being that the grant or concession on which the confirmation was made was false and fraudulent. The case underwent the scrutiny of two judicial tribunals, and of the attorney-general of the United States as well as that of his subordinate, and was before them for a period of five years' litigation. The bill was filed more than twenty years thereafter, during which time the claimant and person charged with the guilt of the fraud had died. His heirs were not made parties, and the land had passed by conveyance to the defendants, who were charged to have taken with notice. It was held that, although the government was not bound by the statute of limitations, the bill should, under such circumstances, present on its face a clear and unquestioned ground of equity jurisdiction. *Ibid.*

§ 1985. Equity will not relieve against a judgment at law, in cases other than those of fraud or collusion, unless it clearly appears that to allow the judgment to be executed would be contrary to equity and good conscience, and that the facts which render it inequitable were unavailable as a defense in the action in which the judgment was recovered, without any fault or negligence of the losing party. Thus, in a case where the pleadings presented clearly every matter in issue between the parties, the trial was regular, and no exceptions were taken, the absence of one of the counsel employed by the defendant furnishes no ground for equitable relief, where it does not appear that the party might not have employed another equally competent to conduct the defense; nor does the allegation that one of the witnesses was sick during the examination, so that it impaired his recollection and rendered him incapable of stating material facts within his knowledge, where no continuance or postponement was asked; nor that the defendant was unable to procure certified copies of certain court records, this being a good ground for a continuance, and secondary evidence being admissible. *Crim v. Handley*, §§ 2027-2029.

§ 1986. The complainant sought to enjoin a judgment in favor of the respondent on a note for \$10,000 given by the former to the latter, on the ground that it was given for a debt of only \$4,000, the respondent desiring to use the same as collateral security on which to raise money, and agreeing not to sell or dispose of the same or urge the complainant for the payment thereof, but to indulge him until he could make collections. There was no allegation in the bill that adequate relief could not be had at law. There was no charge of fraud, or that the note had been assigned contrary to the agreement, or that by contrivance or unfairness of the respondent a remedy was not had at law. There was nothing in the bill from which the court could infer the necessity of the discovery sought for. It was decided that a demurrer to the bill had rightly been sustained by the lower court. *Hungerford v. Sigerson*, § 2030.

§ 1987. A defendant against whom a judgment has been rendered on a promissory note, in a proceeding in which the consideration was fully open to investigation, cannot come into equity for relief against the judgment on the ground of the illegality of the consideration, after he has failed to set up this defense in the suit at law, and executed a forthcoming bond equivalent to a confession of a second judgment. *Creath v. Sims*, §§ 2031-34.

§ 1988. A court of equity will not relieve a judgment debtor from the judgment, where he alleges as a ground for relief that the obligation on which the judgment was rendered and to which he voluntarily became a party was intentionally made in fraud of a statute prohibiting such contracts. The parties being *in pari delicto*, the court will leave them just where they have placed themselves. It was so held where the complainant alleged that the notes on which the judgment was rendered against him were given for the purchase of certain slaves, the contract being in reality and designed to be in fraud of the constitution and laws of Mississippi forbidding the introduction of slaves as merchandise within the state. *Ibid.*

§ 1989. One against whom a judgment had been rendered as garnishee of a bank brought a bill to enjoin the enforcement of the judgment, alleging that he had a good defense to a large part of the judgment which he was ignorant of at the time; that he was entitled to pay the original debtor, the bank, its own depreciated notes in discharge of any balance due to it; and that through fraud between the bank and the respondents the demand against him had been assigned to them, and he had been sued as garnishee of the bank in order to exclude the payment in its notes. It was held that the bill was not demurrable, the jurisdiction being clear upon the ground of the fraud alleged, and the ignorance of the defense being considered as a plausible reason in favor of the injunction. *Davis v. Tileston*, §§ 2035-39.

§ 1990. In a suit for equitable relief against a judgment upon an insurance policy on the

ground of fraudulently casting away the vessel and boring holes in her, it cannot be objected on demurrer that the defense of fraud was made at the trial and did not prevail, where this is not admitted in the bill. *Ocean Insurance Company v. Fields*, §§ 2040-48.

§ 1991. Mere cumulative evidence of fraud or of any other leading fact not discovered since the trial will not ordinarily authorize the interference of a court of equity to grant relief against a judgment. But where the defense has been imperfectly made out at the trial from the defect of real and substantial proofs, although there were some circumstances of a doubtful character or some presumptions of a loose and indeterminable bearing before the jury, and afterwards newly discovered evidence has come out, full, and direct and positive to the very point in controversy, it has never been decided that a court of equity will not interfere to grant relief and to sustain a bill to bring forth and try the force and validity of the newly discovered evidence. *Ibid.*

§ 1992. If a bill in equity charge a public crime committed by the defendant, that may constitute good ground against compelling him personally to a discovery thereof. But it will not prevent relief in equity against a judgment on an insurance policy on the ground of newly discovered evidence of fraud on the part of the plaintiff in the judgment in casting away the vessel and boring holes in her bottom, that the act charged constitutes a felony. Especially is this so where the felony, if any, was committed on board of a British vessel by a British subject and within British waters, and therefore punishable only by British laws. *Ibid.*

§ 1993. A fraudulent overvaluation and misrepresentation of the value of the subject-matter of insurance will avoid a policy of insurance; and, if unknown at the time of the suit and judgment on the same, is a proper ground for equitable interference. *Ibid.*

§ 1994. A purchaser of personal property who is in unmolested possession cannot invoke the aid of a court of equity to recover a part of the purchase money recovered by judgment against him, and to enjoin the collection of the balance on the ground that the sale was void as against the law, and that the vendor had no title, when the facts were known to him at the time of the action against him, and no interference with his possession is threatened. *Truly v. Wanzer*, § 2044.

§ 1995. A judgment will not be set aside upon an original bill upon the ground that it was founded upon a fraudulent instrument or perjured evidence, when there were no hindrances besides the negligence of the defendant in presenting the defense in the first suit. *Brooks v. O'Hara*, §§ 2045-48.

§ 1996. A judgment at law affecting the title to real property may be enjoined in part only and allowed to stand as to part. *Dunlap v. Stetson*, §§ 2049-58.

§ 1997. With the proceedings and determinations of inferior boards or tribunals of special jurisdiction courts of equity will not interfere, unless it becomes necessary to prevent a multiplicity of suits or irreparable injury, or unless the proceeding sought to be annulled or corrected is valid upon its face, and the alleged invalidity consists of matters to be established by extrinsic evidence. In other cases the review and correction of the proceedings must be obtained by the writ of *certiorari*. So where a bill was filed to enjoin the enforcement of certain judgments rendered against the complainant by the mayor of St. Louis for the amount of alleged benefits to his property from the opening of a street in that city, which set forth, as grounds of relief, a want of authority in the mayor, and various defects and irregularities in the proceedings, a demurrer was sustained on the ground that a court of equity had no jurisdiction of the matter and that the complainant had a plain, adequate and complete remedy at law. *Ewing v. City of St. Louis*, §§ 2059-60.

[NOTES.— See §§ 2061-2113.]

METCALF v. WILLIAMS.

(14 Otto, 98-99. 1881.)

APPEAL from U. S. Circuit Court, Eastern District of Virginia.

Opinion by MR. JUSTICE BRADLEY.

STATEMENT OF FACTS.— This was a bill in equity filed for setting aside a judgment at law, the rendering and entry of which, as alleged, were a surprise upon the complainant, who was misled by certain proceedings which took place in the court. The complainant was sued personally upon a check drawn by him, as he contends, officially, as the vice-president of the Montpelier Female Humane Association of Orange county, Virginia, an incorporated asso-

ciation of that state, having its office in the city of Alexandria. The check was in these words, to wit:

"No. .]

ALEXANDRIA, VA., Oct. 2, 1875.

"The First National Bank of Alexandria, Va., pay to the order of A. E. & C. E. Tilton seven thousand $\frac{7}{100}$ dollars.

"E. P. AISTROP, Sec'y.

W. G. WILLIAMS, V. Pres't."

The action was brought in the circuit court of the United States in the name of Charles E. Tilton, as surviving partner of himself and Alfred E. Tilton [the payees of the check], for the use and benefit of Ferdinand Metcalf. The writ was returnable on the first Monday of July, 1877, declaration filed at that time, and judgment ordered unless defendant should appear and plead to issue at the next rules, namely, first Monday of August, 1877. At the latter day the rule was confirmed, and on the 17th of October, 1877, during the sitting of the court at Richmond, final judgment was moved and entered. The circumstances on which the bill relies for setting aside this judgment are, that the complainant does not owe the money, and made arrangement to have the claim properly litigated; that in September, 1877, he employed counsel to appear and plead to the action; that the said counsel, appearing at the clerk's office, was informed by the clerk that it was usual to file the pleas in open court; that when the court came on in October, and before the judgment was entered, the said counsel called the attention of the judge to the case, and stated that he desired to have entered the plea of *nil debet*, and to call the attention of the court to some preliminary questions which would have to be settled before a trial could be had on the merits; that the judge informed him that he had ordered all cases against persons living in the congressional district in which defendant resided to be tried in Alexandria; and that the counsel for plaintiffs were residents of Alexandria and were not then in court, and probably kept away from the knowledge of the fact that this suit, under the rule, would be tried there; that thereupon the counsel said he would not press the matter further, but would wait until the court commenced its term in Alexandria to have said preliminary questions disposed of; that he supposed that the formal plea of *nil debet* had been noted by the clerk, it not being usual in the state courts to write out the plea of the general issue, but simply for the clerk to note it on the record. The judgment was afterwards entered without the knowledge of complainant or his counsel. When the court came on at Alexandria, in January following, the complainant's counsel attended for the purpose of trying the cause, and was informed that no plea had been entered on the record at Richmond, and the case was not on the docket for trial. Being taken by surprise, he moved the court to reinstate the cause upon the docket; but the judge, doubting his authority to do this, refused the motion. By an amendment to the bill, the complainant states that the check sued on was not his check, but the check of the Montpelier Female Humane Association, the corporation before referred to, of which Metcalf, for whose use the action was brought, was general agent in the city of New York, and of which the complainant was vice-president, and E. P. Aistrop was secretary,—which association was doing business as a public corporation, and all persons dealing with it dealt with it as such; that the check was signed by complainant and by Aistrop in their official characters, of which Metcalf was fully cognizant, and knew that the check was not the individual paper of complainant. Letters of Metcalf, dated in December, 1875, are annexed to the bill, showing that he recognized and treated the check as the check of the

association. Tilton, the nominal plaintiff in the action at law, and Metcalf, for whose use it was prosecuted, were made defendants to the bill, and filed a demurrer thereto.

§ 1998. *When abatement is the proper plea.*

Upon the argument, the demurrer was overruled, and thereupon it was agreed by the counsel of both parties that the court should finally dispose of the case upon the merits, and a decree was rendered for the complainant on two grounds: first, that he was not personally bound by the check,—in other words, that it was not his check, but the check of the corporation; and, secondly, that Aistrop was not joined in the action. The latter ground is untenable, because non-joinder of a defendant in an action *ex contractu* can be taken advantage of only by a plea in abatement. But, upon the other ground, we think that the decree was correct.

§ 1999. *Equity will relieve when the party is without remedy at law.*

First, however, it is proper to inquire whether sufficient cause was shown in the bill for setting aside the judgment. It is manifest that the judgment was a surprise upon complainant. After what passed in the court at Richmond, his counsel had a right to suppose that the cause would be tried in the ensuing term at Alexandria. The practice in Virginia as to entering pleas of general issue on the record sufficiently accounts for the omission to file a formal plea. Had not the term passed by, the district judge would undoubtedly have set aside the judgment, and reinstated the cause on the docket for trial. If, as he supposed, the passage of the term deprived him of power to do this, it became a proper case for equitable interference by bill. When a party has been deprived of his right by fraud, accident or mistake, and has no remedy at law, a court of equity will grant relief. Perhaps, in view of the equitable control over their own judgments which courts of law have assumed in modern times, the judgment might have been set aside, on motion, for the cause set forth in the bill; but if this were true, the remedy in equity would still be open; and the fact that the court declined to exercise the power upon motion, rendered the resort to a bill necessary and proper. Formerly bills in equity were constantly filed to obtain new trials in actions at law, a practice which still obtains in Kentucky, and perhaps in some other jurisdictions; but the firmly settled practice by which courts of law entertain motions for new trial, and the dislike of one court unnecessarily to interfere with proceedings in another, have caused an almost total disuse of that jurisdiction. Courts of equity, however, still entertain bills to set aside judgments obtained by fraud, accident or mistake.

§ 2000. *When express disclosure of agency not necessary.*

As to the merits of the case, we agree with the court below in holding that, according to the showing of the bill, and as between the parties, the check sued on was the check of the Montpelier Female Humane Association, and not the individual check of the defendant. There is nothing on its face to preclude this construction. The bank was requested by two persons, who sign themselves as officers, one as vice-president and the other as secretary, to pay a certain sum. Whether they made this request as officers or as individuals is ambiguous, to say the least. It is evident that an inquiry into the circumstances of the case might render it certain which was intended; as, if the bank had an account with a corporation, of which these persons were the officers designated; if they had been in the habit of checking on that account in that form, with the knowledge and consent of the corporation, and the bank had been in the habit of answering such checks accordingly; and if all this were

known to the party taking the checks,—it would be a construction contrary to truth to hold them to be personal checks of the individuals, and not the checks of the corporation. The bill states as facts that the check in question was the check of the association; that the defendant and Aistrop acted as officers only in drawing the check; and that Metcalf, for whose use the suit was brought, was the general agent of the association, and knew and understood the facts, and treated the checks as the checks of the association. Under these circumstances it would be unjust, as between these common agents of the same corporation, to hold the complainant and Aistrop personally responsible on the check. Where a person acts merely as agent of another, and signs papers in that capacity, that is, signs them as agent, and the party with whom he deals has full knowledge of his agency and of the principal for whom he acts, an express disclosure of the principal's name on the face of the papers, or in the signature, is not essential to protect the agent from personal responsibility.

It is unnecessary to determine whether the form of the document in this case was sufficient to charge innocent holders of the check with notice of its character. The fact that it bore two official signatures, that of the complainant as vice-president and of Aistrop as secretary, is so unusual on the hypothesis of its being an individual transaction, and points so distinctly to an official origin, that it may very well be doubted whether any holder could claim to be innocently ignorant of its true character. But, in the present case, the party claiming to have the beneficial interest in the check was a fellow-agent of the company on whose account it was drawn, actually knew its origin, and cannot pretend that he took it for anything else than a check of the corporation. The plea that the name of the principal was not disclosed on the face of the paper cannot be made by him, for he knew all about it.

The remarks of Mr. Justice Johnson, in delivering the opinion of this court in the case of *Mechanics' Bank v. Bank of Columbia*, 5 Wheat., 326 (AGENCY, §§ 45, 46), are apposite to this case. There the cashier of the bank drew a check and signed it with his individual name without any official designation; but the name of the bank was printed as part of the date. The justice said: "The question is whether a certain act, done by the cashier of a bank, was done in his official or individual capacity. Had the draft signed by Paton borne no marks of an official character on the face of it, the case would have presented more difficulty. But if marks of an official character not only exist on the face, but predominate, the case is really a very familiar one. Evidence to fix its true character becomes indispensable." Again, in reference to the ambiguity raised on the face of the check as to whether it was personal or official, the justice said: "It is enough for the purposes of the defendant to establish that there existed on the face of the paper circumstances from which it might reasonably be inferred that it was either one or the other. In that case it became indispensable to resort to extrinsic evidence to remove the doubt. The evidence resorted to for this purpose was the most obvious and reasonable possible, viz., that this was the appropriate form of an official check; that it was in fact cut out of the official check-book of the bank, and noted on the margin; that the money was drawn in behalf of and applied to the use of the Mechanics' Bank; and by all the banks, and all the officers of the banks through which it passed, recognized as an official transaction."

In *Brockway v. Allen*, 17 Wend. (N. Y.), 40, where the makers of a note appended to their signatures the words "Trustees of the Baptist Society," the

supreme court of New York held that they were entitled to show by proof that there was a corporation called The Trustees of the First Baptist Society of the village of Brockport; that they were its trustees; that the note was given by them in their official capacity, and that the plaintiff, the payee, knew this fact.

In *Kean v. Davis*, 21 N. J. L., 683, the bill was signed "John Kean, President Elizabeth & Somerville R. R. Co." The court of errors and appeals of New Jersey, in an elaborate opinion by Chief Justice Green, decided that parol proof was admissible to show that the bill was the bill of the company, and not of the defendant individually; and held that, although where a written instrument is not ambiguous or uncertain on its face, parol proof cannot be resorted to to show what was the real intention of the parties, yet, that in cases of ambiguity on the face of the instrument, as in that case, it might be introduced to explain which of two doubtful constructions was the intent of the parties.

§ 2001. *The effect of the addition of such words as "agent," "trustee," "treasurer," to a signature.*

The ordinary rule undoubtedly is, that if a person merely adds to the signature of his name the word "agent," "trustee," "treasurer," etc., without disclosing his principal, he is personally bound. The appendix is regarded as a mere *descriptio personæ*. It does not of itself make third persons chargeable with notice of any representative relation of the signer. But if he be in fact a mere agent, trustee or officer of some principal, and is in the habit of expressing, in that way, his representative character in his dealings with a particular party, who recognizes him in that character, it would be contrary to justice and truth to construe the documents thus made and used as his personal obligations, contrary to the intent of the parties.

It is hardly necessary to review the long catena of decisions on this subject. They are very numerous, and somewhat conflicting, but we do not think that there is any preponderating authority which prevents us from giving to the instrument in question that construction and effect which was given to it by the parties themselves. Decree affirmed.

ROGERS v. PARKER.

(Circuit Court for Virginia: 1 Hughes, 148-158. 1877.)

Opinion by HUGHES, J.

STATEMENT OF FACTS.—Jesse J. Simpkins, at the outbreak of the war, was collector of customs at the port of Norfolk. The complainants were sureties on his official bond. In the month of January, 1871, the United States obtained a judgment in this court on the bond for \$11,795.58, which has never been satisfied.

The bill prays for an injunction to restrain all proceedings under the said judgment to collect it, and the prayer of the bill is based on two grounds: 1. That said judgment was rendered in the absence of the complainants and of their counsel, who had been employed to defend the action, and *who had entered an appearance in the action*, and that its rendition did not come to the knowledge of the complainants or to their counsel until the same had become absolute. That the counsel thus employed is insolvent, and unable to respond in damages should a judgment be obtained by complainants against him for his neglect of duty in not defending said action.

§ 2002. *Equity will not relieve one who has had his day in court against a judgment obtained through the neglect of his attorney.*

There is no more fully settled principle of equity jurisprudence than that a party who has had "his day in court," and against whom judgment has been rendered at law, is not entitled to the interference of a court of equity by granting an injunction to the judgment, unless it be clearly shown that it would be inequitable and "against good conscience" to enforce said judgment, and that the same was rendered without default or negligence on the part of the defendants or their agents. No case can be cited where the contrary has been held, while in favor of the proposition as laid down, a long train of decisions of the highest courts in this country and in England can be adduced.

"It is to the interest of the republic that there be an end of suits." Parties, therefore, will not be allowed to relitigate in a court of equity matters passed upon by a court of law, and to which opportunity was afforded to appear and make defense. If it were otherwise, there would literally be *no end of litigation*, and litigious persons would be encouraged to neglect their causes at law by an assurance that a ready ear would be lent by courts of equity to their applications to reopen the controversy. This would not only be against public policy, as tending to *prolong*, instead of ending, litigation, but would work manifest injustice to those suitors whose causes, not yet litigated, are awaiting hearing.

§ 2003. — *authorities reviewed.*

It is unnecessary, however, to enlarge upon a principle so very often expressed by the ablest judges this country has produced. The leading case upon the subject in this country is the case of *The Marine Insurance Co. v. Hodgson*, 7 Cranch, 333. In that case Chief Justice Marshall, in delivering the opinion of the court, says (p. 336): "It may safely be said that any fact which *clearly proves it to be against conscience* to execute a judgment, and of which the injured party *could not* have availed himself in a court of law, or of which he might have availed himself at law, but was prevented by fraud or accident, *unmixed with any fault or negligence in himself or his agents*, will justify an application to a court of chancery. On the other hand, it may with equal certainty be laid down as a general rule that a defense cannot be set up in equity which has been fully and fairly set up at law, although it may be the opinion of that court that *the defense ought to have been sustained at law*." In this case the complainants sought relief "from a judgment on account of a defense which, if good anywhere, was good at law, and which they were *not prevented by the act of the defendants*, or by any pure and unmixed accident, from making at law" (pp. 336-7). See, also, *Foster v. Wood*, 6 Johns. Ch., 89.

In the case of *Truly v. Wanzer*, 5 How., 142 (§ 2044, *infra*), the complainants prayed a perpetual injunction to a judgment at law on the ground that the contract upon which the judgment was rendered was illegal. But the supreme court said: "Even if the alleged illegality of the contract would have constituted an available defense to the payment of the note, it would be a strange abuse of the functions of a court of equity to grant an injunction against enforcing a judgment at law because a purchaser, with a full knowledge of his defense, had omitted to urge it" (p. 142).

In the case of *Creath v. Sims*, 5 How., 192 (§§ 2031-34, *infra*), the complainants prayed an injunction to a judgment at law, on the ground, among others, that the contract upon which judgment was obtained was illegal, and that

"the judgment was in fraud of the defendant's rights." In the course of the opinion of the supreme court the following language is used: "Whenever a competent remedy or defense shall have existed at law, the party who may *have neglected to use it* will never be permitted here (in a court of equity) to supply the omission, to the encouragement of useless and expensive litigation, and perhaps to the subversion of justice."

It has been held in Arkansas that "a judgment at law will not be enjoined merely on account of *the negligence*, unaccompanied by fraudulent combination or connivance, *of the defendant's attorney*." *Wynn v. Wilson*, Hemp., 698. The law upon the subject has been very clearly laid down in a number of cases by the Virginia court of appeals, and especially in two recent decisions by that court. In the case of *Enquirer Company v. Robinson*, 24 Gratt., 548, it is held that "equity will only relieve against a judgment at law, if the omission of the defendant to avail himself of his defense at law was unmixed with any negligence in himself *or his agents*." In the same case, at page 552, the court says: "This rule is absolutely inflexible, and cannot be violated even when the judgment is manifestly wrong in law or fact, or when the effect of allowing it to stand will be to compel the payment of a debt which the defendant does not owe, or which he owes to a third person."

In the case of *Wallace v. Richmond*, Assignee, a case like this, in which relief from a judgment at law was prayed for, on the ground of the negligence of defendant's attorney in not pleading and making defense at law, and in which the facts seem to be stronger in favor of complainant than in the case at bar, the Virginia court of appeals refused to grant the relief prayed for, and affirmed the decree of the court below dismissing the bill. 26 Gratt., 67. See all the authorities upon the subject referred to and commented upon in second volume L. Cases in Equity, 1335, etc. "A party cannot have relief in equity because he has lost the benefit of a good defense in consequence of the ignorance, mistake or *negligence of his attorney*, however clearly it may appear that a cause was sacrificed which might have been successfully defended." L. C. in Equity, p. 1335, and cases there cited.

From these authorities it will appear that the mere fact of the insolvency of the agent, by whose neglect the judgment at law complained of was rendered, will not suffice to give jurisdiction to a court of equity to grant an injunction. And the reason is obvious. Parties can select whom they please as counsel. If they, therefore, choose to retain a negligent attorney, who is at the same time insolvent and unable to respond in damages for his neglect, they have no one but themselves to blame for their choice and its consequences.

The case of *Holland v. Trotter*, 22 Gratt., 136, is not an authority in this case. There the defendant at law was prevented from employing counsel and making defense to the action in consequence of the promises and representations made to him by the plaintiff's attorney, who induced him to believe that the plaintiff would abandon the suit, and that it would therefore be unnecessary for him (the defendant) to make defense or trouble himself further about the matter. Notwithstanding, judgment was afterwards, without notice or retraction of these promises, rendered against him. To have held otherwise would have been a shock to all sense of propriety and fair dealing. It would have been judicially declaring the plaintiff entitled to the fruits of his fraud upon an innocent party. Such is not this case. The bill contains no allegation of imposition or fraud practiced upon the complainants by the attorney of the United States, who obtained the judgment, and who now, as attorney

for the complainants, seeks to have it perpetually enjoined. See also the decisions in *Scott v. Hore* and *In re Ferguson*, reported elsewhere in this volume [see 1 Hughes, 163, and 2 Hughes, 286].

§ 2004. *What is vis major which will relieve an officer for surrendering public funds to the enemy in time of war.*

2. As to the second ground upon which relief is prayed for in this case. It is alleged in the bill that the commander of the Confederate forces at Norfolk, in 1861, demanded of the collector the moneys of the United States in his hands, and that there was at hand an ample force to compel obedience to the demand. Nevertheless, *no attempt to use force was made, or even threatened*, to compel the payment of the money, and the collector himself did substantially what General Huger required, viz., surrendered the fund to a hostile government at war with the United States, to wit, the *de facto* state government at Richmond. It thus appears that no steps were taken to enforce the demand of General Huger, and that, therefore, the question of "*forcible seizure*" does not arise in this case, as in the case of *United States v. Thomas*, 15 Wall., 341 (Bonds, §§ 266-73), upon which the complainants' counsel relies. Moreover, in the case just referred to stress is laid by the court on the fact that Thomas, the surveyor of customs at Nashville, and the principal defendant, was shown to have been *loyal*, and not one of the insurrectionists willingly co-operating with the public enemies. No such allegation is made with respect to Simpkins, and the presumption is the other way. This case, therefore, comes strictly within the rule laid down by the supreme court in the case of *United States v. Keiler*, 9 Wall., 87, and the demurrer to the bill must be sustained.

SAMPLE v. BARNES.

(14 Howard, 70-76. 1852.)

APPEAL from U. S. Circuit Court, Southern District of Mississippi.

Opinion by MR. JUSTICE DANIEL.

STATEMENT OF FACTS.—In their bill filed in the circuit court it is alleged by the appellants that in the month of October, 1836, the appellee, Barnes, in conjunction with one Dunett, introduced from other states of the Union into the state of Mississippi, and in violation of her constitution and laws, a number of negro slaves for the purpose of being sold as merchandise. That in execution of the design for which they were introduced, a number of those slaves were sold by the appellee to one Thomas B. Ives, from whom he took in payment a bill of exchange, bearing date in October, 1836, drawn by Ives on N. & J. Dicks, of New Orleans, and indorsed by the appellant, Sample, and one G. A. Thompson. That this bill, being presented first for acceptance and subsequently for payment, was in each instance refused by the drawees, but was not protested either for non-acceptance or non-payment. That after these transactions, upon some agreement between Barnes and Ives, a second bill of exchange was, in 1837, drawn by the latter upon the firm of Ford, Markham & Co. for \$5,916.66, at ten months after date, and was indorsed by the appellant, Sample, and by George A. Thompson, the indorsers of the previous bill, and was substituted in lieu thereof. That this second bill was not paid; but whether it was protested, or whether notice of its dishonor was ever given, the appellant, Sample, states that he was unable to recollect. That Barnes, being urged by Sample to sue Ives immediately for the amount of the

second bill, instead of complying with this direction, took a deed of trust on certain property of Ives, stipulating in this deed to give further time for the payment of the bill; and that this deed of trust, and the agreements therein contained, were made without the knowledge and against the consent and directions of the appellant, Sample, and in fraud of his rights as a surety. That a suit having been instituted in the circuit court of the United States for the southern district of Mississippi against Sample, as the last indorser of the bill of exchange drawn on Ford, Markham & Co., the said Ives, upon information being given him of that fact by Sample, assured him that he need not feel any uneasiness on that account, as he, Ives, had employed able counsel to defend him in that suit. That subsequently to this assurance from Ives, in a conversation of the appellant, Sample, with Barnes, the latter promised him that if Ives would confess a judgment in the state court for the amount of the bill, he, Barnes, would dismiss the suit he had instituted against the appellant as indorser of that bill. That upon communicating to Ives the proposition of the appellee, Ives professed his perfect readiness to comply with that proposal, and Barnes then parted with the appellant with the professed purpose of obtaining from Ives a confession of judgment, and at the same time agreed with the appellant, Sample, that in the event of a failure by Ives to give such confession, he would inform Sample thereof, in order that they conjointly might endeavor to obtain from Ives a fulfillment of his promise. That Barnes omitted to give information of the refusal on the part of Ives; but permitted the appellant, Sample, to remain under the impression that a confession of judgment had been given by Ives until after the commencement of the circuit court in the month of May, 1839, when the appellant, Sample, was informed by Barnes that Ives was insolvent. That by these circumstances, and especially by the conduct of Barnes, Sample was thrown off his guard, and a judgment by default was, in consequence thereof, rendered against him at the May term of the circuit court in 1839 for the sum of \$6,822.62 and the costs of suit. That execution having been sued out on this judgment, the appellant, Sample, in conformity with advice given him, had, with the other appellants, Pickins and Scott, as his sureties, executed a forthcoming bond for the delivery to the marshal of the property therein named; which bond, having been forfeited, operated as a judgment, and execution thereon had been sued out, and had been levied on the slaves and other personal property of Sample.

Upon the foregoing statements the appellants prayed that the original contract for the sale of the slaves by Barnes, and all the undertakings and liabilities growing out of that sale, might be declared to be void as having been in violation of the constitution and laws of Mississippi; and that for this cause, affecting the character of the contract, and by reason too of the fraud and deception imputed by the bill to the appellee, Barnes, with reference to Sample, the judgments and executions obtained for his benefit might be perpetually enjoined.

Upon the 24th of April, 1840, an injunction was awarded the appellants by the judge of the district court of the United States for the southern district of Mississippi.

To that portion of the bill which charges the introduction of slaves in violation of the constitution and laws of Mississippi the appellee declines to answer, as that charge included the liability to a criminal prosecution. To this refusal of the appellee no exception was taken, either in the pleadings or at the hearing of the cause. To every other charge in the bill the answer is

directly responsive, and fully denies every material allegation. And with respect to all the charges, inclusive of the first, the testimony adduced by the complainant below falls far short of sustaining any one of them. It is deemed loose, vague and immaterial. Nay, the very contract with Ives, filed as an exhibit with the bill, and which is alleged to have been an agreement for indulgence to Ives, to the prejudice of the rights of Sample, absolutely overthrows this assertion, and is shown upon its face, and by its terms and object, to have been simply an additional security from Ives, operating, if at all, for the advantage of Sample; a security, too, which the grantee, in that instrument, had the right to enforce immediately upon failure to pay the bill of exchange drawn on Ford, Markham & Co.

Upon the hearing of this cause before the circuit court at the November term of 1848, the injunction which had been awarded the appellants was dissolved, and the bill dismissed with costs. For the examination of that decree upon appeal, this cause is now before us.

This case is then left to be decided upon its features as disclosed in the bill and answer; and the application to these of a few settled and familiar principles of equity jurisprudence will at once determine its fate. And first with respect to the intrinsic merits of the appellant's original claim to exemption from liability; and secondly, as to the degree or extent in which such claim, if ever existing, has been affected by his own conduct, as evincing either the assertion or the surrender of that claim. The bill commences by charging the introduction and sale of slaves within the state of Mississippi, in violation of the constitution and laws of that state, as the essential ground of impeachment of the original contract and of Sample's exemption from liability accruing therefrom. Yet it is somewhat singular, that whilst urging this objection, and whilst admitting his participation in the sale, by giving it the sanction of his name and credit, he is entirely silent as to any knowledge by him as to the illegality of a transaction in which he bore so important a part. He certainly possessed, at some period of time, knowledge of the character of that transaction; and if his knowledge reached back to its origin and purposes, or to the date of his own participation therein, he must be viewed as standing *in pari delicto* with all similar actors therein—a position which, however it might shield him against attempts from associates in wrong, so far as these should be urged through the instrumentality of courts of justice, can invest him with no rights, either at law or in equity, as against advantages acquired by his confederates. The appellant, Sample, was certainly bound to show himself clear of the taint of a transaction which he denounces as illegal and fraudulent, but in which he shows that he has mingled from its inception, and which he deliberately ratified at an interval of six months after his first participation in it. His failure to do this, if his denunciation of the transaction be taken as true, must be decisive of his fate before a tribunal which lends its aid or countenance to those only who can present themselves with pure hands and who are free from suspicion.

§ 2005. *Whoever obtains relief from a court of equity must come into it with clean hands.*

The rule as applicable to the position of this party, a rule believed to be without exception, has been distinctly announced by this court in a case very similar in most of its features to the one now before us; for that, like the present, was a case in which the contract was impeached for precisely the same reason for which the interposition of equity was here invoked; and in

that, too, as in this instance, after the omission to set up a defense at law. We allude to the case of *Creath v. Sims*, 5 How., 192 (§§ 2031-34, *infra*), where this court, on page 204, have thus announced the rule by which courts of equity are governed. "Whosoever," say they, "would seek admission into a court of equity must come with clean hands, and such a court will never interfere in opposition to conscience or good faith. The effect of these principles upon the statements of the complainant is obvious upon the slightest consideration. The complainant alleges that the obligation to which he had voluntarily become a party was intentionally made in fraud of the law, and for this reason he prays to be relieved from its fulfillment. This prayer, too, is addressed to a court of conscience, to a court which touches nothing which is impure. The condign and appropriate answer from such a tribunal to such a prayer is this: that, however unworthy may have been the conduct of your opponent, you are confessedly *in pari delicto*; you cannot be permitted here to plead your own demerits; precisely, therefore, in the position in which you have placed yourself, in that position we must leave you." The attitude of the appellant, Sample, in connection with this aspect of the case, would of itself alone be conclusive against his application to equity for relief; but as this party has adduced other reasons upon which he has supposed himself entitled to equitable interposition, it may not be out of place to show their utter inconsistency with the very rudiments of equity jurisprudence; with principles so familiar to the courts and to the profession as to render their particular annunciation scarcely necessary.

§ 2006. *A legal defense to a demand must be set up at law; after an opportunity to do so has been permitted to pass unimproved, equity will not relieve.*

The defense now attempted to be set up by Sample, namely, the illegality under the constitution and statutes of Mississippi of the consideration for which the two bills of exchange were given, if true, was a legal defense, to be availed of in the action at law by plea or demurrer. Of this principle he seems to be aware, and therefore he endeavors to escape from its operation by attempting to fix upon Barnes certain practices by which he, Sample, was prevented from making a proper defense in the action against him in the circuit court; but with respect to the testimony adduced to establish such alleged practices, it may be remarked, in the first place, that it does not make them out as they are averred by the bill to have occurred; and in the next place, admitting the averments in the bill with respect to the practices objected against Barnes after the institution of the suit at law, supposing them to have occurred as stated in the bill, they could have formed no valid obligation upon Barnes to surrender, without consideration or equivalent, his legal rights, nor any dispensation to the appellant, Sample, from his duty to guard his interests in the pending litigation in which he was a party. Barnes had no power to compel a confession of judgment by Ives; and even if such confession had taken place, there could be no propriety in requiring Barnes to substitute for his demand, upon a solvent debtor, a judgment against another who was not solvent.

The appellant, Sample, appears to have been guilty of the grossest neglect and disregard of that diligence which the law requires at the hands of all suitors, and from the consequences of which they cannot be rescued consistently with the rights of others or the order of society. The law, as applicable to such neglect, is plainly declared in the case of *Creath v. Sims*, already quoted, in which this court have said that "a court of equity will never be called into

activity to remedy the consequences of laches or neglect, or the want of reasonable diligence. Whenever, therefore, a competent remedy or defense shall have existed at law, the party who may have neglected to use it will never be permitted here to supply the omission, to the encouragement of useless and expensive litigation, and perhaps to the subversion of justice."

How, then, shall the conduct of the appellant, Sample, be reconciled with the principles by this court so emphatically announced? He not only omits to insist upon his legal defense in the suit at law against him in the circuit court, but, after the judgment in that court by default, he executes a delivery bond, with the other appellants as his sureties; thus, after the first judgment against himself by default, he procures a second judgment against himself and his sureties as it were by confession. This party has, by his conduct, four times recognized the claim against him by Barnes — twice by his indorsement upon the bills drawn on N. & J. Dicks & Co. and on Ford, Markham & Co.; in the third instance by permitting the judgment by default; and fourthly, by executing the forthcoming bond, which he knew was tantamount to a confession of judgment for the demand.

Upon these grounds, solely and independently of the original consideration on which the undertaking by Sample was founded, and supposing that consideration to have been invalid, if inquired into at the proper time, this appellant must, by his conduct, be regarded as having waived all right of inquiry into that consideration, nay, rather as having repeatedly admitted its validity. To permit him, after so doing, to contradict all that he has repeatedly and formally declared, would be to allow him to falsify his solemn acts, to trifle with the settled rules of law and the practice of the courts, and would lead to endless litigation. We therefore order that the decree of the circuit court dissolving the injunction and dismissing the bill in this case be, and the same is hereby, affirmed.

HENDRICKSON v. HINCKLEY.

(17 Howard, 444-447. 1854.)

Opinion by MR. JUSTICE CURTIS.

STATEMENT OF FACTS.—The complainant filed his bill in the circuit court of the United States for the district of Ohio; and that court having ordered the bill to be dismissed, on a demurrer, for want of equity, the complainant appealed. The object of the bill is to obtain relief against a judgment at law, founded on three promissory notes signed by the complainant, and one Campbell, since deceased.

§ 2007. *When equity will give relief against judgments at law.*

A court of equity does not interfere with judgments at law unless the complainant has an equitable defense of which he could not avail himself at law because it did not amount to a legal defense, or had a good defense at law which he was prevented from availing himself of by fraud or accident, unmixed with negligence of himself or his agents. *Marine Ins. Co. v. Hodgson*, 7 Cranch, 333; *Creath v. Sims*, 5 How., 192 (§§ 2031-34, *infra*); *Walker v. Robbins*, 14 How., 584 (§ 2013, *infra*). The application of this rule to the case stated in the bill leaves the complainant no equity whatever.

The contract under which these notes were taken was made in December, 1841. One of the notes is dated in December, 1841, and the others in January, 1842. In April, 1848, suit was brought on the notes. In October, 1850, the

trial was had and judgment recovered. The reasons alleged by the bill for enjoining the judgment are, 1. That the consideration of the notes was the sale of certain property, and the complainant and Campbell were defrauded in that sale. But this alleged fraud was pleaded in the action at law as a defense to the notes, and the jury found against the defendants. Moreover, upwards of six years elapsed after the sale, and before the suit was brought; and the vendees, who do not pretend to have been ignorant of the alleged fraud during any considerable part of that period of time, did not offer to rescind the contract, nor did they, at any time, either return or offer to return the property sold. 2. The bill alleges certain promises to have been made by an agent of the defendant, concerning the time and mode of payment of the notes, when they were given. These promises could not be availed of in any court as a defense to the notes; for, to allow them such effect, would be to alter written contracts by parol evidence, which cannot be done in equity any more than at law, in the absence of fraud or mistake. *Sprigg v. The Bank of Mount Pleasant*, 14 Pet., 201 (Bonds, §§ 523-25). But whatever substance there was in this defense, it was set up at law, and upon this, also, the verdict was against the defendants; and the same is true of the alleged partial failure of consideration.

3. The next ground is, that on the trial at law, letters from the joint defendant, Campbell, containing admissions adverse to the defense, were read in evidence to the jury; and the bill avers that Campbell was not truly informed concerning the subjects on which he wrote, and that, until the letters were produced at the trial, the complainant was not aware of their existence, and so was surprised.

To this there are two answers, either of which is sufficient. The first is, that the complainant and Campbell, being jointly interested in the purchase and ownership of the property for which these notes were given, and joint defendants in the action at law, and there being no allegation of any collusion between Campbell and the plaintiff in that action, the complainant cannot be allowed to allege this surprise. If he did not know what admissions Campbell had made, he might, and with the use of due diligence would, have known them; and he must be treated, in equity as well as at law, as if he had himself made the admissions.

§ 2008. *Surprise for which equity will not relieve.*

Another answer is, that if there was surprise at the trial, a motion for delay, as is practiced in some circuits, or a motion for a new trial, according to the practice in others, afforded a complete remedy at law.

4. The complainant asserts that he has claims against the defendant, and he prays that, inasmuch as the defendant resides out of the jurisdiction of the court, these claims may be set off against the judgment recovered at law by the decree of the court upon this bill. But upon this subject the bill states, speaking of the action at law: "Your orator frequently conferred with L. D. Campbell, one of his attorneys, in reference to the said cause, and frequently spoke to him of the claims which your orator and said Andrew Campbell had against the said Hinckley, as hereinafter specifically set forth; but the said Campbell, attorney, regarded the defense pleaded as so amply sufficient as that neither he nor your orator ever thought it necessary to exhibit said demands against said Hinckley as matter of defense, could it even have been done consistently with the defense made as aforesaid."

He purposely omitted to set off these alleged claims in the action at law,

and now asks a court of equity to try these unliquidated claims and ascertain their amount, and enable him to have the same advantage which he has once waived, when it was directly presented to him in the regular course of legal proceedings. Courts of equity do not assist those whose condition is attributable only to want of due diligence, nor lend their aid to parties, who, having had a plain, adequate and complete remedy at law, have purposely omitted to avail themselves of it.

It is suggested that courts of equity have an original jurisdiction in cases of set-off, and that this jurisdiction is not taken away by the statutes of set-off, which have given the right at law. This may be admitted, though it has been found exceedingly difficult to determine what was the original jurisdiction in equity over this subject. 2 Story's Eq., 656, 664. But whatever may have been its exact limits, there can be no doubt that a party sued at law has his election to set off his claim, or resort to his separate action. And if he deliberately elects the last, he cannot come into a court of equity and ask to be allowed to make a different determination, and to be restored to the right which he has once voluntarily waived. *Barker v. Elkins*, 1 Johns. Ch., 465; *Greene v. Darling*, 5 Mason, 201.

§ 2009. *Set-off waived — no relief in equity.*

Similar considerations are fatal to the plaintiff's claim for relief, on the ground that the defendant resides out of the state, and that therefore he should have the aid of a court of equity, to subject the judgment at law to the payment of the complainant's claim. When the complainant elected not to file these claims in set off in the action at law, he knew that defendant, who was the plaintiff in that action, resided out of the state. If that fact was deemed by the complainant insufficient to induce him to avail himself of his complete legal remedy, it can hardly be supposed that it can induce a court of equity to interpose to create one for him. The question is not merely whether he now has a legal remedy, but whether he has had one and waived it. And as this clearly appears, equity will not interfere. The decree of the court below is affirmed. (a)

HUMPHREYS v. LEGGETT.

(9 Howard, 297-314. 1849.)

Opinion by MR. JUSTICE GRIER.

STATEMENT OF FACTS.—The appellant, Humphreys, who was complainant below, filed his bill against the defendants, praying an injunction against the issuing of an execution on a judgment they had obtained against him at law.

His bill sets forth that he was one of the sureties of Richard Bland, late sheriff of Claiborne county, in his official bond. That in March, 1839, the present defendants instituted a suit on the bond against Bland and his sureties, on which the circuit court rendered a judgment in favor of the defendants. The cause was removed to this court by writ of error, where the judgment of the circuit court was reversed, and the case remanded to the circuit court, with directions to enter judgment against Humphreys, the surviving surety. This was in February, 1845. In the meanwhile, at May term, 1840, judgments were entered in the state circuit court of Claiborne county against the sheriff and his sureties on the same bond, and the whole amount of the penalty collected, by levy and sale of complainant's property.

(a) Affirming *Hendrickson v. Hinkley*, * 5 McL., 211.

The bill, moreover, avers that complainant had no notice or knowledge whatsoever of the suit and proceedings against him by these defendants, till after the case was remanded by this court; that the sheriff's return of service of the writ on him was false, and made at the request of Bland, for the purpose of keeping the complainant in ignorance of the pendency of the suit; that when the cause was remanded to the circuit court, he offered to plead his payment of the bond *puis darrein continuance*; but the court refused to receive the plea, on the ground that the mandate of the supreme court was imperative on them to enter a judgment for the plaintiff. The defendants demurred to this bill for want of equity, and the court below sustained the demurrer, and dismissed the bill, and the complainant has appealed to this court.

Do the facts set forth in the bill, and admitted by the demurrer, entitle the complainant to the injunction prayed for? According to the view entertained by the court of the true merits of this case, it will be unnecessary to examine the question so much mooted on the argument, as to the conclusiveness of the sheriff's return, or whether equity would interfere, where a false return has been made by the sheriff in collusion with a co-defendant, without any fraud or fault of the plaintiff. We shall, therefore, consider the case as if the complainant had full notice of the suit at law, and the summons had been duly served on him.

The laws of Mississippi limit the liability of the sureties in the official bond of the sheriff to the amount of the penalty. Any person injured by a default of the sheriff in paying over money collected by him may have a judgment entered on the bond for the amount due to him, on motion, without service of process, or stay of execution. This judgment is a lien on all the personal and real property of the defendants, and has a priority over all judgments subsequently obtained. As the officer is liable to the extent of his defaults, and the surety only to the extent of the bond, difficulties will, no doubt, often occur as to the mode in which sureties may defend themselves when judgments are demanded exceeding the amount of the penalty. If the prior judgments should be paid out of the property of the sheriff, the sureties might wrongfully escape, if the amount of prior judgments might be pleaded against subsequent demands. On the contrary, if it could not, the surety might be compelled to pay more than the amount of his bond, unless the court should protect him in some way.

§ 2010. *Where a surety has paid the full penalty of the bond, he is entitled to relief from further executions by writ of audita querela, by motion, or by injunction in equity.*

In some states, where a similar law prevails as to suits on sheriffs' bonds, each suitor is permitted to take a judgment on the bond for the amount of his claim; and when the sureties have paid in the whole amount of the penalty, all further executions are stayed by the court, and the money apportioned to the claimants according to their respective priorities. But, whatever may be the practice of the courts of Mississippi in such cases, it is clear that, when the surety has paid the whole penalty of his bond, he should, at some stage of the proceedings, be suffered to plead this defense to further exactions. If he has had no such opportunity before judgment, the court, on motion, should permit it to be done after judgment, and order a stay of execution. Formerly, courts of law gave a remedy in such cases by a writ of *audita querela* — "a writ," it is said, "of a most remedial nature, and invented lest in any case

there should be an oppressive defect of justice where a party who has a good defense is too late in making it in the ordinary forms of law;" and although it is said to be, in its nature, a bill in equity, yet, in modern practice, courts of law usually afford the same remedy on motion in a summary way. The practice in Mississippi seems to prefer a bill in equity for the same purpose.

§ 2011. — *doctrine of relief against judgments.*

And courts of equity usually grant a remedy by injunction against a judgment at law, upon the same principles. In *Truly v. Wanzer*, 5 How., 142 (§ 2044, *infra*), this court say: "It may be stated as a general principle with regard to injunctions after a judgment at law, that any fact which proves it to be against conscience to execute such judgment, and of which the party could not have availed himself in a court of law, or of which he might have availed himself at law, but was prevented by fraud or accident, unmixed with any fault or negligence in himself or his agents, will authorize a court of equity to interfere by injunction to restrain the adverse party from availing himself of such judgment." See, also, Story, Eq. Jur., § 887.

§ 2012. — *defense by plea puis darrein continuance.*

In the case before us, the surety had been compelled to pay the whole amount of his bond by process from the state courts, before the present defendants obtained their judgment against him, but after the institution of their suit. This would have been a good defense to the action if pleaded *puis darrein continuance*. The complainant tendered this plea at the proper time, and was refused the benefit of it, not because it was adjudged insufficient as a defense, but because the court considered they had no discretion to allow it. The mandate from this court was, probably, made without reference to the possible consequences that might flow from it. At all events, it operated unjustly, by precluding the complainant from an opportunity of making a just and legal defense to the action. The payment was made while the cause was pending here. The party was guilty of no laches, but lost the benefit of his defense by an accident over which he had no control. He is, therefore, in the same condition as if the defense had arisen after judgment, which would entitle him to relief by *audita querela*, or a bill in equity for an injunction.

We are of opinion, therefore, that the complainant was entitled to the relief prayed for in his bill, and that the decree of the court below should be reversed.

WALKER v. ROBBINS.

(14 Howard, 584-586. 1852.)

APPEAL from U. S. Circuit Court, Southern District of Mississippi.

Opinion by MR. JUSTICE CATRON.

STATEMENT OF FACTS.—William F. Walker, Samuel M. Puckett and John Lang filed their bill against Robbins and others, praying a perpetual injunction against a judgment at law recovered in the circuit court of the Mississippi district, alleging, among other grounds of relief, that William F. Walker, one of the complainants, was not served with notice to appear and defend the suit at law.

The deputy marshal returned the original writ, "executed on William F. Walker, 6th of April, 1840, personally." More than ten years afterwards, the deposition of the deputy (Cook) was taken in Texas, when he testified that his return was false; that he did not notify Walker, but indorsed the writ exe-

cuted, intending to execute it after the indorsement was made, and therefore he let it stand, although he never did notify Walker.

Assuming the fact to be that Walker was not served with process, and that the marshal's return is false, can the bill, in this event, be maintained? The respondents did no act that can connect them with the false return; it was the sole act of the marshal, through his deputy, for which he was responsible to the complainant, Walker, for any damages that were sustained by him in consequence of the false return. This is free from controversy; still, the marshal's responsibility does not settle the question made by the bill, which is, in general terms, whether a court of equity has jurisdiction to regulate proceedings, and to afford relief at law, where there has been abuse, in the various details arising on execution of process, original, mesne and final. If a court of chancery can be called on to correct one abuse, so it may be to correct another; and, in effect, to vacate judgments, whether the tribunal rendering the same would refuse relief, either on motion, or on a proceeding by *audita querela*, where this mode of redress is in use.

In cases of false returns affecting the defendant, where the plaintiff at law is not in fault, redress can only be had in the court of law where the record was made, and if relief cannot be had there, the party injured must seek his remedy against the marshal.

§ 2013. *Where a competent defense existed at law and defendant failed to set it up, he will not be permitted to do so in a court of equity.*

We are of the opinion, however, that the return was not false; but if it was, that Walker waived the want of notice, by pleading to the action. The suit was against Walker, Puckett and Lang. The latter employed David Shelton as his attorney to defend the suit. Lang told Shelton to put in pleas for all the defendants who had been served with process. Upon examination, Shelton found that process had been served on Walker, Lang and Puckett, and he put in a joint plea for them. Afterwards, Shelton, the attorney, met both Walker and Lang in Jackson, where the court sat, and spoke to them in each other's presence about the defense of the case, and a conversation was held with them, in which they promised Mr. Shelton that another attorney, William Seiger, should be associated with him in defending the suit. The questions likely to arise in the case were stated by Lang and Walker, and they were especially anxious to know from Shelton whether Mr. Shields, the principal to the note sued on, would be competent as a witness on their behalf. The cause was tried at a subsequent term, on the issue made by the plea put in by Shelton, and a verdict and judgment rendered.

No defense was made on the trial at law, impeaching the consideration of the note sued on, either on the ground that Green had not delivered the bank-notes, as stipulated by him; nor on the ground that usury entered into the transaction, because the notes were at a discount of from forty to fifty per cent. Neither was any proof introduced on the hearing of this chancery suit in the circuit court, tending to show that Green failed to deliver the bank-notes, although the respondents put the fact in issue; and as the face of the note imported a consideration, no further evidence to sustain it was required from the respondents.

They admit that the bank-notes were at the rate of discount stated in the bill, but insisted they were of equal value to Shields as if they had been at par; and this the bill admits would have been the case had Shields received them according to his agreement with Green; and there being no proof to the con-

trary, we must assume that they were duly received. But whether they were duly delivered or not is immaterial. The defendants in the suit at law had an opportunity to make their defense there, and, having failed to make it, cannot be heard in a court of equity. By way of authority, we need only repeat, as the settled rule, what was adjudged in the case of *Creath v. Sims*, 5 How., 204 (§§ 2031-34, *infra*), that whenever a competent defense shall have existed at law, the party who may have neglected to use it will never be permitted to supply the omission, and set it up by bill in chancery.

This court has never departed from the foregoing rule, nor allowed the circuit courts to depart from it in cases brought here. Nor can we do so without violating the sixteenth section of the judiciary act of 1789 (1 Stats. at Large, 82), in its true sense. Apparent aberrations may be found, but they are only apparent. We order that the decree below be affirmed.

SAHLGARD v. KENNEDY.

(Circuit Court for Minnesota: 1 McCrary, 291-299. 1880.)

Opinion by NELSON, J.

STATEMENT OF FACTS.—The complainant, an alien, files his bill in equity on behalf of himself and other holders of any of the \$3,000,000 issue of bonds by the First Division of the Saint Paul & Pacific Railroad Company, of the date of March 1, 1864, who shall come in and contribute to the expenses of this suit. Relief is prayed against a decree charged to have been obtained in a state court of Minnesota by the fraudulent practices of some of the defendants, and a sale thereunder in fraud of the rights of complainant and others similarly situated.

The bill alleges that a suit was brought in the court of common pleas of Ramsey county, Minnesota, to foreclose a trust deed executed by the First Division of the Saint Paul & Pacific Railroad Company to secure \$3,000,000 of bonds, and on March 24, 1879, a decree of foreclosure was entered by consent of parties to the record in said suit, no answer having been interposed to the complaint.

The relief prayed for is substantially that the said mortgage be declared by the court to be a subsisting and valid lien upon the property described therein, and the rights of the holders of all of said bonds outstanding be maintained, and they be allowed to prove them; that the sale of said property under the said decree of the said state court, and the deed executed to the purchaser thereupon, be declared to be fraudulent and void, and be set aside and canceled; that a receiver be appointed to take possession of the property, the purchasers at said sale enjoined from interfering therewith, and account for the earnings and income while in their possession, and that the property be sold under direction of this court for the benefit of all the *bona fide* bondholders. General relief is also asked.

§ 2014. *When a suit to set aside a decree for fraud should be brought in the court in which the decree was rendered, and when it may be brought elsewhere as an original proceeding. Jurisdiction.*

A demurrer is interposed by the defendants, alleging:

1. Want of jurisdiction in this court. The defendants' counsel argue, with great ability, that relief should be sought in the court rendering the decree; that this court has no jurisdiction to interfere with, set aside or annul the decree of the court of common pleas, that court pertaining to another

sovereignty. As I understand the rule, it is this: that in all cases where, in a direct proceeding, there are parties before a court other than that in which a decree has been rendered, and it is charged that the decree was fraudulent, the court can entertain jurisdiction, and if the fraud is proved, can prevent all parties who are before it from enforcing the decree, and, of course, from obtaining any advantage by virtue of a sale made thereunder. The court acts upon the decree and sale through the parties who are before it, not directly upon the decree of the other court, but adjudges that, notwithstanding the decree, the parties who obtained it, and those before the court who claim property by virtue of a sale under it, with knowledge of the fraud, shall not appropriate to their use the property thus acquired.

It is true, relief may sometimes be had by motion in the same court, or by a bill in the nature of a bill in review, but such relief is not always adequate, and an original bill is a proper mode of seeking redress against a decree obtained by fraud or covin.

The rule is clearly and concisely stated by Justice Bradley in *Barrow v. Hunton*, 9 Otto, 82 (COURTS, §§ 486-88). In speaking of the distinction between the two classes when an original suit may be entertained, and when the application for relief should be made to the court granting the judgment or decree, he says: "If the proceeding is merely tantamount to the common law practice of moving to set aside a judgment for irregularity, or to a writ of error, or to a bill of review, or an appeal, it would belong to the latter category, and the United States court could not entertain jurisdiction of the case. . . . On the other hand, if the proceedings are tantamount to a bill in equity to set aside a decree for fraud in the obtaining thereof, then they constitute an original and independent proceeding, . . . and the case might be within the cognizance of the federal courts. In the one class there would be a mere revision of errors and irregularities, or of the legality and correctness of the judgments and decrees of the state courts; in the other, the investigation of a new case arising upon new facts, though having relation to the validity of an existing judgment or decree, or to the right of the party to claim any benefit by reason thereof."

I think the jurisdiction of the court to entertain this suit not doubtful, and the bill must stand, unless there is no equity stated therein, and this brings me to the consideration of the other ground of demurrer.

§ 2015. *Allegations of collusion between one of the trustees and the purchasers of mortgaged property state equities sufficient to require an answer.*

2. The defendants demur for want of equity in the bill. The bill alleges, in substance, that the trustees, in the deed to secure the \$3,000,000 issue of bonds, in May, 1874, at the instance of John S. Kennedy, one of the defendants in this suit, and the agent of a committee of Amsterdam bondholders, having in their hands and under their control a majority of the bonds of this series, commenced a suit against the First Division of the St. Paul & Pacific Railroad Company and others to foreclose the trust deed, and that after the commencement of the suit Kennedy, the agent, entered into an agreement with the defendant company for the suspension of the prosecution of the suit, and the trustees who instituted it, at his instance, suspended the prosecution of the same for several years, and until requested by him to proceed; that some time in 1878 one of the trustees resigned, and Kennedy was appointed as trustee and co-complainant in said foreclosure suit, and thereafter acted in the capacity of trustee in said trust deed and foreclosure suit, and as the spe-

cial agent of the committee, and of the bondholders who had placed their bonds in the hands of the committee for control and management; that on the 9th of October, 1876, the trustees, including Kennedy, under the authority conferred in the deed of trust, took possession of the railroad appurtenances and property covered by the trust deed, and operated the road, and that in 1876 or 1877 Donald A. Smith, George Stephen, N. W. Kittson, James J. Hill and others formed a syndicate for the purpose of acquiring the line of railroad, etc., covered by the mortgage, under the foreclosure proceedings and a sale, and made a proposition, through Kennedy, to the committee of Amsterdam bondholders for the purchase and control of the bonds in their hands, and that Kennedy, the agent of a committee of bondholders, and trustee for all the bondholders, entered into an agreement with Smith, Stephen, Kittson and Hill for the purchase and control of the bonds held by the committee, and into negotiations which contemplated the acquisition of the line of railroad of the First Division of the St. Paul & Pacific Railroad Company, etc., by purchase at the foreclosure sale to be made in said pending foreclosure suit, and payment therefor in bonds; that the suit should proceed under the advice and instruction of said parties, Smith and others; that the negotiation for the sale of the bonds was consummated with Kennedy, who approved the proposal and recommended its acceptance, and that the suit was prosecuted, conducted and concluded under the advice and instruction of Smith, Stephen, Kittson and Hill, through Kennedy as agent, and with a view to obtain a transfer of said road to them under the forms of judicial proceedings in fraud of the rights of bondholders who had not contracted to sell their bonds to said parties; that Kennedy, as agent, paid and controlled the counsel in the foreclosure suit; and further, in substance, that the result of the suit and the decree, by consent, was in the interest of the parties who had so negotiated with Kennedy, they having become *domini litis* in respect to the foreclosure proceedings. It is also charged that the trustees, through Kennedy, fraudulently connived and combined with the syndicate to allow the property and railroad to be purchased at the foreclosure by the St. Paul, Minneapolis & Manitoba Railroad Company at a nominal price compared with its true value.

“PROPOSAL MADE AT NEW YORK MEETING OF JANUARY 3, 1878, BY CANADA PARTY.

“[TRANSLATION.]

“The proposal embraces all certificates which have been issued by the committee, and must be accepted by at least the same proportion of certificates which acceded to the former proposal. It is offered to pay for first section bonds (\$1,200,000) net seventy-five per cent. in gold; consolidated bonds (\$2,800,000) net twenty-eight per cent. in gold; second section bonds (\$3,000,000) net thirty per cent. in gold; 1869 bonds (\$6,000,000) net thirty-five per cent. in gold; St. Vincent & Brainerd bonds (\$15,000,000) net thirteen and three-fourths per cent. in gold, of the nominal amount of the bonds, including the past-due coupons, which pass with the bonds for this price.

“Upon acceptance of this proposal, these bonds shall be deposited in the Mercantile Safe Deposit Company of New York, in the name of trustees, for which the committee proposes the Messrs. J. S. Kennedy and John S. Barnes, chiefs of the firm of J. S. Kennedy & Co. These bonds shall be delivered to the purchasers by the trustees, as agents of the committee, against the payment of the purchase price in the manner hereinafter named.

"The aforesaid purchase price must be paid within six months after the date which, by virtue of the last foreclosure decree of each court, has been declared as the day of the sale of the bonds, as described in the trust deeds by which the above named issues of bonds have been respectively secured. The aforesaid purchase price for said bonds shall bear interest from the 22d of December, 1877, at seven per cent. per annum, payable half yearly in gold, in the city of New York. The principal of the above named purchase price shall be paid: *First*, either in gold; *second*, or in first mortgage gold bonds of the newly to be created company, bearing seven per cent. interest, payable half yearly in gold at par; but the purchasers shall also add to every bond of \$1,000 the amount of \$250, in first preferred stock of the new company; *third*, or, at the option of the certificate holders, or any of them separately, the same first mortgage gold bonds as described under number 2 calculated at ninety per cent., but in that case without addition of the preferred stock.

"It is further expressly agreed that on the reorganized road no further first mortgage shall be issued than the above named, so that the rate of \$12,000 per mile on the completed road shall not be increased.

"As soon as '*bonds*' shall be offered in payment, the form and contents of the trust deeds must be subjected to the approval of the agents of the committee. The trust deeds must comprise all property of any and every kind belonging to the new company at the time that the mortgage is created, including the land grant, and these bonds shall be received at par in payment for the lands of the company.

"The total amount of the above named *preferred stock* shall be limited to twenty-five per cent. of the whole issue of bonds of the first mortgage, and the dividend on this preferred stock not to exceed six per cent. per annum in currency shall be paid, but only after the receipts of the new company, after payment of all necessary expenses and the interest on the bonds, shall have been provided for.

"The option of payment named under number 1 and number 2 is left, primarily, to the purchasers, but should they choose to pay in money, the seller shall have the right to demand bonds, as described,—subdivisions 2 and 3,—either at par with preferred stock or at ninety per cent. without preferred stock.

"The purchasers further bind themselves:

"*a.* As soon as they have received the notice that their offer is accepted, and the bonds have been delivered to the above named trust company, to restitute the costs caused by them to the committee, as well as the amount of the committee costs resting on the assenting certificates.

"*b.* To complete the extension to St. Vincent as speedily as possible; if possible within this year; and agree to furnish sufficient security for the execution hereof, which will be acceptable to the agents of the committee, Messrs. J. S. Kennedy & Co.

"*c.* To restitute the cost of the construction of the Breckenridge-Barnes line *in cash*, at the same time with the payment for the bonds, and in the meanwhile to pay interest at seven per cent. per annum, half yearly.

"*d.* The now pending foreclosure suits, and other suits, shall be continued by the committee and its agents, under advice and instruction of the purchasers, free of all costs for the holders of the assenting certificates."

It is unnecessary to recapitulate all the allegations in the bill which are con-

ceded to be true by the demurrer, nor is it necessary to determine whether all the relief prayed for can be granted. The charges are sufficient to require an answer, for they tend to show that Kennedy combined with Smith, Stephen, Kittson and Hill to aid them in acquiring the property mortgaged at a sacrifice of the interests of bondholders not parties to the contract, to secure the road, etc., and that the former permitted the control of the litigation to pass to Smith and his associates, consenting that they might assume the functions of trustees; the co-trustees of Kennedy in the trust deed having accorded to him the right to determine and control the action of the trustees in all matters appertaining to the trust property and the execution of the trust.

While there is no doubt that creditors may combine to purchase the property of their debtor, and such action is proper and will be sustained, yet if a trustee, holding the property for the benefit of all the creditors, combine with a part to aid them in purchasing it to the exclusion of the other creditors, and the trustee also has in his possession, as agent, the evidences of debt belonging to the creditors with whom he has combined, and the property, by the act of the trustee, passes into the possession of those creditors at a price much less than its value, it can hardly be claimed that a purchase thus consummated is not inequitable. Such is one of the charges in the bill, and it requires an answer so that the court may determine upon the proofs, at the final hearing, whether it is true or not. The demurrer is overruled, with leave to answer at the July rule day.

RAILROAD COMPANY *v.* NEAL.

(Circuit Court for Texas: 1 Woods, 353-358. 1870.)

Opinion by BRADLEY, J.

STATEMENT OF FACTS.—This is a suit in equity brought for an injunction to stay proceedings on a judgment at law obtained in this court by default, and for a trial on the merits of the case.

In ancient times courts of equity very freely entertained jurisdiction of bills to stay proceedings at law for the purpose of giving to parties the benefit of a new trial, or the benefit of a trial where none had been had, when it appeared that injustice would be done if the relief prayed for were not granted. Such bills were called bills for new trial. This jurisdiction was assumed principally on the ground that there was no remedy at law. For, until the middle of the seventeenth century, the courts of law did not grant new trials for matter *dehors* the record. Since that period, however, they have gradually assumed jurisdiction of such cases, and for nearly a century past have granted new trials and opened judgments in all cases where justice required, and where they were not restrained by some statutory or technical rule. The establishment of a legal remedy has led to the disuse of the equitable one except in cases of a peculiarly equitable character, as where the injured party has had a verdict or judgment rendered against him in consequence of accident or mistake or fraud of the other party, without any fault of his own, and has no remedy, or has without his fault lost his remedy at law. This restriction of the equitable remedy has obtained in England and most of the American states, although the more liberal relief is still accorded in Kentucky and perhaps one or two other exceptional jurisdictions. The courts of the United States, however, adhere to the rule adopted in England and in most of the equity courts of this country.

§ 2016. *Authorities discussed as to equitable relief against judgments.*

Mr. Justice Story, in his Commentaries on Equity Jurisprudence, section 887, thus describes the jurisdiction as at present exercised: "In regard to injunctions after a judgment at law," says he, "it may be stated as a general principle that any facts which prove it to be against conscience to execute such judgment, and of which the injured party could not have availed himself in a court of law, or of which he might have availed himself at law, but was prevented by fraud or accident, unmixd with any fault or negligence in himself or his agents, will authorize a court of equity to interfere by injunction to restrain the adverse party from availing himself of such judgment. Bills of this sort are usually called bills for a new trial." In subsequent sections he states more fully some of the qualifications under which relief will, in any case, be granted. Thus: Equity will not interfere upon a defense equally available at law. § 894. Nor upon a defense which has been fully tried at law. *Id.* Nor if the complainant himself has been guilty of laches in bringing forward his defense. § 895. Nor where he has neglected to apply for a new trial within the time appointed by the rules of the proper court of law. *Id.*

A case came before Lord Redesdale in which a verdict had been rendered against the plaintiff, and he had applied for a new trial, which was refused for defect of notice of the motion; and thereupon the plaintiff filed a bill in equity. Lord Redesdale said that if the party had not brought evidence which was in his power, or had neglected to apply in time for a new trial, he could not interfere. "I do not know," said his lordship, "that equity ever does interfere to grant a trial of a matter which has already been discussed in a court of law, a matter capable of being discussed there, and over which the court of law had full jurisdiction." *Bateman v. Willoe*, 1 Sch. & Lef., 201.

Chancellor Kent, in a case where a court of law had refused to set off one judgment against another, refused to entertain a bill for that purpose, saying, "The plaintiff elected to seek relief in the mayor's court upon the very point now raised by the bill. He had his choice whether to apply to that court or to this in the first instance. It is *res adjudicata*." Again: "The settled doctrine of the court of chancery is, not to relieve against a judgment at law on the ground of its being contrary to equity, unless the defendant below was ignorant of the fact in question pending the suit, or it could not have been received as a defense." *Simpson v. Hart*, 1 Johns. Ch., 91.

The principles announced by these eminent jurists have been expressly adopted by the supreme court. In the case of *Hendrickson v. Hinckley*, 17 How., 445 (§§ 2007-9, *supra*), the court say: "A court of equity does not interfere with judgments at law, unless the complainant has an equitable defense of which he could not avail himself at law, because it did not amount to a legal defense, or had a good defense at law, which he was prevented from availing himself of by fraud or accident, unmixd with negligence of himself or his agents." These principles will enable us to decide the case before us without much difficulty. It is undoubtedly a case of hardship, and requires on the part of the court a firm adherence to the principles there propounded, in order not to be led astray.

It quite clearly appears that the defendant, having sustained an injury by a fall from one of the complainants' cars, went voluntarily to the complainants' office, and, whilst claiming from them nothing by way of damages as a matter of right, asked for a donation to enable him to get to a hospital, and on receiving \$50, signed a receipt in full of all claims and demands against the complain-

ants, which they still hold. Immediately after this he sued the complainants in the state district court, and laid his damages at \$15,000. Discontinuing this suit he brought another suit in this court for \$50,000, and for default of a plea obtained judgment and an inquest of damages to the amount of \$22,000. The complainants allege that the judgment was rendered against them in consequence of a misapprehension and a mistake on the part of their counsel, and was a complete surprise upon them after they had taken every reasonable precaution for putting in their defense. If this is true (and the proofs serve to establish its truth), the complainants ought undoubtedly to have had a trial and a suspension or opening of the judgment for that purpose.

§ 2017. *A court of equity will not afford relief against a judgment at law except when it has been the consequence of accident or mistake and there is no adequate remedy at law.*

But this ground for suspending or opening the judgment and awarding a trial was one of which the complainants could have availed themselves by motion, on the law side of the court, where the action was brought and the judgment was rendered. And the court ought not to entertain a bill in equity where there was a full and adequate remedy at law. Had the complainants lost their remedy at law by lapse of time, or otherwise without their fault; for example, had the original mistake or misapprehension continued without notice of the judgment until the expiration of the term; or, had the defendant or his attorney, by his conduct, misled the complainants until the time for making a motion had passed,—then the want of a remedy at law would have furnished the court good ground for entertaining a bill in equity. But so far from this being the case, the complainants (or their attorneys) not only became aware of the judgment almost immediately after it was rendered and during the same term, but on the second day thereafter, to wit, on the 17th of July, 1869, actually entered a motion to open the judgment and award a trial. This motion was heard on affidavits on the 24th of the same month, and substantially the same grounds were urged in favor of the application as are now urged on this hearing, namely, the existence of a good defense, of which the complainants had written evidence, signed by the defendant himself, and their being prevented from making said defense by the misapprehension and mistake of the complainants' counsel. The court, after full argument, denied the motion. If I should now hear the case again on this bill in equity, it would be, in effect, to entertain an appeal from that decision, a thing entirely inadmissible.

It is said that the receipt itself was not exhibited to the court, although its existence was proved and relied on; and that the complainants were surprised by the defendant's denying its existence, and by the decision of the court in relation thereto. All this may be true, but is not to the purpose. Having presented the issue, it was the duty of the complainants to prove it to the satisfaction of the court, or accept the consequences.

It is also said that the complainants did not have a full and fair hearing on the motion, because of the indisposition of their counsel. A postponement of the hearing for this cause, had it been applied for and warranted by the facts, would undoubtedly have been ordered by the court; but, at all events, it was a matter within the exclusive cognizance and discretion of the court sitting as a court of law on that hearing, and cannot be laid as the ground of a decree on this bill.

§ 2018. — *it is not sufficient to show that injustice has been done; it must be shown to be such as authorizes a court of equity to interfere.*

The sympathies of the court, if proper to be indulged, might lead it to afford the complainants relief if it could be done without violating those necessary rules which have been prescribed by public policy for the purpose of setting a limit to litigation. But it is "a common maxim that courts of equity, as well as courts of law, require due and reasonable diligence from all parties in suits, and that it is sound policy to suppress multiplicity of suits." Story's Eq., § 896.

In the language of Lord Redesdale, in the case already cited, "It is not sufficient to show that injustice has been done, but that it has been done under circumstances which authorize the court to interfere. Because, if a matter has been already investigated in a court of justice, according to the common and ordinary rules of investigation, a court of equity cannot take on itself to enter into it again. Rules are established, some by the legislature, some by the courts themselves, for the purpose of putting an end to litigation." *Bateman v. Willoe*, *supra*.

It is suggested by the complainants' counsel, however, that this is not to be regarded as a suit in equity, but simply as a petition for a new trial, addressed to the law side of the court. To take this view, it seems to me, we must confound all distinctions of procedure. In the first place, the whole form of the proceeding is that of a suit in equity, and it has been treated as such by the parties. And, in the next place, a petition for a new trial being, in effect, nothing but a motion for a new trial, will not be entertained or heard after a similar motion has already been made and decided, except upon express application to the court for that purpose. To renew a motion *ex mero motu* of the party, after it has been solemnly decided against him, would be the veriest trifling with the court. The bill must be dismissed with costs.

TREFZ v. KNICKERBOCKER LIFE INSURANCE COMPANY OF NEW YORK.

(Circuit Court for New Jersey: 8 Federal Reporter, 177-182. 1881.)

Opinion by NIXON, J.

STATEMENT OF FACTS.—The bill is filed in this case by the complainant to set aside a judgment recovered in this court at the term of September, 1877, on the ground that it was obtained by fraud. The defendant has put in a general demurrer, which admits all the material averments of the bill of complaint. The only question, therefore, is, are these sufficient to maintain the suit?

The bill alleges that on the 27th of September, 1877, the defendant recovered a judgment against the complainant for the sum of \$12,201.01, in an action of *assumpsit*, which was founded upon two policies of insurance on the life of her late husband, Christopher Trefz, one for \$2,500 and the other for \$8,500, both issued September 6, 1873, in favor and for the benefit of his wife, the defendant; that the policies on which the judgment was obtained had been received in exchange for two prior policies—one for \$3,000, issued May 25, 1867, and the other for \$10,000, issued March 18, 1868; that upon issuing the two later policies it was agreed, in writing, between the defendant and her husband and the complainant, that the statements in the application for the former policies were true, and were the basis for the contracts of the policies; and that it was expressly provided that the new policies were granted on the faith of said statements, and that if any of them were untrue, the said policies should be

void; and that they should be void if the death of the insured should be caused by the habitual use of intoxicating drinks; and that among the statements that thus formed the basis of the new contracts, and on the faith of which they were made, were assertions by the said Christopher that he was sober, and had never been sick, and had never had spitting of blood, or any of the other diseases mentioned in the said statements.

The bill further alleges that the complainant resisted the payment of the said policies, after the death of the insured, because it had reason to suspect that before and at the time of obtaining the first policies the said Trefz was an habitual drunkard, and had procured the policies by false statements, and had continued to be a drunkard after the later policies were issued, and that he brought about his death by the habitual use of intoxicating drinks; that in preparing for the trial of the case at law, it made every effort to obtain proof of these facts, but without success, so far as the matter of intoxication was concerned, but learned that he had been afflicted with sun-stroke, which he had concealed in obtaining the later policies, and that on the trial the complainant was obliged to abandon the defense of death by the habitual use of intoxicating drinks, and rely only on showing that the contracts were void by reason of the untruth of the statement of the insured that he was never sick, in which defense it was unsuccessful.

The bill then states that during the spring of 1880 complainant ascertained, on what is believed to be abundant proof, that the said Christopher, for a long time prior to 1873, when he obtained the new policies, had been a confirmed and habitual drunkard, and had greatly impaired his health by gross habits of intoxication, which rendered him liable to the sun-stroke, the concealment of which was the ground of defense urged in said trial; that the defendant, when the policies were renewed in her favor, well knew the physical situation and habits of her husband, and that the policies were obtained by the fraudulent concealment thereof; that the said habits of intoxication continued and increased constantly after the re-issue of the said policies, and caused the death of the insured during the year 1876; that he was in the constant habit of being drunk day by day, and became subject to *delirium tremens*, which rendered him very violent in his family, and rapidly undermined his health, and speedily caused his death; that the said defendant and the members of his household were perfectly aware of his condition, but expecting to obtain the amount of the policies from the complainant upon his anticipated death, she took pains to conceal his condition from the public, and especially from the agents of the complainant, who, as she knew, were making strenuous efforts to obtain proof of the facts which were suspected, but not actually known, in order that they might be proved on the trial; that the physicians who had attended him, and who were well aware of his condition and habits, had died shortly before the trial, and she, knowing that the facts could not be reached through them, concealed as far as possible his true condition from the physicians who attended him towards the close of his life, and who were called as witnesses in her behalf; that she herself was a witness on the trial, and in her testimony studiously concealed the fact that he had been suffering with *delirium tremens* and spitting of blood, and that his death was caused by his habits of intoxication, and gave an account of his sickness entirely inconsistent with her own knowledge of his condition, and that she congratulated herself upon the successful concealment of these facts when the policies were obtained and the payment recovered; and that, upon the discovery of the foregoing facts, the complain-

ant obtained the affidavits of Christina Sitzman, Catherine Engle and Frank Ehehalt, made in April, 1880, and annexed to the bill of complaint, with the view of obtaining a new trial, and made application to the court for the same, which the court declined to grant, in view of the pending writ of error.

The prayer of the bill is that the judgment against the complainant may be declared to have been obtained by fraud; that the defendant may be restrained by injunction from causing any execution to be issued thereon, or from enforcing the same in any manner against the complainant, and that the complainant may have such other and further relief as shall be agreeable to equity and good conscience. The general ground on which relief is sought in this case is that the two policies of insurance, on which the judgment is founded, were obtained by the fraud of the defendant and her deceased husband; that the fraud was unknown to the complainant at the time of the trial, although it was suspected, and efforts were made to find evidence of it; and that it was known and concealed by the defendant on the trial, so that the verdict was fraudulently obtained in her favor.

§ 2019. *A court of equity has jurisdiction to set aside a judgment at law for fraud.*

There is no question about the jurisdiction of a court of equity to grant relief against a judgment at law on the ground of fraud, whether the fraud was in the transaction or the instrument on which the action arose, or in the trial and the manner of obtaining the judgment. The whole subject was carefully considered in the case of *The Ex'rs of Powers v. The Adm'r of Butler*, 3 Gr. Ch., 465, in which it was held that where facts existed which rendered it inequitable in the plaintiff at law to enforce his judgment, and these facts could not avail the defendant, either by reason of the rigid rules of law, or by fraud or accident, or by reason of their being unknown to him in time for that purpose, without any fraud or negligence on his part, equity would restrain the plaintiff by perpetual injunction from proceeding upon the judgment, or would otherwise relieve against it. Such jurisdiction, with the proper limitations upon it, was never more tersely or clearly stated than by Chief Justice Marshall, in *The Marine Ins. Co. v. Hodgson*, 7 Cranch, 336:

"Without attempting," says the learned judge, "to draw any precise line to which courts of equity will advance and which they cannot pass, in restraining parties from availing themselves of judgments obtained at law, it may safely be said that any fact which clearly proves it to be against conscience to execute a judgment, and of which the injured party could not have availed himself in a court of law, or of which he might have availed himself at law, but was prevented by fraud or accident, unmixed with any fault or negligence in himself or his agents, will justify an application to a court of chancery."

See, also, *Tompkins v. Tompkins*, 3 Stock., 512; *Freeman on Judgments*, § 491; *Insurance Co. v. Fields*, 2 Story, 59 (§§ 2040-43, *infra*). The learned counsel for the defendant, while admitting, on the argument, the general jurisdiction, insisted that there was nothing in the structure of the bill in the present case which authorized the court to treat the suit as an application for a new trial on account of newly discovered evidence.

§ 2020. *Mode in which courts of equity proceed in relieving against a judgment obtained by fraud.*

The specific prayer undoubtedly is that the judgment be set aside on the ground that it was obtained by fraud. But there is also a prayer for an injunction and for general relief, and under these it has been the practice in

equity, unless the case disclosed some defense peculiar to courts of equity, and which would be unavailable at law, to decline to go further than to set aside the judgment and leave the parties to a new trial in the original forum. This is especially so when the prayer of the bill is for an injunction; bills of which sort, says Judge Story, are usually called bills for a new trial. Story, Eq. Jur., § 887.

Regarding the case as in effect an application for a new trial, do the allegations of the bill authorize the court to interfere with the judgment? As the alleged newly discovered evidence is a legal and not an equitable defense, the only questions are whether it is sufficient, if true, to prove fraud and injustice in the judgment, and whether the complainant has shown due diligence in the effort to procure the testimony for the trial.

1. The complainant states in the bill of complaint that more than two years after the judgment, to wit, in the spring of 1880, it ascertained, on what is believed to be abundant proof, that the assured, Trefz, for a long time prior to 1873, when he obtained the new policies of insurance, had been a confirmed and habitual drunkard, and had greatly impaired his health by gross habits of intoxication, which rendered him liable to the sun-stroke, the concealment of which was the ground of defense urged on the trial; that the defendant, Christina Trefz, when the policies were renewed in her favor, well knew the physical situation and habits of her husband, and that the renewal was obtained by the fraudulent concealment thereof from the complainant; that the said habits of intoxication continued and increased constantly after the policies were issued, and caused the death of the insured during the year 1876; that he was in the constant habit of being drunk day by day, and became subject to *delirium tremens*, which rendered him very violent in his family, rapidly undermined his health, and speedily caused his death; that the defendant was perfectly aware of his condition, but expecting to obtain the amount of the policies upon his anticipated death, she took pains to conceal his condition from the public, and especially from the agents of the complainant, who, as she knew, were making strenuous efforts to obtain proof of the facts, which were suspected but not actually known, in order that they might be proved upon the trial; that the physicians who had attended him, and who were well aware of his condition and habits, had died shortly before the trial, and she, knowing that the facts could not be reached through them, concealed as far as possible his true condition from the physicians who attended him towards the close of his life; that as soon as these facts were discovered the complainant obtained the several affidavits of Christina Sitzman, Catherine Engle, and Frank Eehalt, tending to establish the foregoing material allegations of fraud, which were first used in the court on an application for a new trial, and are now annexed to the bill of complaint and form a part thereof. Whilst the demurrer of the defendant does not admit the truth of the mere *pro forma* charge of fraud in obtaining the judgment at law made in the complainant's bill, it does admit the truth of every fact stated which goes to establish the fraud; and if the foregoing statements must be accepted as true, they are quite sufficient to justify the court in enjoining all further proceedings upon the judgment until at least some further investigation into their truth can take place.

2. There is more difficulty about the question of the use of due diligence. I wish that the bill had been more specific in this regard. It iterates and reiterates its use, but I should have been better satisfied if it had told us more

definitely what was done and in what particular directions this large activity expanded itself.

However, as most of the important facts are alleged to be within the personal knowledge of the defendant, and the charge is that she has carefully concealed them from the complainant, I think the latter is entitled to a discovery. The demurrer is therefore overruled, and the defendant is allowed forty days in which to put in her answer.

UNITED STATES v. THROCKMORTON.

(8 Otto, 61-71. 1878.)

APPEAL from U. S. Circuit Court, District of California.

Opinion by MR. JUSTICE MILLER.

STATEMENT OF FACTS.—In this case a bill in chancery is brought in the circuit court of the United States for the district of California, to use the language of the bill itself, “by Walter Van Dyke, United States attorney for that district, on behalf of the United States,” against Throckmorton, Howard, Goold and Haggin.

The object of the bill is to have a decree of the court setting aside and declaring to be null and void a confirmation of the claim of W. A. Richardson, under a Mexican grant, to certain lands, made by the board of commissioners of private land claims in California on the 27th day of December, 1853; and the decree of the district court of the United States made February 11, 1856, affirming the decree of the commissioners, and again confirming Richardson’s claim. The general ground on which this relief is asked is that both these decrees were obtained by fraud.

The specific act of fraud which is mainly relied on to support the bill is that, after Richardson had filed his petition before the board of commissioners, with a statement of his claim and the documentary evidence of its validity, March 16, 1852, he became satisfied that he had no sufficient evidence of an actual grant or concession to sustain his claim, and, with a view to supply this defect, he made a visit to Mexico, and obtained from Micheltorena, former political chief of California, his signature, on or about the 1st day of July, 1852, to a grant which was falsely and fraudulently antedated, so as to impose on the court the belief that it was made at a time when Micheltorena had power to make such grants in California; and it is alleged that, in support of this simulated and false document, he also procured and filed therewith the depositions of perjured witnesses.

There is much verbiage, repetition and argumentative matter in the bill; but no allegation whatever that any of the attorneys, agents or other officers of the government were false in their duty to it, or that they assisted or connived at the fraud, unless a single allegation on that subject, which will be hereafter considered, sufficiently makes such charge. For the present it will be assumed that no such charge is made.

While the bill is elaborate in its statement of matters which are supposed to impeach the decree, and is correspondingly silent as to anything tending to its support, there are important facts which, it cannot escape attention, could not be omitted. Among these is, that, in attempting to negative the idea that juridical possession of the land was ever delivered to Richardson by the Mexican authorities, it is incidentally admitted that at the time the transaction oc-

curred on which his claim is founded, he was in actual possession and residing on part, if not all, of the land in controversy. So, also, it is tacitly admitted that the archives of the Mexican government, turned over to the office of the United States surveyor-general, and original documents produced by Richardson, showed an expediente which was sufficient to establish the claim, except for the want of the final concession. It is, therefore, to be taken as true, that Richardson, being on the land prior to 1838, made his petition to the governor for a grant of this land, which was appropriately referred for information, and that the proper report was had that there was no objection to the grant. According to Mexican law, but two things remained to perfect the title; namely, a grant or concession by the governor, and the delivery of juridical possession. The latter has never been held by this court as indispensable to a confirmation of the grant, and least of all when the party was already in possession, which he had held for many years. It is also important to observe that the original petition was filed before the board, March 16, 1852, and its decree was rendered December 27, 1853; that an appeal was taken to the district court, where the case remained until February 11, 1856, when it was affirmed; that an appeal was again taken to the supreme court of the United States, which was dismissed by order of the attorney-general on the 2d day of April, 1857. The case was pending in litigation, therefore, more than five years before the decree became final, and more than four years after the alleged fraudulent grant by Micheltorena was filed in the case. It is also to be observed that the necessity of such a paper to the support of Richardson's claim had been made obvious to the board of commissioners, to the claimant himself, and to the attorneys representing the government, by the report of the surveyor-general, that, while everything else seemed right in his office, the important final decree of concession was not there. The attention, therefore, of all the parties and of the court must have been drawn to a close scrutiny of any proceeding to supply this important document.

There was also ample time to make all necessary inquiries and produce the necessary proof, if it existed, of the fraud. The allegation of the bill is that this simulated concession was filed with the board of commissioners in January, 1853, and the decree rendered on December 27th, thereafter. The appeal was pending after this in the district court over two years; and after the final decree in that court it remained under the consideration of the attorney-general another year, when he authorized the dismissal of the appeal. The case, then, unless these officers neglected their duties, underwent the scrutiny of two judicial tribunals and of the attorney-general of the United States, as well as of his subordinate in the state of California, and was before them for a period of five years of litigation.

The bill in this case is filed May 13, 1876, more than twenty years after the rendition of the decree which it seeks to annul. During that time Richardson, the claimant, and the man who is personally charged with the guilt of the fraud, has died; his heirs, who with himself were claimants in the suit, are not made parties, and the land has passed from his ownership to that of the present defendants by purchase and conveyance.

It is true that the defendants are charged in general terms with being purchasers with notice. It is true that the United States is not bound by the statute of limitations, as an individual would be. And we have not recited any of the foregoing matters found in the bill as sufficient of itself to prevent relief in a case otherwise properly cognizable in equity. But we think these

are good reasons why a bill which seeks under these circumstances to annul a decree thus surrounded by every presumption which should give it support, shall present on its face a clear and unquestionable ground on which the jurisdiction it invokes can rest. Let us inquire if this has been done.

§ 2021. *Effect of fraud on judgments.*

There is no question of the general doctrine that fraud vitiates the most solemn contracts, documents and even judgments. There is also no question that many rights originally founded in fraud become — by lapse of time, by the difficulty of proving the fraud, and by the protection which the law throws around rights once established by formal judicial proceedings in tribunals established by law, according to the methods of the law — no longer open to inquiry in the usual and ordinary methods. Of this class are judgments and decrees of a court deciding between parties before the court and subject to its jurisdiction, in a trial which has presented the claims of the parties, and where they have received the consideration of the court.

There are no maxims of the law more firmly established, or of more value in the administration of justice, than the two which are designed to prevent repeated litigation between the same parties in regard to the same subject of controversy; namely, *interest rei publicæ, ut sit finis litium*, and *nemo debet bis vexari pro una et eadem causa*.

If the court has been mistaken in the law, there is a remedy by writ of error. If the jury has been mistaken in the facts, the remedy is by motion for new trial. If there has been evidence discovered since the trial, a motion for a new trial will give appropriate relief. But all these are parts of the same proceeding, relief is given in the same suit, and the party is not vexed by another suit for the same matter. So in a suit in chancery on proper showing a rehearing is granted. If the injury complained of is an erroneous decision, an appeal to a higher court gives opportunity to correct the error. If new evidence is discovered after the decree has become final, a bill of review on that ground may be filed within the rules prescribed by law on that subject. Here, again, these proceedings are all part of the same suit, and the rule framed for the repose of society is not violated.

§ 2022. *What fraud will vitiate a judgment.*

But there is an admitted exception to this general rule in cases where, by reason of something done by the successful party to a suit, there was in fact no adversary trial or decision of the issue in the case. Where the unsuccessful party has been prevented from exhibiting fully his case, by fraud or deception practiced on him by his opponent, as by keeping him away from court, a false promise of a compromise; or where the defendant never had knowledge of the suit, being kept in ignorance by the acts of the plaintiff; or where an attorney fraudulently or without authority assumes to represent a party and connives at his defeat; or where the attorney regularly employed corruptly sells out his client's interest to the other side,—these and similar cases which show that there has never been a real contest in the trial or hearing of the case, are reasons for which a new suit may be sustained to set aside and annul the former judgment or decree, and open the case for a new and a fair hearing. See *Wells, Res Adjudicata*, sec. 499; *Pearce v. Olney*, 20 Conn., 544; *Wierich v. De Zoya*, 7 Ill., 385; *Kent v. Richards*, 3 Md. Ch., 392; *Smith v. Lowry*, 1 Johns. Ch., 320; *De Louis v. Meek*, 2 Ia., 55.

In all these cases, and many others which have been examined, relief has been granted, on the ground that, by some fraud practiced directly upon the

party seeking relief against the judgment or decree, that party has been prevented from presenting all of his case to the court.

§ 2023. *When a court will not set aside a judgment for fraud.*

On the other hand, the doctrine is equally well settled that the court will not set aside a judgment because it was founded on a fraudulent instrument, or perjured evidence, or for any matter which was actually presented and considered in the judgment assailed. Mr. Wells, in his very useful work on *res adjudicata*, says, section 499: "Fraud vitiates everything, and a judgment equally with a contract; that is, a judgment obtained directly by fraud, and not merely a judgment founded on a fraudulent instrument; for, in general, the court will not go again into the merits of an action for the purpose of detecting and annulling the fraud." . . . "Likewise, there are few exceptions to the rule that equity will not go behind the judgment to interpose in the cause itself, but only when there was some hindrance besides the negligence of the defendant, in presenting the defense in the legal action. There is an old case in South Carolina to the effect that fraud in obtaining a bill of sale would justify equitable interference as to the judgment obtained thereon. But I judge it stands almost or quite alone, and has no weight as a precedent." The case he refers to is *Crauford v. Crauford*, 4 Desau. (S. C.), 176. See, also, Bigelow on Frauds, 170-172.

The principle and the distinction here taken was laid down as long ago as the year 1702 by the lord keeper in the high court of chancery, in the case of *Tovey v. Young*, Pr. Ch., 193. This was a bill in chancery brought by an unsuccessful party to a suit at law for a new trial, which was at that time a very common mode of obtaining a new trial. One of the grounds of the bill was that complainant had discovered since the trial was had that the principal witness against him was a partner in interest with the other side. The lord keeper said: "New matter may in some cases be ground for relief, but it must not be what was tried before; nor, when it consists in swearing only, will I ever grant a new trial, unless it appears by deeds or writing, or that a witness on whose testimony the verdict was given was convicted of perjury, or the jury attainted." The case seems to have been well considered, for the decree was a confirmation of one made by the master of the rolls.

The case of *Smith v. Lowry* (*supra*) was also a bill for a new trial, on the ground that the witness on whose testimony the amount of damages was fixed was suborned by the plaintiff, and that complainant had learned since the trial that a fictitious sale of salt had been made for the purpose of enabling this witness to testify to the market price. Chancellor Kent said that complainant must have known, or he was bound to know, that the price of salt at the place of delivery would be a matter of inquiry at the trial; and he dismissed the bill for want of equity, citing the case of *Tovey v. Young* with approval. And he cites a number of cases to show that chancery will not interfere though new evidence has been discovered since the trial, which, if the party could have introduced it, would have changed the result.

In *Bateman v. Willoe*, 1 Sch. & Lef., 201, Lord Redesdale said: "I do not know that equity ever does interfere to grant a trial of a matter which has already been discussed in a court of law, a matter capable of being discussed there, and over which the court of law had full jurisdiction." The rule must apply with equal force to a bill to set aside a decree in equity after it has become final, where the object is to retry a matter which was in issue in the first case and was matter of actual contest. The same doctrine is asserted in

Dixon v. Graham, 16 Ia., 310; Cottle v. Cole, 20 id., 482; Borland v. Thornton, 12 Cal., 440; Riddle v. Baker, 13 id., 295; Railroad Co. v. Neal, 1 Woods, 353 (§§ 2016-18, *supra*).

§ 2024. *Frauds for which a court of equity will set aside a judgment must be extrinsic and collateral.*

But perhaps the best discussion of the whole subject is to be found in *Greene v. Greene*, 2 Gray, 361, where the opinion was delivered by Chief Justice Shaw. That was a bill filed by a woman against her husband for a divorce. The husband had five years before obtained a decree of divorce against her. In her bill she alleges that the former decree was obtained by fraud, collusion and false testimony, and she prays that this may be inquired into and the decree set aside. The court was of opinion that this allegation meant that the husband colluded or combined with other persons than complainant to obtain false testimony, or otherwise to aid him in fraudulently obtaining the decree. The chief justice says that the court thinks the point settled against the complainant by authority, not specifically in regard to divorce, but generally as to the conclusiveness of judgments and decrees between the same parties. He then examines the authorities, English and American, and adds: "The maxim that fraud vitiates every proceeding must be taken, like other general maxims, to apply to cases where proof of fraud is admissible. But where the same matter has been actually tried, or so in issue that it might have been tried, it is not again admissible; the party is estopped to set up such fraud, because the judgment is the highest evidence and cannot be contradicted." It is otherwise, he says, with a stranger to the judgment. This is said in a case where the bill was brought for the purpose of impeaching the decree directly, and not where it was offered in evidence collaterally. We think these decisions establish the doctrine on which we decide the present case; namely, that the acts for which a court of equity will on account of fraud set aside or annul a judgment or decree, between the same parties, rendered by a court of competent jurisdiction, have relation to frauds, extrinsic or collateral, to the matter tried by the first court, and not to a fraud in the matter on which the decree was rendered.

That the mischief of retrying every case in which the judgment or decree rendered on false testimony, given by perjured witnesses, or on contracts or documents whose genuineness or validity was in issue, and which are afterwards ascertained to be forged or fraudulent, would be greater, by reason of the endless nature of the strife, than any compensation arising from doing justice in individual cases.

The case before us comes within this principle. The genuineness and validity of the concession from Micheltorena produced by complainant was the single question pending before the board of commissioners and the district court for four years. It was the thing, and the only thing, that was controverted, and it was essential to the decree. To overrule the demurrer to this bill would be to retry, twenty years after the decision of these tribunals, the very matter which they tried, on the ground of fraud in the document on which the decree was made. If we can do this now, some other court may be called on twenty years hence to retry the same matter on another allegation of fraudulent combination in this suit to defeat the ends of justice; and so the number of suits would be without limit and the litigation endless about the single question of the validity of this document.

We have alluded to an allegation concerning the agent representing the

United States before the board of commissioners. The substance of it is that Howard, one of the present defendants, then the law agent of the government before the board, had, from the papers in some other suit, derived notice of the fraudulent character of the Micheltorena grant, and that he failed and neglected to inform the commissioners of the fact, or otherwise to defend the interest of the United States in the matter. If there had been a further allegation that Howard was then interested in the Richardson claim, or that Richardson had bribed him, or that from any corrupt motive he had betrayed the interest of the government, the case would have come within the rule which authorizes relief. But nothing of the kind is alleged; and the statement is a mere charge of carelessness or negligence on the part of the attorney for the government, which would not have supported a motion for a new trial in a case at law at the same term, much less a suit in chancery to set aside a decree twenty years after it had been rendered.

Nor is there any such clear statement of the notice which Howard had as is necessary to establish his negligence. In fact, one great if not fatal defect in the bill is the absence of any declaration of the means by which the fraud has been discovered or can be now established.

§ 2025. *To vacate a patent for lands of the United States the attorney-general must authorize the proceedings.*

There is another objection to the bill which, though not going to the merits, is, in our opinion, equally fatal to it in its present shape. We are of opinion that, unless by virtue of an act of congress, no one but the attorney-general, or some one authorized to use his name, can bring a suit to set aside a patent issued by the United States or a judgment rendered in its courts on which such a patent is founded.

That is the case before us, and we see nothing in the bill to indicate to the court that it ever received the sanction of the attorney-general, or was brought by his direction. The allegation already cited implies that Mr. Van Dyke, the district attorney, is the complainant; but if, construing it liberally, we hold that the United States is the complainant, the statement is clear that the bill was brought by the district attorney, and not by the attorney-general. Leaving out of consideration all mere questions of form, there arises no presumption from the act of congress which gives the department of justice a general supervision over the district attorneys, that this suit was brought by his direction; for they, in the strict line of their duty, bring innumerable suits, indictments, and prosecutions, in which the United States is plaintiff, without consulting him. In the class of cases to which this belongs, however, the practice of the English and the American courts has been to require the name of the attorney-general as indorsing the suit before it will be entertained. The reason of this is obvious; namely, that in so important a matter as impeaching the grants of the government under its seal, its highest law officer should be consulted, and should give the support of his name and authority to the suit. He should, also, have control of it in every stage, so that if at any time during its progress he should become convinced that the proceeding is not well founded, or is oppressive, he may dismiss the bill.

There is appended to this record, though no part of it, a bond, given by some private persons to the United States, to save it harmless of costs in regard to this suit. If it is intended by this to show that the attorney-general authorized the suit, it fails to prove it, though the bond recites that that officer had directed the district attorney to bring the suit.

It is not in this way that the then attorney-general should have placed himself on the record as responsible for such a bill. In confirmation of this view, it does not appear that he or his successors have ever given the slightest attention to the case. In the argument of it before us no officer of the government appeared. It would be a very dangerous doctrine, one threatening the title to millions of acres of land held by patent from the government, if any man who has a grudge or a claim against his neighbor can, by indemnifying the government for costs, and furnishing the needed stimulus to a district attorney, institute a suit in chancery in the United States to declare the patent void. It is essential, therefore, to such a suit, that without special regard to form, but in some way which the court can recognize, it should appear that the attorney-general has brought it himself, or given such order for its institution as will make him officially responsible for it, and show his control of the cause.

§ 2026. *The circuit court cannot reform surveys.*

It is unnecessary at this day to say that, as a substantive matter, standing alone, the circuit court has no jurisdiction to interfere with or relieve against a survey which, by the allegation of the bill itself, is pending before the district court. For these reasons we are of opinion that the decree of the circuit court, sustaining a demurrer to the bill, and dismissing it on the merits, was right.

Decree affirmed.

CRIM v. HANDLEY.

(4 Otto, 652-660. 1876.)

APPEAL from U. S. Circuit Court, Southern District of Georgia.

§ 2027. *When equity will enjoin a judgment at law.*

Opinion by MR. JUSTICE CLIFFORD.

Courts of equity will not enjoin judgments at law, unless the complainant has an equitable defense to the cause of action of which he could not avail himself at law, because it did not amount to a legal defense; or where he had a good defense at law, of which he was prevented from availing himself by fraud or accident, unmixed with negligence of himself or his agents. *Hendrickson v. Hinckley*, 17 How., 443 (§§ 2007-9, *supra*).

Where a party has failed to make a proper defense through negligence, a court of equity will not enjoin the judgment; but where it appears that such a defense has been prevented by fraud or accident, without fault of the losing party, a court of equity may grant relief, if the proofs are satisfactory. *Hungerford v. Sigerson*, 20 How., 161 (§ 2030, *infra*).

STATEMENT OF FACTS.—Sufficient appears to show that goods of great value were owned by the mercantile firm of J. W. Buffington & Co., and that they, on the 1st day of February, 1866, sold the same to the firm of King, Crim & Co., William Peeples, one of the old firm, entering into the new firm which made the purchase. Payment of the price was made at the time of the purchase, less \$4,591.64, for which the purchasing firm gave to the vendors four promissory notes, payable to the creditor firm or bearer, on the first days of April, May, June and July next ensuing, with interest. Debts of the old firm were still outstanding, for which Peeples, of the new firm, was liable; and for his security the four notes given by the new firm were deposited in the hands of a third person, with the understanding that the depositary was to hold the

notes for that purpose, so that, when the debts of the old firm were presented, they might be paid by Peeples or the new firm, and in that event the amounts paid were to be credited on the notes in the hands of the depository.

Subsisting liabilities of the old firm were presented for payment, and were paid by Peeples, of the new firm; but the record shows that controversy arose respecting the same, and that the depository of the notes refused to allow the credits to be made on the notes, pursuant to the original understanding. Instead of that, he caused one of the notes to be put in suit to enforce payment of the same. Pending that suit, the new firm brought a bill in equity against the depository and the old firm, to compel the respondents to carry the understanding into effect. What they prayed was, that the payments thus made should be indorsed on those notes, and they also claimed a credit for worthless cotton-seed sold to them when they purchased the stock of goods of the old firm.

Litigation ensued; but, in the view taken of the case, it will not be necessary to enter very fully into those details. Suits of garnishment were also instituted in behalf of the creditors of the old firm against the depository of the notes; and during their pendency the notes were placed in the hands of certain attorneys, with directions that the notes be put in suit in the name of the agent of the creditors prosecuting the suits of garnishment. Pursuant to those directions, the agent, James M. Handley, on the 14th of April, 1873, sued the appellant and Peeples, as surviving partners of the new firm which gave the notes, counting on those notes as indorsee against the makers.

Service was made; and the defendants appeared and set up the following defenses: 1. That they never promised. 2. Payment before the suit was instituted. 3. Payment to the payees, and due notice to the indorsee and holder. 4. That the notes were given for a stock of goods, part of which consisted of a lot of cotton-seed, warranted sound, which proved to be unsound and worthless. 5. Prior recovery against the defendants to the extent of their liability in the garnishment suits, and the full payment of the amount so recovered. 6. Subsequent sale of the stock of goods to another firm for an amount greatly in excess of what was due on the notes, the purchasers, with the consent of the firm, agreeing to assume and pay what was unpaid on those notes. Peeples also filed a separate plea, in which he alleged that he had previously been adjudged a bankrupt by the district court.

Taken as a whole, it must be admitted that the pleadings fully and clearly present every matter in issue between the parties. Both parties appeared on a subsequent day, and they went to trial, the record showing that the verdict as against the appellant was for the plaintiff in the sum of \$3,154.21, and in favor of the other defendant, under his plea that he had been duly adjudged a bankrupt. Judgment was accordingly rendered for the plaintiff, and the present appellant filed a motion for new trial. Before the motion came to a hearing, the defendant, with the consent of the plaintiff, filed a statement of the evidence introduced in the case, which was also approved by the presiding justice, as exhibited in the record.

Enough appears in that statement to show that evidence was introduced in support of all the issues presented in the pleadings, and that the error, if any, must have been committed by the jury. For aught that appears to the contrary, it must be assumed that all the evidence offered by the defendant was admitted; and the record does not show that any evidence offered by the plaintiff was admitted to which the defendant objected. Nothing appears to

show any irregularity in the trial; and neither party filed any exceptions to the charge of the court, or to any ruling of the court in refusing to instruct the jury as requested.

Viewed in the light of these suggestions, it is clear that the record furnishes no ground whatever to suppose that the defendant did not enjoy every right which belongs to a litigant party, without diminution or restriction. Where no exceptions are taken during the trial, the presumption must be that the rulings of the court were correct; and that presumption in this case is confirmed by the fact that no complaint in that regard is made in the statement filed as the foundation of the motion for new trial. By the allegations of the bill of complaint it appears that such a motion was made and denied before the present bill of complaint was filed, which purports to seek relief for the complainant upon grounds "above and beyond what was considered by the court of law in the former motion."

Prefaced by that statement, the complainant proceeds to state the grounds for the relief, which, as he alleges, exist to support the present application for an injunction and new trial. Briefly stated, they are as follows: 1. That the verdict of the jury is unjust and inequitable, for the reasons that the credits which he claimed were not allowed. 2. That he was misled at the trial and his defense "demoralized" by the failure of recollection on the part of his principal witness, who knew all the facts required to establish the same; that, when the witness was called to testify, he became confused, and that his recollection deserted him to such an extent that he did not know to what he was testifying; that the forgetfulness and confusion of the witness arose, as the complainant is advised, from severe pain and the effect of opiates previously taken to relieve the painful disease with which he was afflicted, and that the consequent inability of the witness to testify to the facts within his knowledge was a complete surprise to the complainant and his counsel. 3. That one of his counsel unexpectedly failed to be present at the trial. 4. That he was unable to procure, as evidence on the trial of the case, the pleadings, proceedings and decree in an equity suit previously heard and determined in the state court, which were material to his defense, and for which he made diligent search without success.

Certain other grounds of relief are also alleged in the bill of complaint, which need not be reproduced as they do not appear to give much additional weight to the application.

Two of the respondents appeared and filed separate answers. Most or all of the material matters alleged in the bill of complaint are denied in the answers, which renders it unnecessary to enter into any preliminary comparison of the allegations of the former with those of the latter.

Credits to considerable extent must have been allowed, as is obvious from a comparison of the verdict with the aggregate amount of the notes and interest. More was claimed by the defendants than was allowed, and all experience shows that a losing party is seldom satisfied when his demand or set-off is reduced by the tribunal appointed to determine its amount.

Parties in suits at common law, where the value in controversy exceeds \$20, are entitled to a trial by jury; but the same amendment to the constitution provides that no fact tried by a jury shall be otherwise re-examined in any court of the United States than according to the rules of the common law. Two modes only were known to the common law for the examination of facts once tried by a jury; to wit, the granting of a new trial by the court where

the issue was tried or to which the record was returnable, or by the award of a *venire facias de novo* from the appellate court for some error of law in the proceedings. *Parsons v. Bedford*, 3 Pet., 448; 2 Story, Const. (3d ed.), 584; *Insurance Co. v. Comstock*, 16 Wall., 269.

All suits not of equity or admiralty cognizance are embraced in that provision and subject to its control. By its terms it is applicable only to common-law suits, and, of course, does not conflict with the rule before stated, that courts of equity may exercise jurisdiction to enjoin a judgment or to grant the injured party a new trial, in a case where the proof is clear to show that it would be inequitable and against conscience to execute it; as where it appears that the injured party has an equitable defense of which he could not avail himself in the suit at law, or if it appears that the defense could be made at law, but that he was prevented from making it by fraud or unavoidable accident, unmixed with any fault or negligence in himself or his agents. *Truly v. Wanzer*, 5 How., 142 (§ 2044, *infra*); 2 Story, Eq. (9th ed.), sec. 887.

Difficulty would attend any attempt to prescribe a rule which will apply in all cases; but it is safe to affirm that equity may exercise jurisdiction in such a case, where the evidence clearly shows that it would be against conscience to execute the judgment, because the injured party had a just defense of which he could not avail himself in the suit at law, or of which he might have availed himself at law, but was prevented from so doing by fraud or unavoidable accident, unmixed with any fault or negligence in himself or his agents. *Insurance Co. v. Hodgson*, 7 Cranch, 336.

On the other hand, said Marshall, C. J., it may with equal safety be laid down as a general rule that a defense cannot be set up in equity which has been fully and fairly tried at law, although it may be the opinion of the court that the defense in the suit at law ought to have been sustained. *Walker v. Robbins*, 14 How., 585 (§ 2013, *supra*); *Creath v. Sims*, 5 id., 204 (§§ 2031-34, *infra*); *Sample v. Barnes*, 14 id., 73 (§§ 2005-6, *supra*).

Where, pending a suit in the circuit court against a surety, judgment was recovered against him in a state court for the same cause of action, and he paid the whole amount before judgment was rendered in the circuit court, the judgment rendered in the circuit court was properly enjoined, it appearing that the surety tendered the defense of antecedent payment *puis darrein continuance*, and that the court refused to admit the defense. *Leggett v. Humphreys*, 21 How., 71; *Humphreys v. Leggett*, 9 id., 313 (§§ 2010-12, *supra*).

Frequent applications to enjoin judgments were made in equity, before the practice of awarding new trials was introduced into the courts of common law. Until the practice of granting new trials in courts of law was introduced, every reason existed why equitable relief should be afforded; but as the courts of law now exercise that power very liberally, especially in case of fraud or unavoidable accident, a resort to equity is seldom necessary or successful. 3 Lead. Cas. (3d ed.), 190; *Railroad Co. v. Neal*, 1 Woods, 353 (§§ 2016-18, *supra*).

Relief in equity may be granted in case of fraud or collusion; but it will not be granted in other cases, unless it clearly appears that to allow the judgment to be executed would be contrary to equity and good conscience, and that the facts which render it inequitable were unavailable as a defense in the action in which the judgment was recovered, without any fault or negligence of the losing party. *Clute v. Potter*, 37 Barb., 199; *Burton v. Wiley*,

26 Vt., 432; *Carrington v. Holabird*, 17 Conn., 537; *Kerr on Inj.*, 22; *Simpson v. Hart*, 1 Johns. Ch., 98.

§ 2028. *Neither absence of counsel at trial nor illness of witness ground for enjoining judgment.*

Absence of one of the counsel employed by the party furnishes no ground for equitable relief in this case, in view of the circumstances, as it does not appear that the party, if he had been present, might not have employed another equally competent to conduct the defense. Nor does the allegation that one of his witnesses was sick during the examination, that it impaired his recollection and rendered him incapable of stating material facts within his knowledge, afford any sufficient support to the present application. Accidents of the kind occasionally occur in the course of trial; but the plain remedy for such an embarrassment is an application to the court to postpone the trial or to continue the case, as the circumstances may require. Applications of the kind, if well founded, are seldom or never refused; but if a party elects to proceed and take his chance of success, he cannot, if the verdict and judgment are against him, go into equity, and claim to have the judgment enjoined. If a witness is too unwell to testify understandingly, the proper remedy for the party is to move for a postponement of the trial; and, if he elects to proceed and is unsuccessful, his only remedy is a motion for new trial to the court where the accident occurred.

§ 2029. — *nor failure of defendant to obtain lost record to use at trial.*

Suppose that is so, still it is insisted by the complainant that the allegations of the bill of complaint, that he was unable to procure an exemplified copy of the record in the prior described suit, if sustained by proof, are adequate to show that the judgment here in question should be enjoined; but there are two answers to that proposition, either of which is sufficient to show that the proposition is not well founded: 1. Because the loss of the record and the inability of the clerk to find it were a good cause for a continuance, if duly presented and supported by an affidavit in due form. 2. Because it was a case where secondary evidence was properly admissible, the party first proving loss and due unsuccessful search.

Nor is it any proper answer to that suggestion to say that the counsel present could not prove the contents of the record. Both the counsel and party knew at the commencement of the suit that the record in question would be material evidence for the defendant; and, if his counsel was unable to testify as to its contents, the defendant should have attended the trial himself, or have summoned the clerk, or some other person having the requisite knowledge. Accidents of the kind usually find a remedy in an application to the discretion of the court for a postponement of the case, or parol proof of contents, or, in case the trial proceeds and a verdict follows, by a motion for new trial at common law.

Due proof of loss, unsuccessful search, and proof of contents, would have been as available for the defendant as an exemplified copy of the record; and, in the absence of any proof of proper diligence in that regard, it is clear that he shows no ground whatever for equitable interference in his behalf. Suffice it to say, without remarking upon the other causes assigned why relief should be granted, that they must all be overruled, for some one or more of the reasons given for overruling those already specifically named.

Decrees affirmed.

HUNGERFORD v. SIGERSON.

(20 Howard, 156-162. 1857.)

Opinion by MR. JUSTICE McLEAN.

STATEMENT OF FACTS.—This is an appeal from the district court for the district of Wisconsin.

In his bill the complainant states that, prior to the 1st of December, 1851, he had numerous business transactions with the defendant, who had made advances of money to him on divers occasions, and payments had been made to him by the complainant. In a conversation in relation to their accounts, the defendant admitted the complainant was indebted to him only in about the sum of \$4,200; and on that day the defendant proposed to the complainant that he should execute to the defendant a promissory note for the sum of \$10,000, payable one day after date, which he wished to use as a collateral security on which to raise money; and he agreed not to sell or dispose of the same, or urge the complainant for the payment of the note, but would indulge him until he could make collections. And having unlimited confidence in the defendant, and feeling under many obligations to him for his various acts of kindness, the complainant made and delivered to the defendant, on the 1st of December, 1851, a note of hand for \$10,000, payable one day after date, to the order of John Sigerson, for value received, without defalcation or discount, negotiable and payable at the Bank of the State of Missouri. And the complainant avers that the note was given under the circumstances and for the consideration stated, and on no other or different account; that, since the date first above stated, he and the defendant have had no dealings whatever.

And the complainant alleges that, on the 10th of August, 1852, the defendant caused a suit to be brought against him on the above note, and on the 11th of January, 1854, a judgment was recovered for \$11,258.33 and costs. And the complainant says the judgment is unjust, in so far as it exceeds in amount the sum of \$4,275 and interest. And the complainant prays the defendant may be enjoined from collecting such part of the judgment as exceeds the sum he owes to the defendant, and this sum he offers to pay. Numerous interrogatories to the defendant are stated in the bill, designed to show the money transactions between them, and the amount due by the complainant to the defendant.

A demurrer was filed to the bill, which, on argument, was sustained, and the bill dismissed at the costs of the complainant, on which an appeal was allowed.

The subject-matter of this controversy arises out of mutual dealings between the parties, and the consideration on which the note stated in the pleadings was given. There is no allegation in the bill that adequate relief could not be had at law. There is no charge of fraud, or that the note had been assigned contrary to the agreement; nor that, by the contrivance or unfairness of the defendant, a remedy was not had at law; nor is there anything in the bill from which the court can infer a discovery is necessary to reach the justice of the case.

§ 2030. *Failure to make proper defense at law.*

Where a party has failed to make a proper defense at law, through negligence, equity will not aid him. If, by accident or fraud, such a defense has been prevented, a court of equity may grant relief. When the decree below was pronounced on the demurrer, the complainant, by application to the court,

might have asked leave to amend his bill, which the court, as a matter of course, would have allowed. But he prayed and appealed to this court, resting his whole case on the bill. And as it contains no averments authorizing relief in equity, none can be given. The decree of the district court is affirmed.

CREATH v. SIMS.

(5 Howard, 192-208. 1846.)

Opinion by MR. JUSTICE DANIEL.

STATEMENT OF FACTS.—This is an appeal from a decree of the circuit court of the United States for the ninth circuit and southern district of Mississippi. The facts of this case, so far as it is necessary to set them forth, are as follows: On the 25th of June, 1838, A. G. Creath, together with William N. Pinkard (who signed himself as principal), John I. Guion and Samuel Mason, executed their promissory note to the appellee, as administrator of John C. Ridley, for the sum of \$10,392.25, payable on the 1st day of October following, at the branch of the Planters' Bank at Vicksburg in Mississippi. Upon failure to pay this note an action was instituted thereupon in the circuit court above mentioned; a judgment was recovered for the amount at the May term of the court, 1839; and upon a *feri facias* sued out upon this judgment, the marshal having returned, on the 2d of October, that he had levied upon certain slaves enumerated in his return, the parties to the promissory note, the defendants in the judgment, together with a certain T. L. Arnold, on the 2d day of October, 1839, executed to the plaintiff in the action a forthcoming or delivery bond, which has the force of a judgment, by virtue of which the property levied upon was released. The condition of this forthcoming bond not having been complied with, a *feri facias* was, on the 16th of December, 1839, sued out thereupon, and on this process the marshal, on the 24th of March, made a return that it had been levied on several lots and parts of lots in the town of Vicksburg, which were not sold by order of the plaintiff's attorney. A copy of the order referred to by the marshal is made a part of the record, and is in the following words: "The marshal is authorized to levy on property enough of the defendants to pay the plaintiff's execution, and return the levy to court without selling or advertising for sale, unless other judgments younger than this are pressed to an amount to endanger this debt; if so, the property will have to be sold March 24, 1840."

On the 21st of May, 1840, a *venditioni exponas* was sued out, ordering the sale of the property which had been levied upon, and on that process there was a return that there had been no sale for the want of bidders. A second *venditioni exponas* was next sued in November, 1840, and on this the marshal returned that the property had been sold on the 2d of March, 1841, and the proceeds applied to the execution. The amount made by this sale does not appear by the return of the officer, but it is stated in the answer of the respondent to have been \$101 only. In consequence of the insufficiency of the sale under the last *venditioni exponas*, to satisfy the judgment, process of *feri facias*, *alias feri facias*, *pluries* and *alias pluries feri facias* was sued out until the autumn of the year 1842, when the marshal, having levied upon certain real and personal estate of the said A. G. Creath, as set forth in the return of that officer, and in his advertisement for the sale thereof, the complainant, on the 25th day of November, 1842, obtained from the district judge of the southern district of Mississippi an injunction to stay all proceedings upon

the judgment recovered against him and others at law. The grounds set forth in the bill, and on which relief is prayed, are the following: 1. That the complainant was a mere surety in the note on which the action was instituted, and that the indulgence granted by the direction to the marshal after judgment obtained was in fraud of defendant's rights as a surety; was in its operation, in fact, injurious to him, from the deterioration of the property of Pinkard, the principal, during the interval of that indulgence; was an infraction of the undertaking of the surety, and therefore absolved him from all responsibility. 2. That the instrument on which the judgment was obtained was one of several notes given for the purchase of a number of slaves sold by the intestate of the plaintiff to Pinkard, several of whom were unsound, although, as the plaintiff charges, they were (as he believes) warranted to be sound and healthy. 3. That although the slaves for which the notes were given were delivered in the state of Tennessee, yet the contract for them was in fact made at Vicksburg, in Mississippi, and was designed to be, and was in reality, a fraud upon the constitution and laws of Mississippi, forbidding the introduction of slaves as merchandise within that state.

The respondent denies that the complainant, Creath, could properly be regarded as a surety, either in the note on which the action at law was instituted, or in the forthcoming bond executed posterior to the judgment, but insists that in both the complainant must, with respect to the respondent, be considered as a principal, equally with the other makers of the note or obligors in the forthcoming bond. But even could Creath be viewed as a surety, it is further insisted that he could have no just cause of complaint, because, in the short space of five weeks, during which the execution was held up, there could be no material depreciation in property of any intrinsic value; and because, moreover, the forbearance was merely voluntary on the part of counsel of the respondent, was wholly without consideration, and without any agreement for delay with either of the parties, and might have been terminated at any moment, at the will of the respondent, or at the request of either of the defendants, had this been desired by them. The allegations in the bill of a warranty of the soundness of the said slaves, and of the making of the contract of sale within the state of Mississippi, and in fraud of the constitution and laws of that state, are, in the first instance, directly denied; and it is next insisted by the respondent that these are objections which, if they ever had any validity, should have been urged as grounds of defense to the action at law. A copy of the bill of sale from Ridley to Pinkard and others, conveying the slaves, is made an exhibit in the cause, and upon the face of that instrument there is no warranty of anything except of the title to the property conveyed. Several depositions were taken on behalf of the complainant, and some exhibits filed by the respondent, but as these are deemed immaterial to the questions on which the decision of this cause properly depends, they will not be made subjects of comment. Upon a final hearing before the circuit judge, on the 15th of May, 1844, it was decreed that the injunction awarded by the district judge on the 25th of October, 1842, should be dissolved, and the bill of the complainant dismissed with costs. From this decree an appeal was taken to this court.

§ 2031. *Grounds of equitable interference.*

In reviewing the grounds relied on by the complainant as the foundation of his claim to relief, the second and third, being coincident with the order and progress of the transactions between the parties, as stated in the bill, and

evincing especially the circumstances and the attitude under which this approach to a court of equity has been made, will be first considered, and this examination will be premised by stating the following principles of equity jurisprudence, which may be affirmed to be without exception: that whosoever would seek admission into a court of equity must come with clean hands; that such a court will never interfere in opposition to conscience or good faith; and again, and in intimate connection with the principles just stated, that it will never be called into activity to remedy the consequences of laches or neglect, or the want of reasonable diligence. Whenever, therefore, a competent remedy or defense shall have existed at law, the party who may have neglected to use it will never be permitted here to supply the omission, to the encouragement of useless and expensive litigation, and perhaps to the subversion of justice. The effect of these principles upon the statements of the complainant is obvious upon the slightest inspection.

§ 2032. *Equity will not relieve from a judgment on a contract made in fraud of a statute, when the parties are in pari delicto.*

The complainant alleges that the obligation to which he had voluntarily become a party was intentionally made in fraud of the law, and for this reason he prays to be relieved from its fulfillment. This prayer, too, is preferred to a court of conscience, to a court which touches nothing that is impure. The condign and appropriate answer to such a prayer from such a tribunal is this: that, however unworthy may have been the conduct of your opponent, you are confessedly *in pari delicto*; you cannot be admitted here to plead your own demerits; precisely, therefore, in the position in which you have placed yourself, in that position we must leave you. And so with respect to the omission by the complainant to set up at law either the failure or the illegality of the consideration for which the note was given; no reason is perceived why such a defense should not have been made or attempted. The action at law was founded upon a simple promissory note, a parol contract in legal intentment, and not upon a specialty; the consideration was fully open to investigation, and it was surely a sufficient indulgence to the payees of that note to have been permitted once to set up a defense by which payment may have been resisted, whilst the whole consideration received by them for their undertaking would have been withheld, and absolutely possessed and enjoined by them. But these payees of the note did not stop even here. After the first judgment recovered against them, and after the levy of an execution sued out on that judgment, they voluntarily go forward, the complainant amongst them, execute to the respondent their forthcoming bond, equivalent in effect to a confession of a second judgment, and after these repeated and conclusive recognitions of their liability, they invoke the aid of a court which repels whatever is unfair, or even illiberal, to declare that these proceedings, thus solemnly had and evidenced of record, shall be utterly null; that the respondent shall be stripped of his property without the promised equivalent, and that property be secured, if not to the complainant, to one with whom he was associated in effecting its relinquishment by the owner.

§ 2033. *A surety is not discharged by a voluntary forbearance toward the principal debtor, when.*

Recurring now to the first ground for relief set up in the bill, being that on which greatest stress is laid,—namely, the suretyship of the complainant, and the wrong alleged to have been done him by a change of his position and responsibility, by the indulgence extended to his co-defendant, Pinkard,—let

us test this ground, first, by the proofs upon the record, and next, by trying the accuracy of the deductions attempted to be drawn from them. The promissory note, on which the action at law was founded, is made an exhibit, and it appears that to the name of Pinkard, the first signer of that note, there is added the word "principal," and to the name of each of the other makers is added the word "surety." It is insisted by the respondent that these designations upon the note had no effect upon the obligations of these parties to him, however it might be supposed to operate upon their relations with each other; that with respect to the respondent all the makers of the note were from the beginning principals, but that at any rate, after their liability was fixed by judgment upon the note, and still more after their uniting in the forthcoming bond, in the nature of a second judgment, their equal responsibility as principals was irrevocably settled. In connection with this view of the case it may not be irrelevant here to remark that, by the statute of the state of Mississippi, promissory notes, though it be not so expressed upon the face of them, are declared in their legal effect to be joint and several. See Howard & Hutchinson's Statutes of Miss., 578. The proposition contended for by the respondent, were it necessary here to pass upon it, would not be found without support from decided cases. Thus, for instance, it was ruled by Chancellor Kent, in *Bay v. Tallmadge*, 5 Johns. Ch., 305, that where bail become fixed with the payment of the debt of the defendant, their character of bail ceases; that after judgment and execution against bail and sureties, there is an end of the relation of principal and surety, and the bail cannot claim any advantage against the creditor on the ground of want of diligence in prosecuting the principal debtor. In *Lenox v. Prout*, 3 Wheat., 520, it is laid down by Livingston, justice, in delivering the opinion of the court, that "the indorser of a note, who has been charged by due notice of the maker's default, is not entitled to the aid of a court of equity as a surety. But without pushing further an investigation which is unnecessary to the decision of the case before us, let it be conceded that the complainant was strictly a surety in the note on which the judgment was obtained at law; have any of his rights been impaired, or have any new rights grown up to him, springing from the conduct of the respondent or his agents in reference to that judgment and the proceedings had thereupon? The directions given by the attorney for the plaintiff in the judgment have been set out *in extenso*. These directions express upon their face no consideration received or promised for the forbearance,—no limitation upon the right of the plaintiff at law to proceed upon his execution,—no condition or stipulation of any kind; nor is there a tittle of proof as to the existence of any such consideration, limitation or agreement, expressed or understood. We see nothing in the case but a voluntary forbearance, which the plaintiff was at perfect liberty to terminate at his pleasure. What say the authorities in relation to a proceeding of this character? In the case of *Rees v. Berrington*, 2 Ves. Jr., 540, cited and pressed in the argument, the interposition of the chancellor was founded upon the ground of an actual and substantive change of the relation and responsibility of the surety, and in such a case his lordship very justly observed that he would not undertake to calculate the degree of injury which might have flowed from it; that if the situation had in fact been changed, that was sufficient to release the surety altogether, for it was an attempt to impose on him a responsibility he had never assumed; but in the case before us was there any such change wrought by a

mere voluntary forbearance, creating no obligation anywhere, contracting with nothing, nor with any person?

§ 2034. — *authorities reviewed.*

A few of the numerous cases, both at law and in equity, which are applicable to this question will be adduced.

Reynolds v. Ward, 5 Wend., 501: It was ruled that an agreement without consideration, enlarging the time of payment, was not a discharge of the surety to the note. So held on demurrer to a plea by surety, averring that, at the time when the note became due, the principal was able to pay, and would have paid had not the time been extended, and that after the note fell due the principal became insolvent. Held, also, in that case, that a promise to pay interest during the time of forbearance was no consideration for such agreement.

Bank of Utica v. Ives, 17 Wend., 501: Indulgence to the maker of a note, on receiving securities from him, does not discharge the indorser, where there is no valid agreement for giving time of payment for a definite period; and per Nelson, chief justice, in this case: "Mere indulgence at the will of the creditor, extended to the debtor, in no way discharges the obligation of the surety; if it did, it would be a most inconvenient and oppressive rule, as then suits must immediately follow the maturity of paper. It is a settled rule that there must be a valid common law agreement to give time, founded of course on a good consideration, to have this effect."

Norris v. Crummey, 2 Rand., 328: It is ruled that indulgence granted by a creditor to the principal debtor will not discharge the sureties of such debtor, unless the creditor shall have bound himself in law or in equity not to pursue his remedy against the principal for a definite length of time.

Hunter v. Jett, 4 Rand., 104: A surety will not be discharged by indulgence granted by the creditor to the principal debtor, unless such indulgence ties up the hands of the creditor from pursuing the debtor at law; nor will the surety be discharged even then, if the indulgence shall have been given with his knowledge and assent.

McKenny v. Waller, 1 Leigh, 434: A mere indulgence to a principal debtor by a creditor, not binding him to suspend his proceedings for any time, though such indulgence be given at the very time the sheriff is about to levy execution on the property of the principal, and although in consequence of that indulgence the principal debtor has been enabled to remove his property out of the reach of future process, was not even in equity a discharge of the surety.

Alcock v. Hill, 4 Leigh, 622: A creditor suspends execution on a forthcoming bond for several years, but he does so without consideration, and he nowise binds himself to suspend execution for any definite time; the principal and all the sureties but one become insolvent; and then the creditor sues out execution against the solvent surety. Held, that the surety is not entitled to relief in equity. The requisites in that case stated as indispensable for absolving the surety are, first, a consideration; second, a promise to indulge; third, the definite nature of such a promise; and fourth, the absence of assent by the surety.

The last case which will be cited on this point is that of *M'Lemore v. Powell*, 12 Wheat., 554, in which it was ruled by this court that an agreement between a creditor and the principal debtor for delay, or otherwise changing the nature of the contract, in order to discharge, the surety, must be an agreement having a sufficient consideration to support it, and be binding upon the parties.

There is not one of the authorities above cited which does not more than cover the predicament presented by the case under consideration. Those authorities furnish examples of agreements — arrangements between creditor and debtor — situations from which something like hardship might possibly spring. In the present case, there is neither contract, arrangement nor even a scintilla of right, on which either law or equity can lay hold. The complainant, after permitting a judgment on the note, without attempting a defense at law, and after execution was levied upon the judgment, voluntarily united in withdrawing the effects of his associate from the operation of that process, and by this very act bound himself with the force of a second judgment for the validity and for the satisfaction of the demand. After this course of conduct, he addresses himself to a court of equity, praying that court to undo all that he has voluntarily and deliberately performed, and, in order to accomplish this end, he seeks to stamp his own acts with illegality from their very inception. For such purposes he surely would have no standing and receive no countenance in a court of equity, upon any of its known principles. We hold the decree, therefore, of the circuit court, dissolving the injunction awarded the complainant below, and dismissing his bill with costs, to be correct; and that decree is accordingly affirmed.

DAVIS v. TILESTON.

(6 Howard, 114-121. 1847.)

APPEAL from U. S. District Court, Northern District of Mississippi.

Opinion by MR. JUSTICE WOODBURY.

STATEMENT OF FACTS.—The judgment in this case below was founded entirely on the bill in chancery and the general demurrer to it. There is in the record an answer filed a few days previous to the judgment. But the cause having before been set down for a hearing on the bill and demurrer, the answer does not appear to have been at all considered, for that or some other reason, and is not referred to in the decision. The only question for consideration by us, then, is, whether the judgment dismissing the bill on the demurrer was correct.

Upon a careful examination of the facts and principles involved, we feel constrained to come to the conclusion that it was not correct. We are reluctant to form this conclusion, because, on examining the contents of the bill, it does not, in some aspects of it, appear free from what is exceptionable, and the answer, if open to consideration now, would show a denial of most of its material allegations. But as the answer in the present decision must be put out of the question, and as the demurrer admits all facts duly alleged in the bill, the plaintiff seems entitled to judgment on these admissions, though, to prevent injustice by oversight or mistake, we shall take care to render such an opinion that the respondents can be enabled in the court below to avoid suffering, if they possess a real and sufficient defense to the bill. The grounds of our judgment are as follows:

§ 2035. *A bill to enjoin a judgment, which shows a good defense to the debt, ignorance of complainant of his defense, no laches, and combination among the judgment creditors and their assignors to defeat his defense, is good on demurrer.*

The demurrer, by admitting the truth of the allegations in the bill, admits these facts: 1. That the complainant had a good defense to a large part of the

original judgment recovered against him, as garnishee of the bank, and which he did not know at that time. 2. That he was entitled to pay to the original creditor, the bank, its own notes in discharge of any balance due to it, and which were under par, and that, through fraud between the bank and the respondents, the demand against him was assigned to them, and he sued as garnishee of the bank, in order to exclude the payment in its notes.

The former judgment having been in the district court of the United States, these grounds for an injunction against the further enforcement of it till the mistake as to the defense is corrected, and the balance allowed to be satisfied in notes of the bank then held, or an equivalent to their value at the time of the judgment, seem equitable on these allegations thus admitted.

§ 2036. *A garnishee has the same defenses against the garnishing party that he has against his creditor on the debt garnished.*

The respondents can, *ex æquo et bono*, claim to stand in no better condition than the bank. If there was a further good defense against the bank, there was against them. And if, in any material respect, they and the bank fraudulently combined, by or in that suit, to deprive the debtor of any legal advantage, the least which can be done in equity is to restore him to it. What is the answer to this view? Not that the demurrer does not in law admit the goodness of a further defense, and one not known at the judgment, and likewise the existence of fraud by those parties, but that the statement of the defense is not entitled to full credit, is contradictory, and develops culpable neglect to enforce the defense, and that the fraud is not set out with sufficient detail.

But so far as regards the credibility to be given to the statement of the further defense in the bill, that statement cannot be impugned on a demurrer. The truth of it can be doubted only where a denial of it is made in an answer, or proof is offered against it, neither of which is now before us. The next objection, founded on some supposed contradictions in the bill, as if not knowing the existence of the defense when he delivered the cotton on which it is founded, can be reconciled on various hypotheses, which need not here be detailed. For, however this may be, we think the allegations sufficiently distinct on a general demurrer.

The validity of the defense, as alleged, is resisted as the last objection, and rests on the ground that he had an opportunity to make it at law, and omitted to improve it. This principle is conceded to be correct if the defense was then known. But the bill avers he was ignorant of the existence of the defense when the judgment was recovered. This excuse, in some instances, might not avail him at law. It has been settled that in an action at law, if the party omits to make a defense which existed to a part or all of the cause of action, he can afterwards have no redress in a separate legal proceeding. *Tilton v. Gordon*, 1 N. H., 33; 7 D. & E., 269; 1 Ld. Raym., 742; 9 Johns., 232; 2 N. H., 101; 12 Mass., 263. In such case he can sometimes obtain relief by a petition for a new trial, but seldom in any other manner.

In certain instances, if the defense arose out of something subsequent to the original cause of action, such as a part payment of money, or a delivery of property to be applied in part payment, and the creditor neglected to make the application, it has been held that this may be treated even at law as a distinct transaction, the creditor having thus rescinded or failed to fulfil his promise to apply the money, and a separate action be then maintained to recover it back. *Snow v. Prescott*, 12 N. H., 535; 7 N. H., 535.

§ 2037. *On a bill to enjoin a judgment, the fact that the judgment was taken by default strengthens the equitable standing of the complainant.*

However this should be at law there is strong equity and substantial justice in it, and much more in cases where, as is usual, the debtor is defaulted, having no defense to the original cause of action, and supposes that the creditor, in making up judgment, will deduct all payments and all promised allowance, and does not discover the neglect to do it till after execution has issued.

§ 2038. *Where a judgment has been obtained by mistake, accident or fraud, it will be enjoined in equity.*

The present application being in equity and not at law, a party in the former is clearly entitled to an injunction, if there was accident, or mistake, or fraud, in obtaining the judgment. So, ignorance of a defense goes far sometimes to repel negligence, though, standing alone, it may not be a sufficient ground for such relief. See 1 Bibb, 173; Cook, 175; 4 Hayw., 7; 4 Mumf., 130; 6 Hamm., 82; Brown v. Swann, 10 Pet., 498, 502; 2 Swanston, 227; Thompson v. Berry, 3 Johns. Ch., 395.

On this point, however, we give no decisive opinion, because all of us are not satisfied that a clear remedy can be given at law on these facts by a separate action, and, as we have jurisdiction of this cause on the other ground of fraud, we advert to this merely as being one of the plausible reasons in favor of an injunction till the whole matters between the parties can be further investigated. See reasons for this course in United States v. Myers, 2 Brock., 516 (§§ 933-41, *supra*); 1 Wheat., 179; 2 Caines' Cas. in Err., 1; 10 Johns., 587; 1 Paige, Ch., 90.

The existence of fraud in obtaining the original judgment, which is the other ground assigned for relief, is next to be considered. It is not only alleged generally, but in the details, so far as already specified, in this opinion. A general allegation of it in the bill would have been sufficient, if so certain as to render the subject-matter of it clear. Nesmith v. Calvert, 1 Woodb. & M., 44; Smith v. Burnham, 2 Sumner, 612; and Jenkins v. Eldridge, 3 Story, 181. The demurrer admits the fraud thus set out, and the law is undoubted that our jurisdiction in equity extends over frauds generally, and in a special manner one like this, to which it is doubtful whether any remedy existed by law when defending the original action. 2 Caines' Cas. in Err., 1; 10 Johns., 587; 1 Paige, Ch., 90; 2 Stew., 420.

The character of this fraud, as admitted by the demurrer to exist, is one of great injustice to the community, it being equitable no less than legal, in Mississippi, by an express statute, for debtors of a bank to make payment to it in its own bills. Laws of Miss., A. D. 1842, p. 140. It seems generally allowable, even on common law principles, as a set-off. See the express declaration to that effect by this court in The United States v. Robertson, 5 Pet., 659; see, also, Planters' Bank v. Sharp, 6 How., 301 (Const., §§ 2177-87).

Looking probably to a transaction much like the present, the court, in 5 Peters, say: "So far as these notes were in possession of the debtor at the time he was summoned as a garnishee, they form a counter-claim, which diminishes the debt to the bank to the extent of that counter-claim." But how the balance is to be paid in respect to notes the court forbore to give any opinion (p. 659).

§ 2039. *A fraudulent assignment made to defeat a debtor of his set-off is void in equity.*

Any assignment or other proceeding got up with the fraudulent intent of

preventing the exercise of that right, as is here alleged and admitted, cannot receive the countenance of this court. But we do not decide on the extent, at law, to which such a defense can be made in Mississippi or in respect to the manner of paying the balance, as all our conclusions here rest entirely on the averments and the admission of their correctness by the demurrer. In coming to our conclusions we by no means would be understood, as before intimated, to approve all the language or forms of allegation adopted in this bill. But we are forced to think that enough is stated in it, in substance, to give us jurisdiction and to entitle the complainant to relief when the statement is not denied by the respondents.

The judgment below in favor of the demurrer is, therefore, reversed. But in order that justice may be done between these parties on the answer and any evidence either of them may wish to file, final judgment is not rendered here for the plaintiff, but the case is remanded in order that leave may be given to the respondents to withdraw their demurrer, and the cause be heard on the bill and answer if no evidence is desired to be put in; or on these and such evidence as the parties may wish to offer.

OCEAN INSURANCE COMPANY v. FIELDS.

(Circuit Court for Massachusetts: 2 Story, 59-80. 1841.)

Opinion by STORY, J.

STATEMENT OF FACTS.—This case comes before the court upon a demurrer to the bill; and, of course, the demurrer admits the truth of the statements made in the bill, at least for the purposes of the present argument. The bill asserts, in substance, that the judgment recovered in this court upon the policy of insurance in the case was procured by the fraud of the defendant, Fields, which has been satisfied; and that the loss of the vessel upon which the recovery was had was occasioned by the fraud of the defendant, in fraudulently casting away the vessel, and also in fraudulently boring holes in her bottom. There is also another distinct allegation of a fraudulent misrepresentation of the value of the vessel insured, at the time when the policy was underwritten. The bill then goes on to allege, although not in a very precise and accurate form, that, at the trial of the cause in this court, the plaintiffs were “uninformed of the fraudulent intentions and practices of the said Fields,” stated in the bill, and “were unable to prove the same, which were by the said Fields fraudulently suppressed and concealed,” and thereupon the verdict was rendered against the plaintiffs. The bill farther alleges that, since the payment of the judgment, “they, for the first time, discovered and were informed of the boring of the holes in the said vessel, herein described, the same concerning;” and, therefore, prays the interposition and relief of the court in the premises.

Now, upon this posture of the case, all these allegations of misrepresentation and fraud must be taken to be true; and, if they are, they certainly do present a strong appeal to the justice and equity of the court, unless solid grounds can be established to repel the conclusion.

What then are these grounds? No just objection exists as to the jurisdiction of the court, because it is a suit between an alien on one part, and a corporation, all of whose members are citizens of some one state in this Union, on the other part; and, besides, this is a case to overhaul and set aside a judgment of this court, which, perhaps, no other court is competent to do to the

same extent, and with all the same beneficial consequences as may be here attainable.

§ 2040. *A bill in equity, although it charge felony, may be sustained by proof, but the defendant is not bound to make a discovery thereof.*

The first objection urged against the bill is, that it charges the defendant, Fields, with a crime punishable, both by our law and the English law, with death; and that, under such circumstances, the bill is not maintainable. Now, in the first place, although if the charge in the bill be of a public crime committed by the party, that may constitute a good ground against compelling him personally to a discovery thereof, yet it is by no means a sufficient reason in all cases why, if the fact is made out by other proofs, the plaintiffs may not well be entitled to relief. It is by no means true, as a general proposition in the common law, that, because the act is a public crime, therefore the civil rights of other parties affected thereby are merged or suspended by the rights of the government to punish the same, even when the crime is a felony. The most that can be said is, that the common law requires that before the party injured by any felonious act can seek civil redress for it, the matter should be heard and disposed of before the proper criminal tribunal in order that the justice of the country may be first satisfied in respect to the public offense. But after a verdict of acquittal or conviction, and a judgment thereon, that judgment is so far conclusive in any collateral proceeding, *quoad* the subject-matter, that the objection is thereby removed to bringing that, *sub judicio*, in a civil action, which was the proper subject-matter of a criminal prosecution. So the doctrine was laid down by Lord Ellenborough in the case of *Crosby v. Long*, 12 East, 409, in which he was supported by the whole court. In *Boardman v. Gore*, 15 Mass., 331, the supreme court of Massachusetts held that this doctrine had not been adopted in our country. Upon that point it is not now necessary to pronounce any definite opinion, although certainly the reasoning of the late learned chief justice, upon that occasion, has great force and strength in it. In *Cox v. Paxton*, 17 Ves., 329, Lord Eldon recognized the doctrine of the courts of common law as strictly applicable in equity. But then the case there was that the plaintiffs made this title to relief against a third person, through a felony committed against them by their own clerk, by an embezzlement of their moneys intrusted to him, and vested by him in certain life policies of insurance, which had been transferred by the clerk to the defendant, alleged in the bill to be with notice. Lord Eldon, upon a demurrer, thought the bill not maintainable, upon the ground that the relief was to be reached through the felony of the clerk, and that an action at law would not lie to recover the moneys embezzled, if they had been in the hands of the defendant. That might be true if the party had not been convicted or acquitted upon a criminal prosecution therefor; and there was no such allegation in the bill. But if he had been, I profess not to see very distinctly what real objection lay to the bill. But upon this case, also, I give no opinion, because the present stands upon considerations wholly independent.

In the first place, the plaintiffs here do not claim title through any felony committed by the defendant to maintain an original suit. Their case is the converse of that of *Cox v. Paxton*, 17 Ves., 329, for theirs is purely matter of a defense to a suit brought originally by the defendant, in which he deduced his own title to recover, through an asserted fraudulent and felonious act on his part. There can be no possible doubt that, if the plaintiffs had, in the suit at law, known the real facts, and had sufficient proofs thereof, they might

have set up that very felony as a bar to the plaintiff's recovery in that suit. It is a case completely out of the mischiefs of the rule at the common law; and it would be a monstrous doctrine to assert, that any person claiming a right to an action founded upon his own fraud and felony could avail himself of it, and thus, by his own turpitude, exclude the other party from a perfect defense to the action. To such a case the maxim of retributive justice is most properly addressed: *Allegans suam turpitudinem non est audiendus*. Now, the very reason upon which the present bill is founded is that this, a perfect and valid defense at law, was, by the fraudulent concealment of the defendant, and the total ignorance of the plaintiffs in the facts, incapable of being set up to the original action; and the recovery was, therefore, inequitable and iniquitous. It would be against all the principles of a court of equity to allow one party to practice a fraud upon another innocent party, and, by another act of fraudulent concealment, recover a judgment against him, founded upon the prior act; and then to be permitted to assert this double iniquity as a bar to all equitable relief against the judgment. Upon this ground alone, the objection would be unavailable.

§ 2041. *If a felony be not cognizable under the criminal law of the country where civil redress is sought, there is no suspension of the civil rights of the felon.*

But there is another and still more urgent and decisive answer to the objection. The bill states a case, where the felony, if any, was committed on board a British vessel by a British subject, within British waters. It is, of course, therefore, solely punishable by the British laws. Now, although this court may judicially take notice of the common law, and the crimes recognized therein, yet as to the statute law of Great Britain, now in force, or created since the Revolution, it is difficult to perceive how it can be judicially taken notice of, or established before the court, except in the same manner and by the same proofs as the criminal laws of any other foreign country.

Even supposing the present statute law of Great Britain could be judicially taken notice of by the court, and the offense supposed to be a felony by that law, it would not change the posture of the present case; because the criminal laws of a foreign country cannot be of any force, or be in any manner enforced in any other country, unless recognized by some treaty stipulation. Now, the common law of England does not apply the rule that a civil action cannot be maintained for any injury or trespass which involves a felony, unless it be a felony committed in and cognizable and punishable by the courts within the realm. If it be an offense committed in a foreign country, there can be no merger or suspension of the civil rights of the injured party, until there has been a conviction or acquittal of the offender, for the plain reason that there can be no trial thereof had in the tribunals of England; and consequently, in such a case, the whole policy of the rule is completely swept away. Upon either ground, therefore, the objection fails of support.

§ 2042. *Overvaluation and misrepresentation will avoid an insurance policy, and are strong presumptive proof of fraud.*

Another objection is that, although the bill charges that the policy was procured by a fraudulent overvaluation, yet it does not allege that the facts relied on to establish it were unknown to the plaintiffs at the time of the trial; and that even if these things were properly alleged in the bill, yet they constitute no ground for equitable relief. Now the bill is certainly not pointed and stringent as to the want of knowledge on the part of the plaintiffs, as it should

and ought to have been. It is not improbable that the concluding allegation in the bill, that, since the payment of the judgment, the plaintiffs were for the first time informed of the boring of the holes, etc., "and of all things herein alleged the same concerning," was thought to be sufficient to cover this particular matter, although it certainly does not. This charge, therefore, of the bill, if it constituted the whole equity, would, by reason of this defect, be insufficient to sustain it. But if the charge were rightly framed, with the proper allegations, it would, in my judgment, constitute a complete title to relief.

A fraudulent overvaluation and misrepresentation of the value of the subject-matter of insurance will avoid a policy of insurance; and, if unknown at the time of the trial and judgment, is a proper case for equitable interference. Overvaluation, I agree, is no necessary proof of fraud; and far less, a positive statement of a sale bargained for at a high price in the port of destination. But there may be very cogent circumstances, from which fraud may be inferred, where the cause otherwise labors under strong suspicions. Besides, the demurrer, with reference to this matter, is merely argumentative, and addressed to the sufficiency of the proofs, and, therefore, seems, in this respect, to be of a character of a speaking demurrer. However, if the other charges in the bill can stand, and sustain it, the demurrer must be overruled.

§ 2042a. *Office of a demurrer in equity.*

Then, as to the main objection, on the ground of the fraudulent casting away of the vessel, and especially of boring holes in her, it is suggested that, in point of fact, the defense of fraud was made at the trial, and did not prevail. Assuming that it was so, still, as the bill admits nothing of this sort, but charges that the facts were unknown until after the judgment, this court cannot, upon demurrer, travel out of the allegations of the bill. The office of a demurrer is to bring before the court the right to maintain the bill upon the admission *pro hac vice* of the entire truth of all its allegations; and the court cannot look *aliunde* to search out or conjecture what other facts might or did exist to defeat the bill. That is the proper office of a plea or answer.

But the parties admit, for the sake of the argument, that the point of fraud was made at the trial; but that it was in effect founded upon circumstances of suspicion, not sustained by any clear and satisfactory proofs; and that the boring of the holes was not known or suspected at the trial; and that it was not and could not therefore then be a matter of controversy. Now, I agree that mere cumulative evidence to the fact of fraud or any other leading fact not discovered since the trial will not ordinarily constitute any just ground for the interference of a court of equity to grant relief for the solid reason that it is for the public interest and policy to make an end to litigation, or, as was pointedly said by a great jurist, that suits may not be immortal, while men are mortal.

§ 2043. *Rule as to when equity will interfere to set aside judgment at law for newly discovered evidence.*

But I do not know that it has ever been decided that, in an assignable case, where the defense has been imperfectly made out at the trial from the defect of real and substantial proofs, although there were some circumstances of a doubtful character, or some presumptions of a loose and indeterminable bearing before the jury, and afterwards newly discovered evidence has come out, full and direct and positive to the very gist of the controversy, a court of equity will not interfere to grant relief and to sustain a bill to bring forth and try the force and validity of the new evidence. My recollection does not fur-

nish me with any case where a doctrine so strict and so binding has been positively upheld and pronounced. This disposition of courts of equity, upon this head, seems, as far as I can gather it, not to encourage new litigation in cases of this sort; but, at the same time, not to assert their own incompetency to grant relief, if a very strong case can be made out. *A fortiori* all reasoning upon such a point must be powerfully increased in strength, when it is applied to a case which, upon the face of the bill, is composed and concocted of the darkest ingredients of fraud, if not of crime. At all events, it would be an extraordinary course for a court of equity to pronounce such a judgment in such a case, upon a demurrer, rather than to retain it for a final adjudication upon a hearing of the merits where the full pressure of the whole facts and the weight of all the attendant circumstances known at the trial and discovered since, may be fully brought before it. While the court would not be disposed lightly to interfere with the verdict of the jury upon the point of fraud, it might well deem itself at liberty to look deeper into the case upon new evidence which might justly, if known at the time, have changed the verdict of the jury.

I agree that there is a strong analogy between bills of this sort and bills of review as to newly discovered evidence; although there may possibly be some ground for a distinction in favor of the former bills, founded upon the consideration that they approach somewhat nearer to the analogy of motions for a new trial. The subject was a good deal considered by this court in *Dexter v. Arnold*, 5 Mason, 309, and *Wood v. Mann*, 2 Sumn., 316, 324 to 336, where it will be found that the principal cases are reviewed. It does not appear to me that it can be laid down as a positive rule, that in no case whatsoever ought relief to be granted, however stringent the evidence may be, which goes to establish the fraud asserted, but imperfectly brought out at the trial, from the mere defect of evidence, without laches of the party seeking relief in equity. But in the present case I am not prepared to say that the very fraud now preferred in the bill was identical with that propounded at the trial. Fraud in casting away a ship may be very distinguishable from fraud in destroying her by boring holes in her bottom. Both may concur and be concomitant circumstances of the same general transaction, but they may also constitute distinct and independent transactions and matters of defense. How can a court of equity, upon a dry demurrer, assert that they are the one rather than the other? If I were compellable to decide, upon the face of this bill, what in this case was the real proximate cause of the loss and destruction of the vessel, I should say that it was not the casting away of the vessel, but the boring of the holes in her bottom. But it is unnecessary to decide that, because upon a demurrer, *in odium spoliatoris*, the court will not decide a matter of such importance in his favor but reserve it for a final hearing upon the merits.

Objections have been urged to the frame of the bill in other respects; that it does not contain any allegations of due diligence to ascertain these facts before the trial, and that the plaintiffs have lain by and been guilty of gross negligence and laches. That may be or may not be made out upon a final hearing of the merits. But the bill asserts that the boring of the holes was unknown until after the judgment; and the court cannot presume that it could by any prior seasonable diligence have been established. If it might have been discovered by such vigilance, it is more properly a matter of defense than of allegation in the bill.

Upon the whole my opinion is that the demurrer ought to be overruled.

TRULY v. WANZER.

(5 Howard, 141-143. 1846.)

APPEAL from U. S. Circuit Court, Southern District of Mississippi.

Opinion by MR. JUSTICE GRIER.

STATEMENT OF FACTS.—It is not easy to apprehend or appreciate the grounds upon which the complainant in this case has invoked the aid of a court of chancery. He purchased some negroes from one Herbert, in 1836, to whom he gave two notes in payment. On one of these, suit was brought, and a judgment obtained, which has been paid and satisfied. The other remains unpaid; but the complainant has been summoned as garnishee of Herbert in a suit by Wanzer and Harrison, in which a judgment has also been obtained, and an execution issued; and he now asks the interposition of a court of equity, not only to protect him from the judgment and execution, but also to restore to him that portion of the consideration which has been recovered by due course of law.

The reasons alleged for this request are, first, because the negroes purchased by him were brought into the state of Mississippi for sale, contrary to the provisions of the constitution of the state, and, therefore, the contract was illegal and void. And, secondly, because he has been informed that the vendor had not a good title to the negroes, but held them as guardian for his infant brothers and sisters, "and ran them off to the state of Mississippi."

§ 2044. *Where the complainant still retains unmolested possession of the property, equity will not enjoin a judgment for the purchase money thereof.*

As the complainant still retains the undisturbed possession of the property, without even a threat of molestation, this allegation would seem to have been inserted in the bill, not as containing in itself sufficient grounds for an injunction, but rather to give some plausibility to the charge of fraud, and thus veil the naked deformity of his case. That a note given for the purchase of negroes brought into the state of Mississippi, after 1833 (when the constitution was adopted), and before 1837 (when the legislature imposed penalties to enforce the constitutional prohibition), was not void, has been decided by this court in the case of *Groves v. Slaughter*, 15 Pet., 459, and again at the present term, in the case of *Rowan v. Runnels*, 5 How., 134.

But even if the alleged illegality of the contract would have constituted an available defense to the payment of the note, it would be a strange abuse of the functions of a court of equity, to grant an injunction against enforcing a judgment at law, because a purchaser, with a full knowledge of his defense, had omitted or was ashamed to urge it.

It may be stated as a general principle, with regard to injunctions after a judgment at law, that any fact which proves it to be against conscience to execute such judgment, and of which the party could not have availed himself in a court of law, or of which he might have availed himself at law, but was prevented by fraud or accident, unmixed with any fault or negligence in himself or his agents, will authorize a court of equity to interfere by injunction to restrain the adverse party from availing himself of such judgment. See 2 Story's Eq. Jur., § 887. It is too plain for argument that none of these conditions can be predicated of the present case.

The complainant has had the undisturbed enjoyment of his purchase, without challenge of its title, for ten years; and it is with a bad grace that he now invokes the aid of a court of equity to shield him from the payment of the

consideration, on the allegation that he had neglected to urge an unconscionable defense, or that he had heard that some persons unknown might possibly, at some future time, assert a claim to the property. It is in vain to search the annals of equity jurisprudence for a precedent of an injunction granted on such bald pretenses.

"There is no power, the exercise of which is more delicate, which requires greater caution, deliberation and sound discretion, or more dangerous in a doubtful case, than the issuing an injunction. It is the strong arm of equity. that never ought to be extended, unless to cases of great injury, where courts of law cannot afford an adequate and commensurate remedy in damages. The right must be clear, the injury impending and threatened, so as to be averted only by the protecting preventive process of injunction." Bald., 218. It never should be permitted to issue where it is even suspected that it will be prostituted to the unworthy purpose of delaying, vexing and harassing suitors at law in the prosecution of their just demands.

Let the judgment of the circuit court be affirmed.

BROOKS & HARDY v. O'HARA.

(Circuit Court for Iowa: 2 McCrary, 644-652. 1881.)

STATEMENT OF FACTS.—Bill in equity to set aside a decree heretofore obtained in this court by the respondents against the complainants and others, by which a mechanic's lien was established for \$39,763.26 upon the railroad of which complainants were trustees. The bill charged fraud "upon information and belief," and stated that until within a short time previous to the filing of the bill complainants were in ignorance of the facts. The bill prayed that the decree complained of be set aside and enjoined. Defendants filed a demurrer to the bill.

§ 2045. *Allegation of fraud.*

Opinion by McCRARY, J.

First. The bill does not allege with sufficient particularity that the decree, which is sought to be set aside, was obtained by fraud. It alleges in general terms that there was nothing due the respondents on their claim, and it is averred that "the amount sued for by them was for a claimed balance unpaid, which your orators charge was fraudulent, and that no such balance was due, and that the money paid by said railway company as aforesaid more than paid said respondents for all the work they had ever done for said railway."

It is further alleged that "said supposed balance was made to appear, either by a mistake of all the parties, or by false statements of the amounts, and deception practiced upon the Burlington & Southwestern Railway Company, or its engineer, or by collusion with the officers of that company, to defeat and injure the claims represented by your orators, and to defraud the holders of bonds secured by the mortgage of your orators.

"That said claim was either a mistake, or was false and fraudulent, and based upon no consideration, and upon a claim for work which was never done, and ought never to have been allowed, all of which was unknown to your orators, and with reasonable diligence could not be learned during the pendency of the suit in this court, the only one to which your orators were parties."

§ 2046. *What is and what is not a sufficient allegation of fraud.*

A bill for relief on the ground of fraud must be specific. It is not enough

to charge in general terms that a particular transaction was fraudulent. The facts constituting the fraud must be stated, so that the court and not the pleader may determine whether, if true, they constitute fraud. This rule applies to all bills for relief on the ground of fraud, including, of course, a bill to set aside a judgment or decree upon that ground. Story's Eq. Pl., 251, 428; Kerr on Fraud and Mistake, 365. It is also necessary to charge the intent to deceive, either by an express averment or by such words as necessarily imply such intent. *Moss v. Riddle*, 5 Cr., 351; *Gray v. Earl*, 13 Ia., 188.

The counsel who drafted this bill evidently intended to comply with these rules by inserting the allegations embraced in the second quotation above, wherein it is set forth in effect that the balance due complainant was made to appear either by mistake of all the parties, or by deception practiced upon the railway company, or by collusion with that company. By this allegation the complainants say, in substance, that the wrong was done them in one of these three ways, but as to which one they are unable to say. The insufficiency of such an allegation will be very apparent when it is suggested that mistake is one thing and fraud another, and that the character of the case and nature of the defense would depend very much upon the question whether it is a case of mistake or a case of fraud that is set out. No man can be required to answer and prepare for trial upon a bill which leaves him in doubt as to the exact nature of the case against which he is to defend. Hence, the rule that allegations must not be in the alternative. Story's Eq. Pl., 245, 245a.

In view of these considerations, I am constrained to hold that the bill does not set forth the circumstances of the fraud charged with sufficient certainty and particularity.

§ 2047. *An injunction will not be granted in the first instance upon a bill charging fraud upon information and belief.*

Second. The fraud relied upon is charged only upon information and belief. An injunction cannot be granted in the first instance upon an allegation of this character. It is necessary that the fraud should be made to appear by positive averments, founded on complainant's own knowledge or that of some person cognizant of the facts. High on Inj., sec. 35, and cases cited; id., sec. 110, and cases cited.

§ 2048. *Rules as to res adjudicata.*

Third. Another and much more important question is presented by this record, and has been discussed by counsel. This is a bill to set aside a former decree of this court between the same parties and upon the same subject-matter. It is clear that all questions touching the validity or amount of respondents' claim were open to investigation in the former suit. Issue was joined upon their cross-bill, and testimony was taken and decree was rendered in their favor. It was the right and duty of complainants to investigate the character of the claim, and to set up, in *that case*, whatever defense they had. It is not enough to allege that they did not discover the facts in time so to do.

The only exception to this rule is in cases where, by some wrong act of the successful party, his adversary is deprived of the right to fully present his case. The rule is thus stated by Mr. Justice Miller in *United States v. Throckmorton*, 98 U. S., 65 (§§ 2021-26, *supra*): "But there is an admitted exception to this general rule in cases where, *by reason of something done by the successful party to a suit*, there was, in fact, no adversary trial or decision of the issue in the case.

"Where the unsuccessful party has been prevented from exhibiting fully his

case, by fraud or deception practiced on him by his opponents, as by keeping him away from court, a false promise of a compromise; or where the defendant never had knowledge of the suit, being kept in ignorance by the acts of the plaintiff; or where an attorney fraudulently, or without authority, assumes to represent a party, and connived at his defeat; or where the attorney, regularly employed, corruptly sells out his client's interest to the other side—these and similar cases, which show that there has never been a real contest in the trial or hearing of the case, are reasons for which a new suit may be sustained, to set aside and annul the former judgment or decree and open the case for a new and fair hearing. See *Wells' Res Adjudicata*, sec. 499; *Pearce v. Olney*, 20 Conn., 544; *Wierich v. De Zoya*, 7 Ill., 385; *Kent v. Ricards*, 3 Md. Ch., 392; *Smith v. Lowry*, 1 Johns. Ch., 320; *De Louis v. Meek*, 2 Ia., 55."

The rule is clearly settled, at least so far as the federal courts are concerned, that a judgment will not be set aside upon an original bill, upon the ground that it was founded upon a fraudulent instrument or perjured evidence, when there were no hindrances besides the negligence of the defendant in presenting the defense in the first suit. The case of *United States v. Throckmorton*, *supra*, is a striking illustration of this rule.

The judgment attacked in that case had been obtained, as was alleged, upon a grant which had been executed by a former Mexican governor of California after he had ceased to hold that office, and falsely and fraudulently antedated. The case was a strong one, but the court said: "There was ample time to make all necessary inquiries and produce the necessary proof, if it existed, of the fraud," in the progress of the original suit; and the bill was held bad on demurrer, because it was the duty of the complainants to ascertain the facts and make their defense in the original suit.

And the court quote with approval the following rule laid down by Shaw, C. J., in *Greene v. Greene*, 2 Gray, 361: "The maxim that fraud vitiates every proceeding must be taken, like all other general maxims, to apply to cases where proof of fraud is admissible. But, where the same matter has been actually tried, *or so in issue that it might have been tried*, it is not again admissible. The party is estopped to set up such fraud, because the judgment is the highest evidence and cannot be contradicted."

See, also, the following authorities, cited by Mr. Justice Miller in the same opinion: *Dixon v. Graham*, 16 Ia., 310; *Cottle v. Cole*, 20 id., 482; *Borland v. Thornton*, 12 Cal., 440; *Biddle v. Baker*, 13 Ia., 295; *Railroad Co. v. Neal*, 1 Woods, 353 (§§ 2016-18, *supra*). The demurrer must be sustained, with leave to complainants to amend, if counsel thinks he can bring the case within the principles announced in this opinion.

DUNLAP v. STETSON.

(Circuit Court for Maine: 4 Mason, 349-379. 1827.)

Bill in equity, to obtain an injunction and general relief against a judgment, rendered against the plaintiff in this case for the recovery of a moiety of certain land. The nature of the plea to the jurisdiction, and the facts on the merits, will appear in the opinion.

§ 2049. *A bill in equity to enjoin a judgment lies in the circuit court where the judgment is given, although the original plaintiff resides in and is a citizen of another state. Such bill is not an original suit.*

Opinion by STORY, J.

I do not think it necessary to go over the pleadings at large in this case, but

shall content myself with an exposition of those facts only which bear upon the main points suggested at the argument.

The first point raised is, whether the suit itself can be maintained, the defendant being a citizen of Massachusetts, and not resident in Maine, and the subpoena having been served upon him in the state of Massachusetts. The exception has been taken by way of plea to the jurisdiction, and has also been relied on in the answer, and must of course now be disposed of, before we can enter upon the merits. The judiciary act of 1789, ch. 20, § 11, has declared "that no civil suit shall be brought before either of the said courts [of the United States] against an inhabitant of the United States, by any *original* process, in any other district than that whereof he is an inhabitant, or in which he shall be found at the time of serving the writ." This has always been deemed a personal privilege of the party defendant, introduced for his benefit, and which he is at liberty to waive, and not, strictly speaking, a question of the jurisdiction of the court. But the defendant has chosen, on this occasion, to take the objection in due season; and the question is, whether the present suit is such an original process as is contemplated by the act. I believe the general, if not the universal, practice has been to consider bills of injunction upon judgments in the circuit courts of the United States, not as original, but as auxiliary and dependent suits, and properly sustainable in that court which gave the original judgment, and has it completely under its control. The court itself possesses a power over its own judgments by staying execution thereon; and it would be very inconvenient if it did not possess the means of rendering such further redress as equity and good conscience required. Although a circuit court in another district might act *in personam* upon the party, and so far grant an equitable relief, the suit could not be effectual to bind the circuit court in which the judgment was rendered. And it is easy to perceive that many embarrassments, as well to the remedy as to the title under the judgment, might arise from this conflict and separation of jurisdictions. And if the party obtaining the judgment should, in the meantime, become a citizen of the same state as the other party, there would, in many cases, be an entire failure of all equitable relief, contrary to the plainest principles of justice. Considerations of this sort have, as I am informed, satisfied the minds of some of the most enlightened judges, that the act of congress never was intended to apply to bills for relief upon judgments rendered in the circuit courts. They are deemed to be not original suits, but branches growing out of the original suits, and dependent upon them, and very much in their nature, like those hearings in equity authorized by our laws, in cases of the confession of forfeiture upon the penalties of bonds, mortgages and other agreements with collateral conditions. There has always appeared to me to be great weight in this reasoning; and I should not hesitate to follow it, unless some stubborn authority stood in my way. I know of no such authority. On the contrary, the case of *Logan v. Patrick*, 5 Cranch, 288, if it did not decide the very point, has never been construed as questioning it. The form of the certificate in the cause was (apparently in answer to the first question put), "that the said circuit court can entertain jurisdiction of the cause."

§ 2050. *Example of a naked possibility of an equity which is not assignable.*

A second point is, that the present suit is not maintainable, because, since the rendition of the judgment, and before the filing of the bill, the plaintiffs sold and released to one Richard Pike all their right and title to the land in controversy. In fact, the land was originally purchased of Pike by the an-

cestor of the plaintiffs, from whom they derived their title, under a deed of general warranty. The argument is, that Pike is now the real plaintiff in interest, and being a citizen of Massachusetts, he could not now maintain any bill in equity in the circuit court against the defendant, who is a citizen of the same state. If this be so, there is an extinguishment of all remedy in equity, in respect both to Pike and the present plaintiffs upon the judgment, for there is no state court of chancery to which the parties can apply. There is another difficulty not adverted to at the argument, and that is founded on the eleventh section of the judiciary act of 1789, ch. 20, which provides that no district or circuit court shall have "cognizance of any suit to recover the contents of any promissory note or other chose in action in favor of an assignee, unless such suit might have been prosecuted in such court to recover the said contents, if no assignment had been made, except in cases of foreign bills of exchange." Now, upon the ground assumed by the defendant, the present plaintiffs could not maintain an injunction bill in this district to this judgment; and supposing the conveyance to Pike to operate as an assignment of their rights, the latter also would be precluded from the same resort. These are inconveniences which cannot escape the most superficial observation. They furnish no reason for assuming jurisdiction where it is not given; but they furnish some reason against the extension of general words to cases which, it is not easy to believe, could have been within the legislative intention.

But it is not necessary to rest this question on any considerations of this nature. The judgment in the writ of entry was a conclusive bar to the title of the plaintiffs, so far as it was of a legal nature. It was a complete recognition of the defendant's right of recovery, and an extinguishment *pro tanto* of the plaintiff's title. It was not necessary to perfect the title of the defendant that he should have been put into possession of the land by a writ of seizin. He might enter into possession without any such execution, for his title was complete by the judgment. So are the authorities recognized by our own courts. Com. Dig., Execution, A., 1; *McNeil v. Bright*, 4 Mass., 282; *Gilbert v. Bell*, 15 Mass., 44; Co. Litt., 34, b. This being so, there is no pretense to say that the deed to Pike did or could convey any legal estate to him against the defendant. It was as little competent to pass any equitable estate in the premises; for in a correct sense the plaintiffs had no such estate. If the plaintiffs are entitled to any redress upon the present bill (and the circumstances therein stated constitute their whole equity), it is most obvious that it is not because they possess any equitable estate in the land, but because they possess an equitable claim upon the defendant, personally, for relief. This is not the case of an express or implied trust, created or admitted by the parties themselves. It is a naked equity, which is set up upon the ground of a constructive trust created by a court of chancery, because there has been some mistake, or fraud, or accident, or other claim, acting upon the conscience of the party. Until the equity has been established by the decree of a court of equity, it has no positive existence. It is the creature of the court itself. *Brace v. Duchess of Marlborough*, 2 P. W., 491; *Brown v. Gilman*, 1 Mason, 191. Now, admitting that choses in action, and even possibilities of interest, are in general assignable in equity (*Thomas v. Freeman*, 2 Vern., 563, and Raithby's note; *Wind v. Jekyl*, 1 P. Will., 572; *Higden v. Williamson*, 3 P. Will., 133), it would be difficult to establish that such a mere naked possibility of equity as this is assignable, or would be recognized and enforced in a court of equity in a suit by the assignee. The cases of *Jacobson v. Williams*, 3 P. Will., 383, 385, and

Spragg v. Binkes, 5 Ves. Jr., 583, admonish us that courts of equity entertain some reserves on this subject; and without a positive authority in its favor, I should feel no inclination to sustain it. Nothing approaching to such an authority can, as far as my researches extend, be found. See *Robinson v. McDonald*, 5 M. & Selw., 228. I cannot perceive how the assignee of such a constructive trust, or naked equity, as is here set up, could sustain a bill to enjoin the judgment. And if he could, it would not necessarily follow that it might not also be maintainable in the name of the plaintiffs for the benefit of the assignee. But the deed to Pike contains no such assignment. It is a mere conveyance and release of all the "right, title and interest [of the plaintiffs] *in and to the lots of land*," etc., free from the claims of all persons claiming by, through, or under them.

§ 2051. *A naked equity, requiring a subsequent decree to bring it into being, constitutes no right, title or interest in the land itself.*

Now, this naked equity constitutes no right, title or interest in the land itself. A judgment creditor has a lien on the land of his debtor; but it is neither *jus in re*, nor *jus ad rem*; and though he releases all his right to the land, he may afterwards extend his execution upon it. *Brace v. Duchess of Marlborough*, 2 P. Will., 491. So a release of a right to land does not extinguish a bare authority in an executor to sell it. *Co. Litt.*, 265; *Com. Dig.*, Release, B., 3. Both of these cases are much stronger than the present; and to carry the interpretation of the words of the deed to the extent of operating as an assignment of the possible equity of the plaintiffs, would be, not to enforce, but to defeat the intention of the parties to it. It would be a much more rational interpretation to construe it (as is contended for by the plaintiff's counsel) as intended to operate as a release or extinguishment of the covenants of warranty of Pike in his original conveyance to their ancestor. For these reasons, I am of opinion that this objection is unsustainable.

§ 2052. *A court of equity has power to enjoin part of a judgment.*

There is another objection to the bill, which may as well be disposed of in connection with the preceding. It is, that if the defendant is entitled to any part of the land, the judgment cannot be enjoined; for relief in equity will be granted only when the fraud goes to the whole of the judgment, and not where it is but of partial application. This objection is founded upon a mistake of the real intent of the authorities which have been relied on to support it. A court of equity will grant relief to the extent of the injury which the party seeking the injunction had suffered. If that applies only to part of the land recovered, there is nothing in the principles or practice of the court which prohibits it from restraining or modifying its relief accordingly.

STATEMENT OF FACTS.— We may now approach the merits of the case. Both parties claim title under one James Budge, who became entitled, in the manner which will be hereafter stated, to one hundred acres of land in Bangor, of which he sold one acre to one William McGlathry by a deed dated in April, 1798, describing the same by certain metes and bounds. The remaining ninety-nine acres confessedly belong to the defendant, and Messrs. Laphis and French, in undivided moieties, through intermediate conveyances from Budge. The whole contest between the parties respects the title to this one acre. It is bounded and described in the deed from Budge to McGlathry thus: "a certain lot of land, lying and being in Bangor, on Condeskeig point, so called, bounded and described as follows, to wit, *beginning at a stake on the west bank of Pe-*

nobscot river *near a thorn-bush*, marked on four sides, running north eleven rods to a stake and stones; thence southerly to a stake and stones, a corner; thence south nine rods to *a stake and stones on the same bank of the same river*; thence *running on the western bank of said river to high-water mark* sixteen rods to the first-mentioned bounds, with all the privileges of water and landing to the same belonging." The colonial act of 1641 declares "that in all creeks, coves and other places, about and upon salt water, the proprietor of the land adjoining shall have propriety to the lower-water mark, where the sea doth not ebb above one hundred rods, and not more, wheresoever it ebbs further." The question is whether by the terms of the present deed McGlathry, as *riparian* proprietor, took the flats to low-water mark in front of the land, or whether, as against Budge and all claiming under him, he is limited to high-water mark on the western bank of Penobscot river. It appears to me very clear that the deed bounds McGlathry by the western bank of the river at the high-water mark. Assuming Budge to have been an original *riparian* proprietor, entitled by the operation of law to the adjacent flats, it was certainly competent for him to sell the upland and reserve the flats. The only question is, what is the true construction of his deed in this particular?

§ 2053. *What description conveys only the land above high water. A question of riparian ownership.*

It is to be observed that it is not a deed bounding the grantee on the river, or the stream of the river generally, where the flats might pass by implication; but the boundaries are specific and definite. The land conveyed is marked out by certain stakes and stones on the west bank of the river; the beginning point is on the same bank near a thorn-bush; and the line along the river runs on the west bank of the river *to high-water mark* to the first bound. The limitation throughout is by the bank of the river, and with reference to known objects on that bank; and the words "to high-water mark" can have no other rational meaning, in the connection in which they stand, than as indicating the front line of the bank itself. The subsequent words, "with all the privileges of water and landing to the same belonging," do not extend the bounds of the land conveyed; but merely secure to it the easements and privileges of water and landing, which may well consist with a reserve of the flats to the grantor. Such, upon principle, is the construction of the deed to which my mind is irresistibly led. And the authorities are equally conclusive in its favor. It is only necessary to refer to *Storer v. Freeman*, 6 Mass., 435; *Hatch v. Dwight*, 17 Mass., 289; and *Hasty v. Johnson*, 3 Greenl., 232.

Then, it is suggested, that since the period of the grant there has been an encroachment upon the bank by the gradual wear of the stream of the river. If this be so, the grantees under McGlathry must be confined to the line of the bank as it now actually exists. It is like the common case of alluvion, where something is gradually added to land by an imperceptible increase. What is taken from the bank is an imperceptible increment to the flats, and passes to the owner of it in the same manner as, if there had been a like increment to the bank, it would have passed to the *riparian* proprietor. He takes the title subject to those common incidents, which may diminish or increase the extent of his boundaries. This is common learning, laid down in *Mr. Justice Blackstone's Commentaries*, 2 Comm., 261, and has been fully recognized in *Adams v. Frothingham*, 3 Mass., 363, and very recently acted upon by the king's bench in a case strikingly in point (*Stratton v. Brown*, 4 Barn.

& Cres., 485). The plaintiffs, then, must be deemed to be limited in their title to the bank of the river, as it now exists, and have no legal or equitable title to any portion of the front which now constitutes flats.

§ 2054. *Where A. procures B. to commit a fraud upon the rights of C., equity will not allow A. to profit thereby.*

But the principal inquiry yet remains to be considered; and that is, whether the plaintiffs have made out any ground whatsoever for equitable relief, so as to entitle them to a decree of the court. To understand the nature of the objections urged against them, it will be necessary to state some of the leading facts asserted in the pleadings and established in the proofs. Budge was a settler on the one hundred acres of land before the 1st day of January, 1784, and continued in possession until he made conveyances to the parties respectively. The land, however, belonged to the commonwealth of Massachusetts, and consequently Budge had no legal title to maintain his possession against the government. On the 5th of March, 1801, the legislature of Massachusetts passed a resolve, on the petition of the inhabitants of Bangor, praying for a confirmation of the respective lots on which they had settled before the 17th of February, 1798. It provided "that all the settlers in the town of Bangor, or their legal representatives, who actually settled before 1st of January, 1784, be entitled to a deed of their respective lots of one hundred acres each by paying into the treasury of this commonwealth \$8.45," etc. It further provided "that the committee for the sale of eastern lands be, and they hereby are, directed to cause the several lots in the town of Bangor to be surveyed and run out by metes and bounds to each of the settlers in said town, agreeably to this resolve, by some faithful surveyor, etc., and a return thereof to be made to said committee by the 1st day of November next; and that six months be allowed to each settler, after the return of the surveyor, to pay for their lands, the settlers paying interest from this date upon the money for their respective lots."

Long before this period, to wit, in 1787, and while he was in possession of his lot, Budge mortgaged the same jointly to Robert Treat and James Ginn. He afterwards, in April, 1794, mortgaged the same to one John Lee, who obtained a judgment for possession of the same in September, 1798, on which execution was issued, and possession taken in January, 1799. In March, 1799, Budge conveyed the same lot to Peck, with the following reserve, "excepting one acre sold to William McGlathry, as by his deed, dated the 19th of April, 1798," and also subject to the mortgage to Lee. Peck, on the same day, as collateral security for the fulfillment of the terms of the sale, remortgaged the lot back to Budge. A few days afterwards Peck sold and released the same lot, with the same exception of McGlathry's acre, to one Daniel Wild. In November, 1800, Wild conveyed one moiety of the same lot to Zadock French and Robert Lapish; and in March, 1801, he conveyed the other moiety to the defendant. Each of these deeds also contains the like exception of the one acre of McGlathry. Budge released to Peck the mortgage given to him by the latter, in February, 1801, and in June of the same year Ginn released to Budge his right in the mortgage to him and Treat; and afterwards Treat released his share of the mortgage to Peck, and confirmed it in October, 1803. In June, 1801, Lee assigned his mortgage and judgment thereon to Robert Lapish; and in October of the same year Lapish released to Budge all actions, causes of action and demands on account of that mortgage, with a proviso which will be hereafter noticed. In November, 1801, the surveyor appointed

by the commissioners made a return that he had "laid out by metes and bounds, conformably to the resolve, to Robert Lapish and others, assignees of James Budge, one hundred acres of land," and proceeded to state the boundaries. In March, 1802, the commissioners made a conveyance according to law to Robert Lapish, Amasa Stetson and Zadock French, "assignees of James Budge, who settled in said town of Bangor, before the 1st of January, 1784," of all the right, title and interest of the commonwealth in and to the same lot of land. Such is the deraignment of the title of the defendant to the moiety of the lot. It is most manifest that the deed of the commissioners, in 1802, conveyed to the grantees the whole lot, supposing them to be assignees of Budge of the whole one hundred acres. It is as manifest that they never were assignees of the one acre conveyed by Budge to McGlathry, and that the very deeds under which they claim all contain an express exception of that acre, so that they had the most perfect and complete notice, not only that they had themselves no title to it, but who the party was that did possess the title.

Under such circumstances, it is natural to inquire upon what ground the defendant can assert any claim whatsoever, in justice or equity, to the acre of McGlathry. He never became the purchaser of it; it never was assigned to him by Wild; he had full notice of the existence of the title of McGlathry; and his own title to the ninety-nine acres is precisely of the same nature under Budge as that of the plaintiffs to the one acre. He has, however, with Lapish and French, procured the legal title to the whole lot from the commonwealth, and he has, at law, recovered his moiety of this acre, under that title, against the plaintiffs, who are in possession under the original title of McGlathry. He now contends that he has a right to hold it discharged of all the equity of the plaintiffs; and that their claim, whatever it was, is utterly extinguished. I was curious to ascertain how this was to be made out, as a matter of general justice, and listened at the argument for some explanation of the merits of such an assertion of right. None was offered; and therefore it stands dryly upon the naked point of superiority of legal title; and it must, if maintainable at all, prevail on this account and on no other. Let us then proceed to the consideration of the objections raised to defeat the relief, under this aspect of the case.

§ 2055. *Mistakes and frauds equally relievable in equity.*

The defendant and Lapish and French have, it is true, obtained from the commonwealth the legal title to the whole lot. And much was suggested at the argument of the sacredness of titles derived from the commonwealth, and of the danger of disturbing them. This court is not insensible of the value of such titles; and has never felt the slightest inclination to bring them into jeopardy. This suit involves no consideration of that sort. The question here is not whether the commonwealth had, or did convey, a title perfect at law, but whether that title has gone to the proper object of its bounty. Would it be pretended that if a man should fraudulently procure from the commonwealth a title to lands, intended for another, either by its bounty or its contract, by misrepresenting himself to be that person, or his assignee, that he should possess the land thus procured by his fraud or misrepresentation, free of all claims of the injured party? That because his deception had been complete, therefore it should constitute and perpetuate an unimpeachable title? A court of law would not hesitate to set aside such a conveyance. No conveyance is so sacred that, if infected by fraud, it may not be overturned. And in

a court of equity, whose very institution is to enforce good faith and honest dealing, it would not admit of a moment's doubt that the court would betray its duty if it did not repudiate such a transaction; if it did not look behind the form, and arrive at the substance. I do not mean to insinuate that the present is such a case. I am very far from thinking so; and I should be sorry indeed to be obliged to decree relief against the defendant upon such an obnoxious ground.

But how was the title obtained from the commonwealth for the whole lot? It was upon the express suggestion that the defendant and his co-grantees were the assignees of Budge of the whole title. So the surveyor's return states it; so also the deed to them of the commissioners. It is a conveyance to them as assignees of Budge, and in no other character. Budge was the original object of the bounty of the commonwealth, as a settler in Bangor; and, by the resolve of 1801, he and his representatives only were entitled to the bounty of the one hundred acre lot. The commissioners had no right to convey to the defendant and Lapish and French but as the representatives of Budge in the character of assignees. If they conveyed the whole lot to them, it was because it was understood that they were the assignees of the whole. It was of no consequence whether McGlathry was a settler or not, any more than whether the defendant was a settler or not. The title turned solely upon Budge's being a settler, and upon the validity and sufficiency of the assignment of his right to others.

How, then, has it happened that the conveyance of the commissioners has, against the express legislative intention, as to this one acre, been made, not to Budge or his assignee, but to persons who now are admitted never to have been assignees, and who had full knowledge of the fact of their total want of title at the very time of the conveyance? It must be either because there has been some fraud or mistake, or an implied trust for the real assignee. In either case, the power of a court of equity to administer relief is, in my judgment, incontrovertible. These are the very classes of cases in which its jurisdiction is ordinarily and most beneficially exercised. I have already said that, in my judgment, fraud ought not, in this transaction, to be imputed to the defendant and his co-grantees. It would, in any case, be a harsh supposition where the circumstances did not necessarily lead to it. The whole of this transaction is perfectly explicable upon other grounds. The defendant and Lapish and French were the real owners of ninety-nine out of the one hundred acres and legally represented it. The commissioners either by mistake supposed them assignees of the whole, or, knowing the facts, and willing to execute the authority confided to them by the legislature, conveyed the whole to them with an implied trust that they would convey to McGlathry his share or extinguish his right. The grantees could have no objection to such a course; for they could not insist upon separate titles to their portions of the land, and might be delayed by the outstanding title of McGlathry from receiving their deed. When they received the conveyance from the commissioners they must have known the mistake, if it was one; or they must have taken the conveyance upon the implied trust that they would hold the one acre for McGlathry's benefit. In no other way can their conduct be reconcilable with good faith; for, if they represented themselves as the sole owners, or knowing the mistake of the commissioners, if they took the deed intending to defraud McGlathry, the transaction, both at law and in equity, would be pronounced void for the fraud, and the deed be set aside on that account, as well against McGlathry and

his assignees as against the commonwealth. Under such circumstances the defense might have been set up in a writ of entry or other action touching the realty, as well as in a court of equity; for it would go to the validity of the whole conveyance. It would prove it bad in its origin. But the view which is taken by myself of this part of the cause is that it presents, not a case of fraud, but a clear case of mistake, or of implied trust; and either way it is within the acknowledged jurisdiction of a court of equity.

§ 2056. *Circumstances under which twenty years' delay will not constitute laches.*

It is further objected that the bill is brought more than twenty years after the deed was given by the commissioners, and that it is now, upon general principles, too late to institute such a suit. If there had been an uninterrupted possession by the defendant and his co-grantees of the land during all this period, there would have been great force in the argument, from lapse of time, against entertaining an original suit. But here there is no pretense of any such possession. On the contrary, McGlathry and his assignees have had an actual or constructive possession of the land during a considerable portion of this period; and the judgment against which relief is now sought was the first disturbance of the plaintiffs' right of possession. While the plaintiffs were left in possession of the land, they might well repose upon their equitable title; and the injunction, now prayed for, is the result of a necessity imposed upon them by the procurement of that judgment. The circumstance of there not having been an ouster during all the intermediate period is not insignificant in expounding the defendant's own opinion of the nature of his own title to the land.

§ 2057. *Who were settlers under the resolve of 1801 in Maine.*

It is further objected that, under the resolve of 1801, no person could be entitled to claim as a settler, or as the representative of a settler, unless the possession was continued down to the time of the passage of that resolve. That this resolve has a tacit reference to the resolve of 28th of June, 1789, where the legislature has defined who shall be deemed settlers, entitled to relief on the cases therein provided for; and that by the terms of the latter resolve, settlers are to be construed to be such persons only, as, before the 1st of January, 1784, went on some tract or lot of land for the purpose of clearing and cultivating the same, and making it the place of their settled abode, and actually resided on such lot by themselves, or some person under them, before the said time, and cleared, fit for mowing and tillage, at least one acre of land, and built a dwelling-house thereon, and *still continue to reside on the same*. Looking to the other provisions of this resolve and the provisions of the resolve of 1801, I confess that my own opinion distinctly is, that they have no common object or connection. The resolve of 1801 gives the bounty to all the settlers in the town of Bangor, or their legal representatives, who actually settled before the 1st of January, 1784, without annexing any qualifications or limitations like those inserted in the resolve of 1789. The object was, a special relief to the inhabitants of a particular town, upon their petition; and there is not the slightest reference in the resolve to any antecedent resolve. It seems to me a very strained construction to incorporate, by implication, the provisions of the resolve of 1789 into this resolve, when there is no necessary connection between them, and no reference which leads the mind from the one to the other. If the case turned upon this consideration, I should feel very great difficulty in adopting such a construction. I am aware that

in *Lambert v. Carr*, 9 Mass., 185, there is an expression in the opinion of the court, delivered by Mr. Justice Sewall, which lends countenance to it. With all my unaffected respect for that able judge, the *dictum* seems to me wholly uncalled for by the case, and not to have been sufficiently considered. I agree with that decision, that the legislature did not intend that any person should take, under the resolve of 1801, except those who were settlers, and whose settlements had not been abandoned, but had been continued down by themselves or their legal representatives. This appears to me a just exposition of the language of the resolve of 1801, standing wholly by itself. A settlement which had been abandoned, and under which no person claimed a continuing, derivative title, could not have been an object of the legislative bounty. The facts of that case distinctly showed that Smart's settlement had been abandoned many years before.

But whether this point were correctly decided or not is, in my view of the present case, not material. The question here is not, as there, who were original settlers, entitled to the legislative bounty. Neither McGlathry, nor the defendant and his co-grantees, could pretend to be such settlers. Their whole claim is derivative from Budge, as an original settler, and any other title would be repugnant to the whole facts of the case. The acts and proceedings of the commissioners are conclusive on this point. They decided that Budge was an original settler, entitled to the bounty, and incidentally, of course, that his settlement was so preserved as to be deemed a continuing settlement down to the passage of the resolve. If a settlement for any part of the land, it was for the whole lot, for his title was recognized for the whole; and whether that possession was personal, or by his assignees, is wholly immaterial now, because the decision of the commissioners is conclusive upon the state of his title. The assignees of Budge cannot now gainsay such possession or title; and they are estopped from disputing it. If McGlathry or Lapiush had a possession, actual or constructive, of any part, it inured for the benefit of the whole lot. I can perceive no evidence of abandonment of their claim to the one acre, either by Budge or McGlathry, or his grantees. On the contrary, the possession has been upheld, through all the intermediate grantees, upon this title alone.

§ 2058. — *authority of commissioners of the commonwealth in regard to ascertaining who were real settlers and their representatives.*

But it is said that the decision of the commissioners was conclusive upon all parties. But of what was it conclusive? I agree that they had the sole right to ascertain who were the original settlers, entitled to the bounty lots; and to ascertain the boundaries of those lots. Their deeds were conclusive on these points. But I cannot admit that their authority was conclusive as to who were the legal representatives of any particular settler. Least of all can I admit that they had a right to convey the whole to any persons who were confessedly the grantees or representatives of a part only. They might be deceived, or they might mistake the state of the facts; but any adjudication of the whole, to persons entitled to but a part, would be an excess of their jurisdiction, and however it might be binding between the commonwealth and the grantees of the lot named in the deed, could not bind the equitable rights of third persons, as to those grantees. The cases of *Lambert v. Carr*, 9 Mass., 185, and *Harlow v. French*, 9 Mass., 192, do not impugn this doctrine. There was no question, in either of these cases, whether either party was the true representative of an original settler. The rights set up were conflicting rights

under adverse settlers. The like answer applies to the case of *Bussey v. Luce*, 2 Greenl., 367. It would be so manifestly unjust, that any person should derive a title by his own wrong, or by mistake, to the whole land, when he had purchased with an exception of a part, and could pretend no right to that part, that nothing but the clearest authority would lead me to affirm such a principle. I know of no such authority. On the contrary, I consider the doctrine in *Wilson v. Mason*, 1 Cranch, 45, 100, strictly applicable. "He who acquires a legal title," say the court, "having notice of a prior equity of another, becomes a trustee for that other to the extent of his equity." No man can doubt the equity of McGlathry and his assignees to the one acre, under the resolve of 1801; and the defendant had the fullest notice of it. There is also another salutary principle in equity of which Lord Redesdale has taken notice in *Bateman v. Willoe*, 1 Sch. & Lef., 201, 205, that where a party has possessed himself improperly of something by means of which he has an unconscientious advantage at law, equity will either put it out of the way or restrain him from using it. Under one aspect of the present case, there might have been difficulty in escaping from the proper application of this jurisdiction.

It is further objected that the plaintiffs are not entitled to relief, because the defendant and Lapish and French are the owners of the legal title to the one acre under the mortgages of Budge to Treat and Ginn in 1787, and Budge to Lee in 1794, which the defendant asserts to be still subsisting mortgages, of which they are the assignees, and he has a right in equity to set them up against the plaintiffs.

Now, it is perfectly clear, that as the conveyance by Budge to McGlathry of this one acre was with covenants against incumbrances and of general warranty, McGlathry or his grantees are entitled to be relieved, as against Budge, from both of these mortgages. When Budge conveyed the one hundred acre lot in March, 1799, to Peck, it was with an express exception of the acre conveyed to McGlathry and subject to Lee's mortgage. It appears from William Hammond's testimony, that it was a part of the contract of sale that Peck should discharge those mortgages; and indeed, as to Lee's, this is apparent from the very face of the conveyance by Budge to Peck. The defendant and Lapish and French were perfectly conusant of Peck's title, and there is no pretense to say that they have any better right than Peck would have. Nor does the answer of the defendant set up any superior equity or title in the defendant. It stands upon Peck's title in respect to these mortgages. What then is the state of the facts on this point? In June, 1801, Lee assigned his mortgage and judgment to Lapish; and afterwards, in October of the same year, Lapish made the release of the same mortgage to Budge, which has been already alluded to. This release purports, in consideration of \$5, to release "all actions, causes of action and demands for or upon account of a certain mortgage deed, made by said Budge to John Lee, of a certain tract, etc., which said mortgage deed was afterwards, by said Lee, duly assigned to me, said Lapish." Then comes this proviso: "Provided, however, that this release shall not be considered as in anywise affecting any right or title which is or may be claimed by me or any other person by any other deed from or under said Budge, *the true purpose and intent hereof being to secure to those who claim the premises under John Peck a good title to the same.*" It appears to me that the real object of this proviso is incapable of being misunderstood. It is merely to operate as an extinguishment in favor of Budge of the very mortgage which Peck was bound to discharge under the conveyance to him by Budge, and

which equitably devolved upon Peck's grantees. The proviso is designed to protect these grantees from any implication of an intention to release their title to the premises derived under Peck. What were these premises? Not the whole one hundred acres; but the whole *excepting McGlathry's acre*. The release, therefore, was an execution of the original contract of Peck, and extinguished the mortgage in favor of Budge, as well to the acre of McGlathry as to the residue conveyed to Peck; and thus relieved Budge from his warranty to McGlathry. Lapish has the full security intended by the release in the extinguishment of the mortgage, as to the premises derived from Peck; and it would be a violation of justice to revive an extinct mortgage to the prejudice of the parties who, in the contemplation both of Peck and Budge, were to be relieved from it.

The case is, if possible, still plainer as to the mortgage of Ginn and Treat. In June, 1801, Ginn, in consideration of \$5, released his title to the whole lot to Budge; and in October, 1803, Treat also, for the consideration of five shillings, released his title in the mortgage to Peck. The very instruments themselves demonstrate the intention of all the parties that these mortgages should be extinguished, and are consistent only with the supposition that the extinguishment of them by Peck or his grantees constituted a part of the original contract between him and Budge on the original sale. The consideration of the conveyances by Lapish to Budge, and Ginn to Budge, and Treat to Peck, are all merely nominal, and indicate, in the most unequivocal manner, that the parties considered them as securities that were to be deemed extinguished as foundations of right or title against Budge or his grantees. To revive them would, in my judgment, be a total departure, as well from the principles of law as of equity. It would be gross injustice to the plaintiffs. There is this additional circumstance which is decisive against the defendant's right to put forth this defense, that he has shown no title to any part of the premises derived under Lapish or under the assignment of the mortgage of Lee to him, or under the release of Ginn to Budge, or of Treat to Peck. His title to the premises is independent of all these transactions, and he is in no just sense a privy in estate under them. It may also be observed that, until the release in 1801, Budge was, by virtue of the mortgage of Peck to him in 1799, so far as respects Peck's grantees, the conditional owner of the whole lot.

It is further objected that McGlathry's conveyance from Budge was a fraud upon the latter, and ought not now to be upheld as a foundation of title. If this objection were well founded in point of fact, it would not avail the defendant. He has derived no title to the one acre by grant from Budge; and it is very clear that, in a case of this sort, none but a party or privy in estate could set up a fraud upon the grantor, as the origin of an adverse title. But the evidence of the asserted fraud is too loose and unsatisfactory to be relied on for a moment. And the supposition of its existence is negatived, in the strongest manner, by the subsequent conveyances and conduct of Budge. It is to the last degree improbable that, if the deed to McGlathry had been fraudulent, Budge would have recognized it in the subsequent deed to Peck; or that he and his heirs would have acquiesced in it, without any serious struggle, up to the present time.

These are the principal points upon which I deem it necessary to make any observations. There are some other suggestions, which, it is only necessary to

say, have not escaped the attention of the court; but they do not seem to me to require any minute answer.

My judgment accordingly is, that as to all the land included in McGlathry's deed, which extends only to the present bank of the river, the plaintiffs are entitled to relief, and the defendant ought to be perpetually enjoined from claiming any title thereto; and as to all the rest of the land recovered by the judgment, the defendant is entitled to a writ of seizin. But this decree ought to be upon the terms that the plaintiffs shall pay to the defendant all equitable charges which he has upon the land of the plaintiffs, for expenses, for purchase money paid to the commonwealth, or taxes or other charges, with interest, to be ascertained by a master, in case either party shall request it.

The district judge concurs in this opinion, and, therefore, a decree is to be entered accordingly.

Decree for plaintiffs.

EWING v. CITY OF ST. LOUIS.

(5 Wallace, 413-419. 1866.)

APPEAL from U. S. Circuit Court, District of Missouri.

Opinion by MR. JUSTICE FIELD.

STATEMENT OF FACTS.—The object of this suit is twofold: 1st. To enjoin the enforcement of certain judgments rendered against the complainant by the mayor of St. Louis for the amount of alleged benefit to his property from the opening of Wash street, in that city. 2d. To obtain compensation for the property of the complainant appropriated by the city for the use of the street.

The bill details the steps taken by the city and the mayor, at the instance and as the servant of the city, for the opening of the street, the finding of the jurors summoned before that officer, and the estimates made by them of the value of the property appropriated and of the benefits which would flow from the improvement, both to the public and to the owners of adjoining property, and sets forth various grounds of alleged illegality in the proceedings.

Of these grounds the principal are, that the proceedings were taken without notice to the complainant, or any appearance by him; that the notice provided by law was not published as required; that no provision was made for compensation for the property taken; that no power to render the judgments was vested in the mayor by any act of the legislature, or could be invested in him by the city authorities under any clause of the city charter; and that the statutes under which the proceedings purported to have been taken were repealed before the proceedings were completed. These grounds are by the demurrer admitted to be true, and being true no reason exists upon which to justify the interposition of a court of equity.

If the statutes and ordinances under which the mayor undertook to act did not invest him with any authority to render the judgments against the complainant, the judgments were void and could not cast a cloud upon his title, or impair any remedies at law provided for the protection of his property or the redress of trespasses to it. On the other hand, if the statutes and ordinances invested the mayor with authority, when new streets in the city were to be opened, to render judgments for the amount of benefits assessed against

the owners of adjoining property, and in this instance he failed to follow their provisions, or exceeded the jurisdiction they conferred, the remedy of the complainant was by *certiorari* at law and not by bill in equity.

§ 2059. *Equitable interference by injunction with inferior tribunals of special jurisdiction.*

With the proceedings and determinations of inferior boards or tribunals of special jurisdiction, courts of equity will not interfere, unless it should become necessary to prevent a multiplicity of suits or irreparable injury, or unless the proceeding sought to be annulled or corrected is valid upon its face, and the alleged invalidity consists in matters to be established by extrinsic evidence. In other cases the review and correction of the proceedings must be obtained by the writ of *certiorari*. This is the general and well established doctrine. Examples in which this is asserted are found in *The Mayor, etc., of Brooklyn v. Meserole*, 26 Wend., 132, and in *Heywood v. The City of Buffalo*, 4 Kern., 534, and in the cases there cited. See, also, *Scott v. Onderdonk*, id., 9.

§ 2060. *The federal courts afford no greater relief in equity than the state courts.*

The complainant can ask no greater relief in the courts of the United States than he could obtain were he to resort to the state courts. If in the latter courts equity would afford no relief, neither will it in the former. The second object of the bill—the obtaining of compensation for the property actually appropriated by the city—falls with the first. If the proceedings for its appropriation were void, the title remains in the complainant, and he can resort to the ordinary remedies afforded by the law for the recovery of the possession of real property wrongfully withheld.

Decree affirmed.

§ 2061. *Grounds for relief; fraud, accident or mistake.*—Equity will set aside a judgment at law where, either by fraud, accident or mistake, the defendant has been deprived of the opportunity to make his defense. *Kibbe v. Benson*, 17 Wall., 637.

§ 2062. In the absence of fraud, a court of equity cannot collaterally question the conclusiveness of a judgment at law. Nor can a court of equity turn itself into a court of review and correct the errors of a court of law. *Tilton v. Cofield*, 3 Otto, 163.

§ 2063. A bill in equity lies to set aside a judgment recovered upon a policy of insurance upon a vessel, on the ground of newly discovered evidence of a concealed fraud and felony on the part of the plaintiff in the judgment in destroying the vessel, such facts constituting a perfect defense to the action on the policy and sufficient to prevent a recovery had they only been known and pleaded. It is no objection to relief that the destruction of the vessel was a felony, especially when committed by a British subject on British waters and on a British vessel, and therefore punishable only by British laws. *Ocean Insurance Co. v. Fields*, 3 Story, 59 (§§ 2040-43).

§ 2064. Courts of equity have undoubted jurisdiction to entertain bills to set aside judgments at law or decrees in chancery on the ground of fraud. The rules by which the sufficiency of such bills is to be determined are the same, whether the purpose be to set aside a judgment at law or a decree in chancery. No relief will be granted if the complainant had knowledge of the facts constituting the fraud, and by the exercise of due diligence might have made them known to the court pending the original suit. Nor will relief be granted if the complainant might by the use of due diligence have ascertained the facts and pleaded them in the original suit. A bill for such a purpose must allege that the complainant was ignorant of the facts pending the original suit and was unable after due diligence to ascertain and plead them. Thus where stockholders of a corporation, seeking to set aside a decree of foreclosure against the company on the ground that it was not in good faith defended by the officers of the company, had knowledge of all the facts relied on pending the foreclosure, and also an opportunity to move in the original suit before decree, or to file a bill immediately upon the rendition of the decree, and failed to do either during a period of four years, their laches was held to be conclusive of their right or the right of the corporation to avoid the decree in a court of equity. The case was considered as strengthened by the fact that, in the meantime,

the decree had been fully executed, the property sold and sale confirmed, and the purchaser at the sale had conveyed to a new corporation, which had issued new stock and executed negotiable bonds for large sums secured by mortgage upon the property. *Pacific Railroad v. Missouri Pacific R'y Co.*, 2 McC., 227.

§ 2065. A defendant in an action at law supposed the cause would be remanded to an auditor after exceptions filed to his report, but the judgment was entered, contrary to his expectations and without the knowledge of himself or of his attorney, and they did not learn of its entry until after the term, when it was too late to supersede it, and it appeared that the complainant had taken exceptions and intended to take the case to an appellate court, and that the defendant was insolvent. An injunction against the enforcement of the judgment was allowed on the filing of a proper injunction bond, together with an approved appeal bond. *Roach v. Hulings*,* 5 Cr. C. C., 637.

§ 2066. Where a judgment creditor has received payment of the demand upon which suit was afterwards brought and judgment entered, the prosecution of the judgment will be enjoined, especially if the creditor is charged in the bill with fraud. *Atkins v. Dick*, 14 Pet., 119.

§ 2067. — payment and satisfaction.— This was a bill for an injunction to stay proceedings upon a judgment at law rendered upon a single bill acknowledging an absolute debt under hand and seal. At the time the bill was given it was expected and understood by both parties that the whole amount might be satisfied by the services of the complainant; and that such services, as far as they should be actually rendered, should be set off against the obligation. Services to an indefinite extent, the value of which was not ascertained, were admitted to have been performed; and it was not denied that the complainant had always been ready and willing to perform all that might be required of him; it was held that the complainant had a right to have the services ascertained and set off against the bill; and that, as it might appear upon the final hearing that the respondent had prevented the complainant from discharging the obligation by services, and as equity might possibly, therefore, relieve him entirely from the obligation, the injunction should be continued until the final hearing. *Ashton v. McKim*,* 4 Cr. C. C., 19.

§ 2068. Where property held under an attachment is purchased by a trustee for certain creditors, and these creditors, on the rendering of a judgment in the attachment suit, bring a bill in equity to be relieved against the judgment, the inquiry is not merely whether the judgment is just and equitable between the parties to it, but whether it includes claims or demands not covered by the action, not due and payable at the commencement of the action, or which by a proper application of payments or credits will appear to have been paid or satisfied, and were not therefore legal and existing claims. Unless the judgment shall appear to be wrong in some of these particulars, and consequently is for more than the property ought to be charged with, the plaintiffs have no ground of complaint, whatever may have been the manner in which the judgment was obtained. *Bradley v. Richardson*,* 23 Vt., 720.

§ 2069. — surprise.— An injunction may be granted to stay execution upon a judgment obtained against a garnishee by surprise, the garnishee having no goods of the debtor, and believing that that fact excused him from appearing. *Baker v. Glover*, 2 Cr. C. C., 682.

§ 2070. — usury.— Equity will not relieve against a judgment at law on the ground of usury, although there be an allegation of such a defect of evidence as would have been the ground of a bill of discovery. *Breckenridge v. Peter*,* 4 Cr. C. C., 15.

§ 2071. Judgment in name of one without interest.— Where, for the purpose of precluding a defense, a judgment is obtained in the name of one not beneficially interested, the judgment will be enjoined. *Greenleaf v. Maher*,* 2 Wash., 44, 898.

§ 2072. Defendant in ejectment.— An injunction against the execution of a judgment in ejectment ought to be granted, where the tenant has *pendente lite* acquired a paramount title to that of the defendant, if he cannot avail himself of it as a defense to the original suit at law; or if he cannot, after the recovery, maintain an action to regain the possession. *Bright v. Boyd*, 1 Story, 478 (§§ 54-57).

§ 2073. Want of notice of issues.— Foreigners resident abroad and without means of immediate communication with their counsel were sued in an action which gave them no notice of a particular claim. On the trial of the action it became necessary to amend the declaration, and in such amendment a claim was introduced to which there was a good and valid defense, but one which the defendants did not know was included in the suit and the existence of which was unknown to their attorneys. Held, upon a bill in equity, brought by the defendants for relief from the judgment, that the case was clearly one of surprise in which equity would relieve and enjoin the judgment *pro tanto* as to the new claim. *Bell v. Cunningham*,* 1 Sumn., 89.

§ 2074. Fraud must be sufficiently proved.— Where a bill in equity was filed for the purpose of setting aside a decree of the circuit court of the District of Columbia, and of the supreme court of the United States affirming it, on allegations of fraud committed by the parties, including complainant's solicitor and counsel, in procuring the decrees, and the evidence

failed entirely to establish the allegations of fraud, the court dismissed the bill. *Clark v. Hackett*, 1 Black, 79.

§ 2075. Plaintiff prays that defendant be enjoined from pleading a certain judgment, in bar to another suit, on the ground that said judgment was rendered through the fraud of plaintiff's counsel in that case. *Held*, that injunction would not be granted in the absence of evidence showing that the misconduct of counsel altered the result. *Amory v. Amory*, * 6 Biss., 174.

§ 2076. The court refused, at the instance of an assignee in insolvency, to enjoin a judgment, in this case, on the ground that it was fraudulent and collusive, the fraud not having been made out by the proofs, but on the contrary positively disproved. That something might be obtained from the defendant's answer to injure his case, was held no ground for the injunction. *Sohier v. Merrill*, * 8 Woodb. & M., 179.

§ 2077. Bill must show equity.—Where the defendant has a judgment at law, and the plaintiff comes into a court of equity to set aside that judgment by his superior equity, he must show that equity. *Brashear v. West*, 7 Pet., 608 (DE. AND CR., §§ 275-78).

§ 2078. A general creditor cannot maintain a suit in equity to enjoin a judgment at law recovered against his debtor, without some special interest in property affected thereby. *Bradley v. Richardson*, * 2 Blatch., 848.

§ 2079. A court of chancery cannot be expected to restrain the collection of several judgments against a municipal corporation, for errors contained in some of them, when it is not pointed out which of the judgments, belonging to different creditors, contain the alleged errors. *Muscatine v. Railroad Co.*, 1 Dill., 586 (BONDS, §§ 1624-28).

§ 2080. An administrator filed a bill in equity alleging that the defendant had brought an action against him at law for a debt due from his decedent, in which he had pleaded *plene administraverunt*, but in which "from the difficulty and unavoidable delay he met with in getting vouchers for those to whom he had paid money for the estate, and getting the estate account settled, he was not able to procure evidence on the trial of the suit," and that consequently judgment was rendered against him; that subsequently a portion of the judgment was paid; that the defendant brought suit on the judgment and obtained a judgment thereon without allowing the payments and asked that the second judgment be enjoined. *Held*, that except as to the allegation respecting the amount paid which was not allowed on the second judgment, the bill was deficient in equity, and that the general allegation of difficulty in procuring vouchers, or of unavoidable delay in settling accounts, without stating from what circumstances that difficulty and delay arose, was too vague and indefinite to support an injunction; that as to the money paid the injunction would issue, and as to the residue the bill would be dismissed with costs. *Wilson v. Bastable*, * 1 Cr. C. C., 894.

§ 2081. A judgment debtor cannot obtain the aid of a court of equity to enjoin the judgment creditor from proceeding to enforce his judgment, upon the ground that it has been agreed between them, upon a settlement, that the creditor shall resort to a certain deed of trust for creditors, where, without the knowledge of the creditor, the time for coming in under the trust deed had expired at the time of the agreement; unless the debtor will enable the creditor to come in under the trust deed. *Mechanics' Bank of Alexandria v. Lynn*, * 1 Pet., 876.

§ 2082. Where the title to land has been settled by an action of trespass in ejectment under the statutes of Missouri, the unsuccessful party has no standing in a court of equity to enjoin proceedings under the judgment on the ground that the legal title is properly in himself. *Miles v. Caldwell*, 2 Wall., 88.

§ 2083. A judgment on a plea of *plene administravit* will not be enjoined on the ground that defendant was unable to produce vouchers, there being no allegation of fraud, mistake, accident or surprise. *Wilson v. Bastable*, * 1 Cr. C. C., 804.

§ 2084. A judgment at law will not be enjoined because the complainant has commenced an action against the plaintiff in the judgment to recover unliquidated damages, unless insolvency be averred, or some ground to believe that the complainant will not be able to get payment of any judgment he might obtain. *Boone v. Small*, * 3 Cr. C. C., 628.

§ 2085. The absence of a material witness is not of itself sufficient ground for enjoining a judgment at law; the court could have continued the cause, and it is not competent for equity to revise proceedings at law where the court had full jurisdiction, equitable as well as legal. *Chapman v. Scott*, * 1 Cr. C. C., 802.

§ 2086. Meritorious defense to the judgment must appear.—A judgment at law will not be enjoined in equity on the ground that the judgment debtor was wrongfully deprived of an opportunity of making defense in the suit at law, unless apparently a defense would have been available. It must appear that the judgment is unjust and inequitable and ought not to be enforced. *Bradley v. Richardson*, * 2 Blatch., 848; 23 Vt., 720.

§ 2087. Property of a debtor which had been attached was purchased by one in trust for certain of his creditors, subject to the charge of the attachments. Judgments having subse-

quently been rendered in the attachment suits, these creditors sought to enjoin the same in equity. The inquiry was held to be, not merely whether the judgments were unjust and inequitable as between the parties to them, but whether they included claims or demands not covered by the actions, not due and payable at the commencement of the actions, or which, by a proper application of payments and credits, would appear to have been paid or satisfied, and were therefore not existing legal demands. And it was held that unless the judgments should appear to be wrong in some of these particulars, and were consequently for more than the property ought to be charged with, the plaintiffs had no ground of complaint, whatever might have been the manner in which the judgments were obtained. *Ibid.*

§ 2088. Necessary parties to proceeding.— In a suit to enjoin a judgment at law, the person in whose favor it was rendered is a necessary party, and until his answer is filed a perpetual injunction should not issue. *Marshall v. Beverley*, * 5 Wheat., 313.

§ 2089. It is not enough that, in his absence, the complainant should state, and another defendant admit, that the latter had paid the judgment and was now the only person interested. *Ibid.*

§ 2090. Right of discovery.— In a suit to enjoin a judgment at law, and praying for a discovery whether the debt has not already been paid to the respondent's agent, a denial by the agent of the charges of agency and payment cannot dispense with the discovery which the complainant has a right to require from the respondent. *Read v. Consequa*, * 4 Wash., 174.

§ 2091. Adequate remedy at law.— Where arbitrators promised complainant that they would not make an award, and did afterwards, without notice to complainant, make the award, relief should be sought in the court of law which rendered judgment on the award. No sufficient reason being shown why this was not done, a court of equity will not enjoin proceedings on said judgment. *Kidwell v. Masterson*, * 3 Cr. C. C., 52.

§ 2092. Held, also, that the allegation in the bill that the arbitrators made the award "under a mistaken impression of the facts as well as the law," not setting forth in what particulars, is too vague; that the court must be able to see clearly that the complainant has equity on his side before it will stay a judgment at law. *Ibid.*

§ 2093. Equity will not enjoin a judgment at law upon grounds which constituted a legal defense, and which the complainants were not prevented from relying on by any act of the defendant or by any positive rule. *Marine Insurance Co. of Alexandria v. Hodgson*, * 7 Cr., 332.

§ 2094. Laches as a bar.— The power of a court of equity to relieve against a judgment, upon the ground of fraud, in a proceeding had directly for that purpose, is well settled. The power extends also to cases of accident and mistake. But such relief is never given upon any ground of which the complainant, with proper care and diligence, could have availed himself in a proceeding at law. In all such cases, he must be without fault or negligence. Laches as well as positive fault is a bar to such relief. *Brown v. County of Buena Vista*, 5 Otto, 157.

§ 2095. A judgment debtor cannot invoke the aid of a court of equity to restrain the collection of the judgment, for a mere clerical mistake which was due to his own gross carelessness. His only remedy is to apply to the court which rendered the judgment. *Muscatine v. Railroad Co.*, 1 Dill., 586 (BONDS, §§ 1824-28).

§ 2096. Matters which were proper defenses, if good at all, to the action on which a judgment has been rendered, and should have been set up, cannot be set up in equity as a ground of restraining proceedings on the judgment. *Ibid.*

§ 2097. Whenever a defendant in a suit at law is possessed of a defense of which he may avail himself in the action, he cannot, after waiving or omitting that defense, invoke the aid of a court of equity for relief, upon the same grounds, nor upon any others which he might have asserted at law. *Wynn v. Wilson*, * Hemp., 698.

§ 2098. Defendant obtained, against complainant, a decree of foreclosure of a mortgage, and by consent of parties the sale of the property by the master was confirmed, and complainant allowed one year in which to redeem. Defendant afterwards obtained judgment in ejectment on the master's deed. Held, that a bill seeking to enjoin the execution of the judgment in ejectment for errors on the record of the foreclosure suit was in effect a bill of review and could not be maintained more than two years after the rendition of said decrees. *Taylor v. Charter Oak Life Ins. Co.*, * 3 McC., 484.

§ 2099. One having knowledge, sufficient to put him upon inquiry, that his counsel has fraudulently allowed judgment to be entered against him, should seek affirmative relief in the court where the judgment was rendered. Having done nothing for eleven years, it is too late to apply for an injunction. *Amory v. Amory*, * 6 Biss., 174.

§ 2100. Executed judgment.— Where, after the filing of a bill by the defendant in an action for the possession of land to restrain the enforcing of the judgment, and before the motion for the injunction, the judgment is executed and possession delivered to the plaintiff, the defendant cannot have a provisional injunction for the restoration of the possession of the property. *Kamm v. Stark*, 1 Saw., 547 (§§ 1302-6).

§ 2101. Where an assignee in bankruptcy has recovered a fraudulent judgment against an alleged debtor of the bankrupt, the fact that the bankrupt's estate has been fully administered, that the bankrupt has been discharged, and that the judgment has been sold by order of the bankruptcy court and the proceeds distributed with the other assets of the estate, constitutes no reason why the execution of the judgment should not be enjoined in equity. *Noyes v. Willard*, 1 Woods, 187.

§ 2102. A defendant against whom a judgment for the possession of land had been rendered brought a suit in equity to establish his title and to enjoin the judgment. At the same time he gave notice to the opposite party of the filing of the bill, and that an application for a provisional injunction would be made on a certain day. After the notice and before the application the judgment was enforced by dispossessing the defendant therein and delivering possession to the plaintiff. It was held that the notice and the filing of the bill did not prevent the plaintiff from proceeding to execute his judgment; and that, after its enforcement, it was too late to grant the provisional injunction. *Kamm v. Stark*, 1 Saw., 547 (§§ 1302-8).

§ 2103. Judgment by confession.—A trustee under a state insolvent law brought a bill in equity against a creditor, in whose favor the debtor had confessed judgment on two promissory notes before applying for the benefit of the act, charging that one of the notes was given upon an usurious and the other upon a gambling consideration; offering to pay the amount actually loaned by the defendant to the debtor, with legal interest thereon; praying to be relieved from the residue of the judgment; and calling on the defendant to state what was the consideration for which the said notes were given. It was held (1) that the omission of the debtor to defend himself at law was no bar to the relief asked by the complainant; (2) that the defendant could not object to the discovery sought on the ground that it would subject him to a penalty or forfeiture, not having made the objection in his answer; and (3) that if the objection had been so made it could not have been sustained, inasmuch as the mere making of a usurious agreement and taking a note for it could not subject him to a forfeiture or penalty, nor could the mere fact that the debt was a gaming one have that effect. *Thomas v. Watson*, Taney, 297.

§ 2104. An indorser of a note, who believed he had a valid defense to the note, was induced to confess judgment upon it, upon the representations of the attorney for the plaintiff, that if he would do so and make no defense he would collect the amount of the judgment from the maker, who was solvent. The indorser frequently urged the plaintiff to proceed against the maker, but he delayed until the latter became insolvent. On a bill in equity setting up these facts, the collection of the judgment against the indorser was perpetually enjoined. *Garey v. Union Bank of Georgetown*,* 8 Cr. C. C., 238; *Union Bank of Georgetown v. Geary*, 5 Pet., 99.

§ 2105. A confessed judgment for a balance claimed by B. to be due to him, but reserved the right to reduce the amount by whatever amounts he might show to be due to him. Not having shown any, it was held that a court of equity would not enjoin the collection of the judgment. *Gear v. Parish*,* 5 How., 168.

§ 2106. Judgment in favor of United States.—The circuit court of the United States cannot enjoin a judgment recovered by the United States on the ground that it has been paid, but the court in which the judgment was rendered may examine the grounds on which the entry of satisfaction is claimed, and may order a stay of execution until such investigation shall be made. *United States v. McLemore*, 4 How., 286.

§ 2107. Negligence of attorney, without fraud.—Mere negligence of an attorney, unaccompanied by fraudulent combination or connivance, has never been deemed a sufficient reason for equitable interposition to arrest a judgment at law. *Wynn v. Wilson*,* Hemp., 696.

§ 2108. Parties presumed to have notice of action of court.—All parties to a suit are conclusively presumed to know what has been done in the case, and to be acquainted with the contents of all decrees in the case spread upon the minutes, and they cannot be heard to say that they were not advised of a decree in time to appeal from it. *Taylor v. Charter Oak Life Ins. Co.*,* 8 McC., 484.

§ 2109. Equity jurisdiction.—It cannot be objected to the equity jurisdiction of the circuit court to enjoin the execution of a fraudulent judgment recovered by an assignee in bankruptcy, on a promissory note against an alleged debtor of the bankrupt, that the remedy is by bill of review or petition of nullity or other proper proceeding in the district court, or by appeal to the circuit court. *Noyes v. Willard*, 1 Woods, 187.

§ 2110. An injunction may issue on a judgment obtained on the law side of the circuit court to stay proceedings on the judgment, although a writ of error had been issued in the case from the supreme court of the United States. *Parker v. The Judges of the Circuit Court of Maryland*,* 12 Wheat., 561.

§ 2111. Federal jurisdiction.—The United States circuit court has jurisdiction of a bill in equity brought to restrain the district court from issuing an execution on a judgment fraudulently recovered by an assignee in bankruptcy. *Noyes v. Willard*, 1 Woods, 191.

§ 2112. Neither the circuit court of the United States nor the circuit judge can interpose by

injunction to prevent the execution of a judgment of a state court, upon the ground that it has been superseded by a writ of error from the supreme court of the United States; or to enjoin state officials or others from disregarding the *superseas*. In any such case the injunction is in aid of the jurisdiction of the supreme court, and the application should be made to that court or one of its judges. *Murray v. Overstolz*,* 1 McC., 606.

§ 2118. A bill filed in the circuit court of the United States* praying for an injunction against a judgment at law, rendered against the complainants in the same court, is not an original bill, and the court has jurisdiction, it having jurisdiction of the suit at law, notwithstanding that the respondent, the representative of the original plaintiff, is a resident of the same state with the complainant. But if other parties are made in the bill, and different interests involved, it is to that extent an original bill, and as to these parties the jurisdiction must depend on their citizenship. *Dunn v. Clarke*, 8 Pet., 1.

VI. DISCOVERY.

SUMMARY—*Bills for discovery and for discovery and relief*, § 2114.—*Attachment plaintiff sued for trespass*, § 2115.—*No defense that facts can be proved by interested third party*, § 2116.—*Section 861, Revised Statutes, considered*, § 2117.—*Interrogatories in lieu of bill of discovery*, § 2118.—*Joinder of a witness for purposes of discovery*, § 2119.—*Party filing bill must show title*, § 2120.—*Relief depending upon discovery improperly asked*, § 2121.

§ 2114. There is a distinction between a bill for discovery merely and a bill for discovery and relief. The former is ancillary to a trial at law. The latter, although a bill of discovery, withdraws the cause from a legal forum and brings it for decision before a court of equity. A bill for discovery merely may be filed as a matter of right, either in aid of proof or as a substitute for proof adducible in a court of law. *Bell v. Pomeroy*, §§ 2122-25.

§ 2115. The plaintiff in an attachment suit, having been sued in trespass by a third person claiming the title to the goods through the debtor, brought a bill for discovery against the plaintiff in the trespass suit, alleging that he had obtained the goods by a fraudulent conveyance from the debtor, and that others were interested with him in the goods, and should have been made parties. The materiality of the facts alleged was held to be obvious. *Ibid*.

§ 2116. It is no answer to a bill for discovery in aid of a defense at law that a third person can prove the facts sought to be discovered from the defendant in the bill, where such third person is interested, the complainant not being compellable to rely on the testimony of an interested witness. *Ibid*.

§ 2117. Section 861 of the Revised Statutes, declaring that the mode of proof in actions at common law shall be by oral testimony, does not refer to discovery, whether by bill or interrogatory. *Bryant v. Leyland*, §§ 2126-27.

§ 2118. Where, under a state statute, the parties are allowed to file interrogatories at law in lieu of a bill of discovery, the same can, under our practice act, be done in the federal courts. But the remedy is cumulative and not preventive of a bill of discovery. *Ibid*.

§ 2119. It is a general rule that a mere witness cannot be joined in a suit in equity for purposes of discovery. But where the suit is against a corporation, an officer of the corporation may be joined for this purpose, where the plaintiff is entitled to a discovery. But he cannot be joined for the discovery of matters which are not within his knowledge as such officer, or learned by him while in the service or as a member of the corporation, or, as in this case, of matters which took place before the corporation was formed, or in which it has had no part, though it appears that through and by other sources of information the officer happens to have obtained such knowledge. That the matters inquired into are dealings in which the officer was the agent of those who are now the stockholders or beneficiaries of the company, and which dealings were a part of the process of bringing the company into life, will not authorize the discovery. *McComb v. Chicago, St. Louis & New Orleans R. Co.*, § 2128.

§ 2120. In a suit in equity for an infringement of a patent a cross-bill was filed by the defendants asking for discovery as to the source and validity of the complainant's title. The cross-bill failed to set up any title or color of title in the defendants, and it was held that they were not entitled to a discovery, as it is an essential of a bill for discovery that it should set forth in the party seeking it a title which will be sufficient to support or defend the suit. *Young v. Colt*, §§ 2129-32.

§ 2121. Where a bill improperly asks for a discovery, and asks for relief which is wholly dependent upon the discovery sought, such relief must be refused. *Ibid*.

[NOTES.—See §§ 2188-2167.]

BELL v. POMEROY.

(Circuit Court for Michigan: 4 McLean, 57-60. 1845.)

Opinion of the Court.

STATEMENT OF FACTS.—The defendant brought an action for trespass on personal property against the complainants, on the law side of this court. In aid of the defense at law, the present bill was filed to procure a discovery from the defendant. In June, 1843, Bell sued out a writ of attachment from a circuit court of the state, against William Cramer, an absconding debtor, which was laid upon certain goods as being his property. The other complainants aided in the service of the attachment. Pomeroy sued them for trespass, on the ground that he had acquired title to the goods from Cramer.

§ 2122. *In a bill for discovery ancillary to a defense at law the materiality of the facts should be averred.*

In their defense, the complainants set up that the goods were obtained by a fraudulent conveyance, and that others were interested with him in the goods, who should have been made parties. And the bill avers that the facts charged are material to the defense of the complainants in said suit at law. "That a discovery by the said Pomeroy of the various matters set forth in the interrogatories to this bill is indispensable to enable the complainants to plead to said declaration, and as proof in the trial of the cause, and that they are unable to prove the facts by other testimony."

§ 2123. *It is no good answer to a bill for discovery to say that another person can give the desired evidence if that other person is interested.*

The defendant pleaded that the facts set forth in the bill of complaint are within the personal knowledge of Obed Smith, and may be proved by him. That said Smith was his agent, and that the defendant has no personal knowledge of his doings. The materiality of the facts alleged in the bill, as a defense to the action at law, is obvious. The non-joinder of the parties connected in interest with the plaintiff in the original suit is important to be known, that a plea in abatement may be pleaded. Should such a plea be filed, on insufficient grounds, the judgment would be peremptory.

In support of the plea it is contended that a discovery is granted in such a case only where there is a failure of other legal testimony in the case. That the plaintiff at law cannot be called upon to disclose facts for the defense, unless he alone has knowledge of the facts, and they are such as the defendant is entitled to have before the jury on the trial. 10 Pet., 497; 2 Paige, 601; 4 John. Ch., 409; 7 Cranch, 89; Mitf., 245. That the only fact in the bill which has anything to do with the defense is that other parties are interested in the goods; and this, if true, may be proved by competent witnesses. That it is a fishing bill, which the law will not tolerate. 2 Caines' Cases, 296; Story's Plead., 263-4.

This argument is in conflict with the express allegations of the bill. The complainants aver that the facts are material in their defense at law, and that they can only be proved by the oath of the plaintiff. The plea is not supported by an answer, and the facts stated in the plea must be considered as true, from the manner it comes before us. The grounds on which the discovery is asked, that the title of Pomeroy is fraudulent, and that other persons have an interest in the goods, it is contended, do not give to the complainants a right of discovery. Hare on Discovery, 197. That it is not a sufficient

ground for a discovery to insist that the evidence sought will prove that Pomeroy has no title, and that the title will, therefore, devolve on the plaintiff.

§ 2124. *Different operation of bills for discovery only and for discovery and relief.*

There is a distinction between a bill filed for discovery merely and a bill filed for discovery and relief. The former is ancillary to a trial at law; the latter, although a bill of discovery, withdraws the cause from a legal forum and brings it for a decision before a court of equity. The present is merely a bill of discovery. It may be filed as a matter of right, either in aid of proof or as a substitute for proof adducible in a court of law. Mitf. Pl., 193, 307; Hare on Discovery, 1, 110, 116; Legget v. Postry, 2 Paige, 601.

The cases cited in 2 Story's Com. on Eq., sec. 1495, were cases where relief was prayed. In 1 Story, sec. 74, the rule is confined to such cases. And this was the character of the cases of *Rupel v. Clarke*, 7 Cranch, 59, and in *Brown v. Swann*, 10 Pet., 497. Judge Story, in his latest work on this subject, refers to this rule, and this will reconcile the cases. Story, Eq. Pl., pp. 280, 348, note 319, sec. 324. The plea presents as an issue the question, who is best acquainted with the facts of the case — the defendant or third persons? Can such an issue be tried? It involves not merely a knowledge of the facts, but the competency and credibility of witnesses. Such an issue, if it could be tried, would lead to great delay and to no practical result.

§ 2125. *A party otherwise entitled to a discovery cannot be turned over to a person interested against him and required to make such a person his witness.*

Smith is charged in the bill as having an interest in the goods. Can he be made a witness in his own case? And, under such circumstances, is it an answer to the bill that Smith has a knowledge of all the facts? He is incompetent. The complainants are not bound to waive this objection and call Smith as a witness in their defense. It would be unsafe for them to do this. And no court could require them to do it. Smith is also personally interested in denying the fraud. If he acted fraudulently, he is personally responsible to Pomeroy. The plea does not aver Smith to be a competent witness. Its averments are limited to what he did, and does not cover the allegations as to the title of other parties.

Pomeroy, it is contended, being in lawful possession of the goods, by his agent, Smith, may maintain an action of trespass against the complainants. This position is founded on the presumption of a legal possession by Pomeroy, and that the defendants, in the action of trespass, are without title. On this bill we are not to try the title. The complainants say that Pomeroy's title was fraudulently acquired, and that they can only prove it by his oath. We think, under the circumstances, they are entitled to an answer, and the plea is consequently overruled.

BRYANT v. LEYLAND.

(Circuit Court for Massachusetts: 6 Federal Reporter, 125-128. 1881.)

Opinion by LOWELL, J.

STATEMENT OF FACTS.—In this action at law a motion is made that the defendants be required to answer certain interrogatories, filed in the clerk's office, in accordance with the practice of the state. Gen. Stat., ch. 129, §§ 46-57. The cheap and easy substitute for a bill of discovery, which was

adopted in Massachusetts in 1852, has proved to be useful, and the question is whether it is now part of the practice of the circuit court by virtue of the Revised Statutes, § 914. Another statute of the state, of still greater value, and much older, but later than the year 1780, when we first adopted the state practice, authorizes a court of law to appoint auditors in certain cases, and makes their report evidence. If these equitable powers, given to courts of common law, are not adopted, the circumstance is to be regretted; but the question seems to be a very doubtful one.

§ 2126. *State practice, of interrogatories filed in a suit at law in lieu of a bill of discovery in equity, is admissible in a federal court, but only as a cumulative remedy, not as a substitute.*

Speaking generally, the method of obtaining evidence to be used at a trial would be a part of the practice and modes of proceeding of the courts. It is so understood by congress, which gives the supreme court power to prescribe such modes of obtaining evidence and discovery as it may see fit, not inconsistent with any statute. R. S., § 917. This provision seems to me to weaken very much the argument so ably presented by Judge Dyer in *Easton v. Hodges*, 7 Biss., 324, that the legislation of congress is intended to cover the whole subject of evidence, and to exclude it from the domain of practice altogether. With much of that able opinion I agree, and I have no doubt that the decision in that case was sound. The adoption of the state practice is not intended to affect the courts of the United States, sitting in equity, in the slightest degree. There is no doubt that discovery is a branch of equity, and it follows that a cheap and easy substitute for a bill of discovery cannot take away the right of a suitor to file such a bill, if he is foolish enough to desire to do so. So of auditors; they are a convenient substitute for a bill in equity, and the power to appoint them in an action at law cannot deprive a plaintiff of the right to go into equity for an account. All this being granted, I am of opinion that when the state has enlarged the powers of the courts of law by giving them some new writs or processes or forms or modes of proceeding or practice by which suitors can, if they see fit, obtain in a suit at law some of the advantages for which they must formerly have gone into equity, such forms are adopted by our practice act, not as substitutes, but as cumulative remedies for the benefit of such suitors as choose to avail of them.

I am not speaking of new subjects brought within the cognizance of courts of law, but of facilities for arriving at justice in matters clearly within the jurisdiction of such courts. Upon this point I agree with the late Judge Johnson in *Bliss v. New Orleans R. Co.*, 13 Blatch., 227, a case closely analogous to the appointment of an auditor. I agree that there must be nothing in the practice inconsistent with any statute. Therefore, if the state practice were that a deposition might be taken if a witness lives twenty miles from the place of trial, and the act of congress says forty miles, the latter must prevail. So, as to the production of books and papers, the statute seems to me to assign the limits to our powers (R. S., § 724); and the practice act was not intended to interfere with this.

§ 2127. *Construction of statutes. Act of 1872, section 5. Section 861, Revised Statutes, does not refer to discovery.*

The practice act of 1872, section 5 (17 St., 197), provided that nothing in that act should alter the rules of evidence under the laws of the United States. In re-enacting this section, this proviso has been dropped, and is not to be found anywhere in the Revised Statutes. The reason for omitting it may be assumed

to be that the rules of evidence are no part of the practice, or forms or modes of proceeding, as they certainly are not in general, though the mode of obtaining evidence is. Still, that proviso was ruled by me, in a very important case, to have this effect; that if the practice of appointing auditors in an action at law had been adopted, as I should have inclined to think it had been, still, their report would not be *prima facie* evidence, in accordance with the statute of the state, and therefore there was no use in appointing an auditor. That proviso having disappeared, it is thought, by Judge Nelson and by me, that we have power to appoint an auditor in an action at law, and that his report will be evidence. And we are further of opinion, that the statute power to file interrogatories, excepting for the production of books and papers, may be used instead of a bill of discovery. Section 861 of the Revised Statutes, declaring that the mode of proof in actions at common law shall be by oral testimony, does not appear to us to refer to discovery, whether by bill or interrogatory. Motion granted.

MCCOMB v. THE CHICAGO, ST. LOUIS & NEW ORLEANS RAILROAD COMPANY.

(Circuit Court for New York: 19 Blatchford, 69-72. 1881.)

Opinion by CHOATE, J.

STATEMENT OF FACTS.—The defendant corporation, having brought a suit in equity against this plaintiff, the principal object of which was to procure a decree adjudging void certain mortgage bonds of the Mississippi Central Railroad Company, a corporation formerly owning a railroad now belonging to the defendant corporation, this plaintiff had leave of the court to file a cross-bill. In his cross-bill the plaintiff joined as a defendant, for the purposes of discovery, the defendant Osborn, the president of the defendant corporation. One of the defenses set up in the cross-bill is, that the title of the defendant corporation to its railroad is derived through the foreclosure of a subsequent mortgage thereon; that, by the terms of the mortgage so foreclosed, and also by the provisions of an agreement entered into by the bondholders under said foreclosed mortgage, made shortly before the foreclosure, and which, by consent of all the parties to the foreclosure, and by order of the court, was embodied in and made part of the decree of foreclosure, the cause of action, if any, existing against this plaintiff, by virtue whereof the defendant corporation would otherwise have been entitled to have the bonds held by the plaintiff adjudged void, was released, and said bondholders and this defendant corporation are precluded and estopped to set up against the plaintiff the illegalities and alleged frauds by which, in the original bill, the validity of said bonds is sought to be impeached. The defendant corporation, or, rather, another corporation, the Central Mississippi Railroad Company, which has, with still another corporation, been consolidated into the defendant corporation, became the purchaser of the railroad from the committee of bondholders who bid off the property upon its sale in foreclosure, and, for the purpose of this demurrer, may be regarded as having been virtually formed of the bondholders under said foreclosed mortgage, as claimed by the learned counsel for the plaintiff. The defendant Osborn, who is the president of the defendant corporation, is alleged to have been one of the purchasing committee of bondholders, and is claimed, from this circumstance, to have been the agent of all the bondholders in the transaction which resulted in the foreclosure, including the Illinois Central Railroad Company, which was the holder of the largest

part of said bonds, and is alleged to have joined in said agreement prior to the foreclosure.

The defendant Osborn demurs on the ground that he is improperly joined as defendant. The interrogatories put to the defendant Osborn are designed to discover what amount of said bonds was held by the Illinois Central Railroad Company, and whether that company, and, if any, what other bondholders assented to the decrees in foreclosure.

§ 2128. *How far and under what circumstances an officer of a corporation can be made a party defendant (for purposes of discovery) in a bill filed against such corporation.*

The demurrer must be sustained. It is proper for a defendant in a bill in equity, who files a cross-bill, to make defendants of parties not parties to the original bill, where they are necessary to complete relief (*Brandon Manuf. Co. v. Prime*, 14 Blatch., 371); and the practice is established, of joining, for purposes of discovery, an officer of a defendant corporation, where the plaintiff is entitled to discovery in a suit against a corporation. The reason of the rule, as stated by Lord Chancellor Talbot in the leading case of *Wych v. Meal*, 3 P. Wms., 310, which seems to have finally established the practice, is that, as the plaintiff ought to have discovery, and as the defendants "can answer no otherwise than under their common seal, and though they answer never so falsely, still there is no remedy against them for perjury," therefore "it has been a usual thing to make the secretary, book-keeper, or any other officer of a company, defendants." As observed in that case, although the answer of the defendant could not be read against the company, "yet it may be of use to direct the plaintiff how to draw and pen his interrogatories towards obtaining a better discovery," and "it may be very mischievous and injurious to the subject" "to deprive them of that discovery to which in common justice they are entitled," and, "on the other hand, no manner of inconvenience can issue from obliging such officers of a company to answer." Later cases have added but little either to the extent of the rule or the exposition of the reason upon which it is based. It is conceded to be an exception to the general rule, that a mere witness cannot be joined for purposes of discovery; and the rule has been extended to members of a corporation who are not officers. *Fenton v. Hughes*, 7 Ves., 289; *Moodalay v. Morton*, 1 Bro. Ch., 469; *Dummer v. Chippenham*, 14 Ves., 245; *Many v. Beekman Iron Co.*, 9 Paige, 188; *Glasscott v. Copper Co.*, 11 Sim., 305; *United States v. Wagner*, L. R., 2 Ch. Ap., 582. No case has gone so far as to join an officer of a corporation for the purpose of a discovery of matters which were not within his knowledge as such officer, or learned by him while in the service, or as a member of the corporation, nor, as in this case, matters which took place before the corporation was formed, or in which it had no part, though it appears that by and through other sources of information this officer happens to have obtained such knowledge. Assuming that the matters inquired of are, as stated by the plaintiff's counsel, dealings in which he was agent for those who are now stockholders or beneficiaries of the company, and which dealings were part of the process of bringing that company into life, yet there is no precedent for this bill, as a bill of discovery against the defendant Osborn; and to sustain it would, I think, be going beyond the recognized limits of this exceptional rule, and beyond the reasons on which the rule is founded. See *Story's Eq. Pl.*, § 235, notes and cases cited. The demurrer is sustained.

YOUNG v. COLT.

(Circuit Court for New York: 2 Blatchford, 373-379. 1852.)

Opinion by BETTS, J.

STATEMENT OF FACTS.— The specific points presented for adjudication in this case arise on a demurrer to a cross-bill filed by the plaintiffs, but the discussion has also involved an examination of the original bill and answer, and it has thus become necessary to advert to the case made by the entire pleadings.

The original bill was filed November 19, 1851, by Colt, as patentee, for an injunction and other relief against Young and Leavitt, for alleged violations of his patent right. It avers that the patentee, before the 25th of February, 1836, invented a new and useful improvement in fire-arms, and that, on that day, letters patent were duly issued to him for his invention, and that he was the first and original inventor thereof. On the 28th of October, 1848, he surrendered the patent to the commissioner of patents, because of a defective claim or description of his invention in the specification, and a re-issue of the patent was made the same day, for the complement of the original term of fourteen years. Previous to the expiration of that term the patentee applied for and obtained, on the 10th of March, 1849, from the commissioner of patents, an extension of the patent for seven years beyond the period of its expiration, and the order for extension was duly indorsed on the patent. The bill charges that the defendants have infringed and violated the patent right since such extension, and continue to infringe and violate it.

On the 26th of December, 1851, the defendants filed their answer to the bill, denying that the patentee was the first and original inventor of the improvement, and that the patent was legally re-issued and extended, and that the patentee has any interest in the patent, and averring that he had sold and assigned his entire title and interest therein to the Massachusetts Arms Company.

On the same day, the defendants in the original bill filed a cross-bill against the patentee, for discovery and relief. That bill seeks from the patentee a discovery of the time and place when and where he made his discovery and first manufactured any fire-arm under the patent, and whether he sued any person during the first term of his patent, for infringing it, or made any claim against any one therefor. It also demands a discovery of the proceedings had in the patent office in obtaining an extension of the patent, and whether the application was submitted to the secretary of war for his opinion thereon; and also a discovery of the proceedings before the commissioner of patents subsequently to the act of May 27, 1848, and whether notice of application for the extension was published, or was given by the patentee to any person. The bill further prays that, when the discovery shall be made, the court may decree the order extending the patent to be inoperative and void, and that the patent expired on the 25th of February, 1850, and also grant a perpetual injunction restraining the patentee from commencing any action at law or in equity for any infringement of the patent since the 25th of February, 1850; and that the court may declare the patent to be void, and may order it to be delivered up to be canceled. A prayer for general relief is also appended. The defendant files a general demurrer to this bill.

Upon the averments of the original bill, the plaintiff therein has clearly a *prima facie* title to the thing patented, and the legal presumption in his favor is, that he had complied with all the requirements of law which are necessary

to render his title complete. Phillips on Pat., 407; Webster's Pat. Cases, 129; Curtis on Pat., §§ 30, 39; Phila. & Trenton R. Co. v. Stimpson, 14 Pet., 448.

The answer of the defendants to the original bill denies that the patentee is the first inventor or has acquired a valid patent. This answer will enable them to disprove any title or right of the plaintiff under the grant, or compel him to support it by evidence *aliunde* the patent. The scope and design of the cross-bill is to make that defense by means of evidence extracted from the patentee, and the demurrer interposed to that bill raises the question whether the defendants in the original suit have a legal right to demand disclosures from the patentee which might show that he had no valid title to his patent.

It is to be remarked that the defendants in the original suit do not take their defense in their answer, or file their cross-bill, under any color of title. They neither claim to be prior inventors or to hold by assignment the elder right of any other person. If not naked intruders or trespassers upon the possession of the patentee, they stand upon no higher ground than the allegation that the grant of the government to him is void, and they present this bill to support that assertion. This is engrafting a novel function upon the office of a cross-bill.

§ 2129. *The principle on which a cross-bill is permitted.*

The broad principle upon which a cross-bill is allowed is, that equity should give suitors a common advantage in its processes. As it compels a defendant to make disclosures and discoveries under oath, to aid an action against him, so should it secure mutuality in this privilege by allowing a defendant to become a plaintiff and compel his adversary, in particular cases, to make disclosures and discoveries of matters within his knowledge that are serviceable to the defense. The parties, to that end, alternate places, in order that each may have the same use of the powers of the court for the same object. A cross-bill, as its name imports, goes no further than to give the party filing it the reciprocal right enjoyed by the complainant in the original bill, in respect to their mutual title or interest in the subject-matter of the suit. Story's Eq. Pl., §§ 389, 390.

§ 2130. *A bill of discovery must set up a title valid upon the face of the bill, and the discovery prayed for must be in support of such title and pertinent thereto.*

The English and American authorities are clear and nearly invariable in respect to the legitimate office of a bill of discovery. It is essential to a valid bill of discovery that it set forth a title in the party which is sufficient to support or defend a suit, and that it pray a discovery pertinent to that title and nothing beyond. Story's Eq. Pl., §§ 317 to 320; 2 Story's Eq. Jurisp., § 1490; Wigram on Discovery, 15; Phillips v. Prevost, 4 Johns. Ch., 205; Van Kleeck v. Reformed Dutch Church, 6 Paige, 600; S. C., in error, 20 Wend., 457. I find but one case (Adams v. Porter, 1 Cush., 170) in which a disposition is indicated to extend to a plaintiff in a cross-bill a wider privilege. That case might seem to authorize such plaintiff to place, in effect, the defendant on the stand, and examine him as to all matters applicable to the defense. But the same court, in a subsequent case (Haskell v. Haskell, 3 Cush., 540), concedes that the general principles of equity law would not favor such a rule, if it is declared in that decision.

§ 2131. *Bills of discovery not founded upon a title are "fishing" bills, and the defendant is not bound in response to them to invalidate his own title.*

Considering the cross-bill in this case as a bill of discovery, the defect is

vital to it, that it rests on no title in the parties filing it, either in common with or hostile to the patentee. It is contrary to all principles of equity pleading to permit a party who has no right himself to a subject-matter in dispute, to subject the one who shows a *prima facie* title to it to interrogatories as to the source or validity of that title. Bills framed on that ground are always rejected as fishing, or as attempts to pry into an adversary's title, and as transcending the privilege granted to a suitor to draw from his adversary facts tending to support his own title. It is sufficient to refer to the elementary books, in which this doctrine is stated and amply supported by authority. Harrison's Ch. Pr., 115; Mitf. Eq. Pl., 189, 190; Cooper's Eq. Pl., 58; Wigram on Discovery, 90, 93, 99; Hare on Discovery, 196, 197; Story's Eq. Pl., §§ 324, 571; 2 Story's Eq. Jurisp., § 1490; McNaughton's Select Cases, 10; 58 Law Lib., 24. An article in 13 London Jurist, 52, gives a learned and able exposition of the late English cases on the subject.

§ 2132. *Where a bill makes no available case for a discovery and none for relief, except on the foundation of discovery, such relief cannot be granted.*

As the defense which the cross-bill is designed to maintain has relation to the weakness of the plaintiff's title, and not at all to any title set up on the part of the defendants, it cannot be sustained as a bill of discovery. But it is contended that, as the bill prays relief as well as discovery, it will be retained for the purpose of relief, although the discovery be denied. This may undoubtedly be so in cases where the bill makes a case for relief independently of the discovery sought for. But, in the present case, the relief asked is to be a consequence of the discovery. The specific relief prayed for is a perpetual injunction against the patentee and his assigns from bringing any suits in equity or at law for infringements of the patent, and a decree declaring the patent void and that it be delivered up to be canceled. An injunction against the patentee is also prayed, restraining him from continuing suits he has already commenced in the District of Columbia, against the defendants, for violating the patent. General relief is also prayed, but the counsel for the defendants admitted on the argument that they could point out no other relief appropriate to their case than what the bill specifies.

Without discussing the question of the competency of the court to give the description of relief sought for by the bill, in protection of a party who shows a title to the patent right in himself, I think that the principle upon which the first point is decided must also govern these demands in the cross-bill, and that, as the plaintiffs therein do not set up any color of right or title in themselves to the patented invention, and seek to defend themselves against the action of the patentee for infringement of his patent, only by evidence to be extracted from him showing the weakness of his title, they are not entitled to any injunction or interference of the court in their behalf, the supposed evidence to support that claim being denied them by the court. Their equity upon their bill is, that the patentee will discover, in his answer to the bill, that he has no valid patent, and that that evidence, when given, will entitle them to be relieved of all suits and prosecutions in his behalf. The court having denied their right to the evidence, the supposed equity to flow from it has no legal existence and affords no cause for upholding the bill.

The other claim, that this court shall enjoin the patentee from bringing actions against any parties whomsoever, and direct the patent to be canceled, does not seem to be a ground of equity upon which the plaintiffs in the cross-

bill can demand the interposition of the court. They have no authority to bring the bill for any other matter than what is connected with their individual rights and interests. The demurrer must be allowed, with costs.

§ 2183. *Bill of discovery will lie, when.*—Where the aid of a court of equity is indispensable to obtain a discovery of the important facts in a case, an application to equity for relief, in connection with that discovery, can be sustained, notwithstanding the sixteenth section of the judiciary act, requiring the courts of the United States to refuse aid in chancery when it can be obtained as fully at law. *Warner v. Daniels*, 1 Woodb. & M., 90.

§ 2184. The complainant may compel a discovery of the defendant's title where it furnishes evidence of the complainant's title. Thus where the complainant alleged that the defendants held under a void sale made by executors in a will which was revoked by a subsequent one under which the complainant claimed title, the complainant was held entitled to a discovery; and the fact that, in that state, titles were registered in a public office was held not to alter the case. *Gaines v. Mauseaux*, 1 Woods, 118.

§ 2185. If several persons have wheat deposited in an elevator, and there is not enough there to satisfy the several claims of all, equity has jurisdiction, at the suit of one or more of the depositors, to compel a discovery and account. And where, without such discovery and account, the court could not know that the complainants had a lien which entitled them to payment in full, this fact, when so brought to light, will not defeat the jurisdiction of the court, on the ground that, that being so, the complainants might have sued at law. *Greenleaf v. Dows*, 3 McC., 27; 8 Fed. R., 550.

§ 2186. Where a decree in admiralty gives the libellant a lien and a right to levy upon the lands of the respondent, he has such an interest in the lands levied upon as will enable him to maintain a bill of discovery to ascertain and determine the rights and interests of other persons claiming interests in the lands under a different lien. *Ward v. Chamberlain*, 2 Black. 490.

§ 2187. A debtor, in failing circumstances, agreed to deliver to certain of his creditors sufficient goods to satisfy their claims, and a part of the goods were inventoried and removed from their place and set apart for that purpose. While this selection was being made, other creditors came in, and, with the consent of the debtor, took possession of the store and all the goods, including those inventoried and set apart, and the inventory also, and refused to allow the preferred creditors to proceed with their selection. The latter creditors filed a bill in equity against the others for a discovery and production of the inventory. *Held*, that having acquired a legal title to the goods the plaintiffs were entitled to a discovery of the evidence. *Walker v. Wanton*, 1 Cr. C. C., 897.

§ 2188. A court of equity will not permit a right of discovery to be lost because the United States is the opposite party. *United States v. Hutton*, 10 Ben., 268.

§ 2189. Section 724 of the Revised Statutes, regulating the production of books and papers, so far as the federal courts are concerned, and giving a remedy by motion in certain cases, is not to be construed as taking away the right to have relief by a bill of discovery, except in cases where the new remedy by motion is given. *Ibid*.

§ 2140. A creditor of a deceased person has a right to go into a court of equity for a discovery of assets and the payment of his debt. When there, he will not be turned back into a court of law to establish the validity of his claim. 'The court being in rightful possession of the cause for a discovery and account will proceed to a final decree upon the merits. An admission by the executor that he has sufficient assets will not deprive the court of jurisdiction. *Kennedy v. Creswell*, 11 Otto, 641.

§ 2141. — *Infringement of letters patent.*—The patent act of 1836 confers equity jurisdiction on the circuit courts in controversies under the patent laws, irrespective of the right of the patentee to an injunction or his demand for one. In cases of infringement, these courts have jurisdiction of a bill for discovery and account, filed after the expiration of the patent, and which does not ask for an injunction. *Nevins v. Johnson*, 3 Blatch., 80.

§ 2142. Although the original and extended term of letters patent has expired, a bill in equity may be maintained against an infringer, to compel a discovery and accounting of the profits made by the defendant's use of the plaintiff's property. Such profits, if not strictly trust moneys, are of that nature, and necessarily require an investigation, which a court of law is not so competent to make as a court of equity. *Sayles v. Dubuque & Sioux City R. Co.*, 5 Dill., 561.

§ 2143. — *under the Virginia usury law.*—The third section of the statute of usury of Virginia, declaring that "any borrower of money or goods may exhibit a bill in chancery against the lenders, and compel them to discover on oath the money they really lent, and all bargains, contracts or shifts which shall have passed between them relative to such loan, or the repayment thereof, and the interest and consideration for the same; and if, thereupon, it

shall appear that more than lawful interest was reserved, the lender shall be obliged to accept his principal money without interest or consideration, and pay costs, but shall be discharged of all other penalties of this act," does not authorize jurisdiction of a bill of discovery which does not aver that the complainants are unable to prove by other testimony the facts sought from the conscience of the defendant, but which states facts from which a different presumption may fairly be raised. After the obtaining of a judgment at law for the loan, discovery cannot be had, when the party seeking it had knowledge of the facts during the pendency of the suit at law, and there was neither accident nor surprise. *Brown v. Swann*, 10 Pet., 497; overruling *Swan v. Brown*, 4 Cr. C. C., 247.

§ 2144. Will not lie, when.—A bill of discovery will not be sustained where the disclosure asked has already been obtained, *Shapley v. Rangeley*,* 1 Woodb. & M., 218. Nor where plaintiff has previous knowledge of all material facts, or when the discovery asked is information to be derived from public records. *Baker v. Biddle*, Bald., 394 (§§ 884-96).

§ 2145. After answer and discovery, a bill brought merely for discovery cannot be revived. *Horsburg v. Baker*,* 1 Pet., 232.

§ 2146. After a verdict for the plaintiff in an ejectment suit, and a motion for a new trial allowed, the defendant cannot maintain a bill for a discovery whether the conveyance to the plaintiff was not made for the purpose of giving jurisdiction to the court. *Richardson v. Matison*, 5 Biss., 31.

§ 2147. A bill in equity will not lie for a discovery after a verdict at law, unless there is a clear case of surprise, accident or fraud; and a party cannot enjoin the judgment where the facts of which he seeks discovery were known to him during the pendency of the action. *Brown v. Swann*, 10 Pet., 505.

§ 2148. A bill for discovery is an ancillary process, and not for original relief; and in order to obtain ultimate relief in equity, there must be other ground than the mere defect of evidence in an action at law. *Breckenridge v. Peter*,* 4 Cr. C. C., 15.

§ 2149. Where an assignee in bankruptcy brought a bill in equity to recover the value of a stock of goods alleged to have been transferred by the bankrupt in fraud of the bankruptcy act, it was held that he could not come into equity for a discovery on the ground of his ignorance of the precise amount of the goods transferred, (1) because, knowing that the goods were a stock of merchandise consisting of groceries, dry goods, fancy goods, hardware, boots and shoes, ready-made clothing and other articles of merchandise, he could frame a declaration at law for the recovery of the goods with all necessary particularity; (2) because he could compel an examination of the bankrupt and the preferred creditor, under the bankruptcy act, and obtain all the information which he could by answer to a bill in equity; (3) because the change of the law so as to allow all parties to be called as witnesses in trials at law had rendered unnecessary bills of discovery in aid of trials at law, or to enforce purely legal rights; and (4) because the bill did not allege that the facts sought to be discovered could not be proved by any other witness. *Garrison v. Markley*,* 7 N. B. R., 246.

§ 2150. It is doubtful whether a bill merely to obtain a discovery in aid of another action or defense ought to be sustained, where under the state law the parties are compellable to testify at the instance of the other side. *Home Insurance Co. v. Stanchfield*, 2 Abb., 1; 1 Dill., 424 (§§ 1163-65).

§ 2151. Under the laws of the United States adopting the laws of the various states as to the competency of witnesses in trials in equity in the federal courts, a bill for discovery in New York is unnecessary where it asks for what can be discovered from the examination of the parties opposed. *Heath v. Erie Railway Co.*,* 9 Blatch., 316.

§ 2152. — when it will subject defendant to penalties and forfeitures.—A court of equity will not compel a discovery where such discovery would subject the defendant to penalties. *United States v. Saline Bank of Virginia*,* 1 Pet., 100; *Stewart v. Drasha*,* 4 McL., 563.

§ 2153. The defendant cannot be compelled to make discovery in answer to a bill which seeks to enforce penalties and forfeitures against him by means of such discoveries. So where a bill claiming a forfeiture, under the seventh section of the act of congress of February 3, 1834, of certain plates and pieces of music, sought a discovery as to the number of pieces published by the defendant and the amount on hand, discovery was refused. *Atwill v. Ferrett*, 2 Blatch., 39.

§ 2154. A bill of discovery in aid of an action on a note which, as the plaintiffs claimed, was substituted for one prepared by them and given the defendants to sign, contained this interrogatory, "whether the said D. is not a lawyer by profession, and whether the said note so substituted was not written by him or by some one in his presence and by his direction," and the court sustained a demurrer to the interrogatory. *Stewart v. Drasha*,* 4 McL., 563.

§ 2155. A court of chancery, on a bill of discovery, will not compel a party to produce evidence which would subject him to a forfeiture. The United States courts are governed by

this rule in exercising the power, given them by section 15 of the act of September 24, 1789, to require parties in actions at law to produce books and writings in their possession or power, which contain evidence pertinent to the issue, "in cases and under circumstances where they might be compelled to produce the same by the ordinary rules of proceeding in chancery." *United States v. Twenty-Eight Packages*, Gilp., 306.

§ 2156. A court of equity will not compel a discovery of that which might subject the defendant to a forfeiture, and as the plaintiff may, in an action of waste under the statute of Gloucester, have a judgment of forfeiture of the estate against the defendant and treble damages, a court of equity will not, in an action against a tenant to stay waste, compel a discovery of the waste, where the plaintiff has not waived nor offered to waive the forfeiture. *Thruston v. Mustin*, 3 Cr. C. C., 335.

§ 2157. Although it is a rule that equity will not compel discovery when it will subject the defendant to penalties and forfeitures, unless such penalties and forfeitures are expressly waived by the bill, yet a bill praying for an injunction and account for the infringement of a patent is not subject to demurrer because it does not waive the penalties and forfeitures prescribed for the infringement. *Farmer v. Calvert Lithographing, etc., Co.*, 1 Flip., 238.

§ 2158. Where, in a suit to recover damages for the infringement of a patent, a motion of the plaintiff demanded a production of the defendant's books to establish the value and quantity of the machinery made by the defendant which was an infringement of the plaintiff's patent, and the effect of the evidence sought for would not only have enabled the plaintiff to recover his entire damages but also subjected the defendant to a penalty of three times the amount of those damages, under section 14 of the act of July 4, 1836, it was held to be against the rules of equity to allow a bill of discovery unless the bill relinquished all claim to the penalty which might be superinduced by the production of the books sought for. *Finch v. Rikeman*, 2 Blatch., 301.

§ 2159. A defendant in equity may demur to discovery which may subject him to anything in the nature of penalty or forfeiture. In a suit for the infringement of a copyright, a discovery that will subject the defendant to the penalties and forfeitures provided in section 4965, Revised Statutes, cannot be enforced by the plaintiff. *Chapman v. Ferry*, 12 Fed. R., 698.

§ 2160. Pleading.—Necessary allegations of bill of.—A person seeking a discovery in equity should charge in his bill that the facts concerning which he wishes discovery are known to the defendant and ought to be disclosed by him, and that the complainant is unable to prove them by any other testimony. When the facts are desired to assist a court of law in the progress of a cause it should be affirmatively stated in the bill that they are wanted for such purpose. *Brown v. Swann*, 10 Pet., 502.

§ 2161. To obtain a discovery in aid of a suit at law, the bill must show it to be necessary for the plaintiff, and that when made it can be used for his advantage. A discovery will not be decreed in aid of a suit at law, where it is manifest that the plaintiff cannot avail himself of it in the suit he is attempting to prosecute. If the plaintiff has adopted a form of action at law which cannot be supported, he cannot have discovery. *Atwill v. Ferrett*, 2 Blatch., 39.

§ 2162. A bill purely of discovery in aid of the jurisdiction of a court of law must allege that the facts are material to the plaintiff's case, and that the discovery of them by the defendant is indispensable as proof; for if the facts lie within the knowledge of witnesses who may be called in a court of law, there is no ground for discovery. *Vaughan v. Central Pacific R. Co.*, 4 Saw., 280.

§ 2163. — answer.—Where the answer to a bill for discovery and relief on the ground of fraud denies all the allegations of fraud, the discovery fails and the bill must be dismissed. *Home Insurance Co. v. Stanchfield*, 2 Abb., 1; 1 Dill., 424 (§§ 1163-65).

§ 2164. — Interrogatories.—Interrogatories in a bill of discovery are not to be framed and limited upon the theory that everything stated in the bill is precisely, and in every detail, true. *Chicago, St. Louis, etc., R. Co. v. Macomb*, 2 Fed. R., 18.

§ 2165. The interrogatory part of a bill to enforce the individual liability of stockholders of a corporation is not demurrable because it calls upon the defendants severally to answer whether they executed a bond by which they received and became the owners of shares of stock in the corporation, and whether they received certificates of shares of such stock, and does not annex an affidavit of loss, or that the complainants are not in possession of the primary evidence of the facts respecting which they seek discovery. The rule requiring such an affidavit applies to cases where resort is had to a court of equity upon the ground that the writings upon which the action is founded have been lost, destroyed or suppressed. *Holmes v. Sherwood*, 3 McC., 405 (CORP., §§ 390-94).

§ 2166. — affidavit of loss of instruments.—When the loss of a deed or other instrument is made the ground for coming into a court of equity for discovery and relief, an affidavit of its loss must be made and annexed to the bill. While the absence of such affidavit is good

cause of demurrer, yet it is not sufficient ground for reversal of the decree, where the defendant failed to demur for that cause and answered over. *Findlay v. Hinde*, 1 Pet., 241.

§ 2167. Where a bill asking for discovery and relief, on the ground of the loss of a deed or other instrument, is not accompanied by an affidavit of loss, a demurrer for that cause is only maintainable as to so much of the bill as states and relies on such instrument. *Ibid.*

VII. BILL OF PEACE. QUIETING TITLE. CLOUD ON TITLE.

SUMMARY—*Denial of title of one in possession; bill to perpetuate testimony*, § 2168.—*Question to be determined at law*, § 2169.—*What necessary to sustain a bill of peace*, § 2170.—*Equity will interfere after title established in ejectment*, §§ 2171, 2172.—*Bill lies to suppress oppressive litigation*, § 2173.—*Proceedings under state statutes*, § 2173.—*Control of equity over a court of law in an action of ejectment*, § 2174.—*Receiver*, § 2175.

§ 2168. Where a person is in possession of land, and does not have the power to bring a suit at law to determine his right, and his title is denied, and in danger of being litigated in the future, when his proof may be lost by the death of witnesses, his only remedy in equity is by bill to perpetuate testimony. *Shepley v. Rangely*, §§ 2176-79.

§ 2169. Where the plaintiff in a bill in equity prays that a title claimed by the defendant may be declared void, and that he may be compelled to release his title to the plaintiff, and be perpetually enjoined from setting it up against the plaintiff, and the question is one of legal title depending on matters *in pais*, and to be determined on the weight and effect of evidence, and the evidence is not clear and free from doubt in favor of the plaintiff, the defendant's title ought to be ascertained to be void by a trial at law and the verdict of a jury before a court of equity is called upon to enjoin him from setting it up. *Ibid.*

§ 2170. To sustain a bill of peace the plaintiff must have the possession, that possession must have been disturbed, and his right must have been previously established at law. It is not enough that he fears that his possession may be disturbed, or that his right may be controverted or brought into litigation. A bill to have the defendant's title declared void as against the plaintiff was dismissed in this case, where neither of the parties had ever had possession; where a third party had the possession, apparently from the record adversely to both; where the court was asked to decide which of the two parties having color of title had the better right, when, for anything that the court could say, the third party in possession might have a title paramount to both; where the defendant might, with just as good cause, have brought a bill against the plaintiff, and with precisely the same reason asked the same relief against him: and where the plaintiff had not established his title by any suit at law. *Ibid.*

§ 2171. Whenever the right to real estate has been satisfactorily established in ejectment, a court of equity will interfere to prevent further litigation, without inquiring particularly what number of trials have taken place. So where A. and his grantees had twice unsuccessfully assailed B.'s title by actions in ejectment, and had taken a nonsuit after hearing the judge's charge in a third, it was held that a court of equity, after being satisfied of the soundness of B.'s title, would compel a cessation of the vexatious litigation by decreeing that A. convey his title to B., and this regardless of the state law relating to the effectiveness of verdicts in ejectment. *Craft v. Lathrop*, §§ 2180-86.

§ 2172. A bill to quiet title may be resorted to to suppress oppressive litigation and prevent irreparable mischief. And an injunction may be granted to quiet the possession of an owner of land against ejectment suits, where the right of the complainant has been satisfactorily established by law. No precise number of verdicts at law is necessary before a bill of peace can be sustained; that the title has been fully and fairly established by one or more trials is all that is necessary. In this case, where there had been one trial by a jury, and the case taken to the supreme court and affirmed, and the complainant had been in possession for a long time so as to raise a presumption of acquiescence in the first decision, and all the points which could have been raised were made and considered in both courts, the court was of opinion that the complainant's title had been sufficiently established. *Harmer v. Gwynne*, §§ 2187-91.

§ 2173. Under the ninth section of the practice in chancery act of Ohio of 1824, providing that "any person having both the legal title to, and the possession of, land may institute a suit against any other person setting up a claim thereto," and compel him to release, the relief may be given by the circuit court of the United States as a court of equity, this statute having created a right and prescribed a remedy to enforce it consistent with the ordinary modes of proceeding on the chancery side of the federal courts. *Ibid.*

§ 2174. A court of equity cannot, in pursuance of an alternative prayer in a bill to quiet title, if it refuses to grant the injunction, require the court of law in which an ejectment is

pending against the complainants to receive the same evidence on behalf of the complainants that was used on the trial of a former ejectment. *Ibid.*

§ 2175. A receiver will not in general be appointed where the defendant holds the clear legal title to lands, but one may be appointed in a proper case. So where the owner in possession under a tax deed files his bill against the original owner to quiet title, and the original owner files a cross-bill attacking the sale for taxes, for fraud, and asking for the appointment of a receiver for the purpose of preserving the rents and profits, such a receiver may be appointed where it appears from the original bill that the tax sale conferred no title. *Peay v. Schenck*, §§ 2192-95.

[NOTES.— See §§ 2196-2225.]

SHEPLEY v. RANGELY.

(Circuit Court for Maine: Daveis, 242-252. 1845.)

STATEMENT OF FACTS.— In January, 1830, Spring and wife mortgaged the property in question to the Saco Bank to secure a note of \$6,000. In 1832 Spring, by quitclaim deed, conveyed to Ether Shepley the equity of redemption to certain lands mortgaged to Sarah Parkman, and by the same deed conveyed the land in question for the consideration of \$1,000. In May or June, 1833, the bank entered on the land for condition broken. On the 13th September, 1833, the bank conveyed its estate to trustees to wind up its business. In May or June, 1836, Spring offered Webster's check in payment of the debt, which was refused as payment, but was left as a collateral security. On the 13th July, 1836, more than a month after the foreclosure of the mortgage, the trustees, at the request of Spring, conveyed to Webster the property in question, he having paid \$5,000 and Spring \$200. Webster had conveyed the land to Burnham in April, 1832, and defendant alleges that before that time he had attached the land as Webster's property in a suit against him and Burnham, obtained judgment and issued execution, which was in due time levied on the land. In April, 1843, Ether Shepley conveyed to plaintiff, who claims under Spring's deed to Ether Shepley of April, 1832. The defendant claimed under his levy, tracing back his title to the mortgage of 1830 to the bank. The prayer of the bill was that the land be declared free from the mortgage; that Rangely's levy be declared void, and that he be enjoined from setting up his title, etc.

Opinion by WARE, J.

I have not thought it necessary to examine all the questions which arise out of this record, and which have been so elaborately and learnedly argued at the bar, because, from the view I have taken of it, the decision of the cause must turn on the single question of the jurisdiction of the court. The bill seeks to draw into equity questions which seem to me properly belong to the forum of law. The plaintiff claims title under a deed to his grantor, Ether Shepley, of John Spring, dated April 14, 1832, and the defendant under a levy of an execution in his favor of July 9, 1839, against Webster and Burnham, and traces back his title through Webster and the bank to the mortgage of Spring and his wife, of January 4, 1830. The titles of both parties are strictly legal, nor do I see that they are affected by any equities that should withdraw them from the cognizance of a court of law to the jurisdiction of equity. There is nothing in them that I see, which will prevent a court of law from doing complete justice between the parties. In truth, the bill does not suggest nor rely on anything of the kind, or at least on anything that should give jurisdiction to equity until the title of the plaintiff is established at law.

§ 2176. *When bill quia timet cannot be sustained.*

The bill sets out the title claimed by the defendant, and alleges that nothing passed by the levy, inasmuch as there was no foreclosure under the mortgage; first, because there was no valid entry to foreclose the three-acre lot in controversy; secondly, because the mortgage was discharged by the payment of the debt. Then as a ground of giving the court jurisdiction, it is contended that this outstanding claim of superior title by the defendant may hang as a cloud over that of the plaintiff, and that he is entitled in equity to have that removed, that is, to have the pretended title of the defendant declared void, and to have a perpetual injunction against his ever setting it up in a court of law in opposition to that of the plaintiff. The bill may, therefore, be considered as in the nature of a bill *quia timet* and bearing an analogy to that class of bills which are brought to have void instruments delivered up and canceled. 2 Story's Eq., §§ 694, 698.

§ 2177. *When a court of equity will direct a trial by jury.*

In these cases the old practice of the court was, when the validity of the instrument was in controversy, to direct a trial by jury to ascertain the fact. But as the court has jurisdiction to determine matters of fact without the intervention of a jury, latterly the more convenient and less expensive course, in some cases, is adopted for the court to determine the fact itself. *Smith v. Carll*, 5 Johns. Ch., 118; *Newman v. Millner*, 2 Ves. Jr., 484; *Jervis v. White*, 7 Ves., 413. Still it is the present practice of the court, when the facts are doubtful and the evidence contradictory and not entirely conclusive, to take the opinion of a jury. 2 Story's Eq., § 702.

The validity of the defendant's title, which the plaintiff asks the court to declare void and restrain him from setting up at law, depends on questions partly of fact and partly of law. It is founded on a levy on the land as the property of Webster, who derived his title under a deed from the trustees of the bank. It is not disputed that the legal estate was transferred by the bank to the trustees, and that the deed of the trustees was sufficient to convey whatever legal interest was vested in them at the time of the conveyance. If any interest was transferred, and that was such an interest as could be taken in execution, then it is not denied that the levy was good to pass that to the defendant. The questions then which arise and have been argued at the bar are, whether any, and if any, what, estate passed to Webster. The argument of the plaintiff is, first, that the deed was entirely inoperative and nothing passed; or secondly, if anything passed, it was only an estate in mortgage. The argument of the defendant is, that an estate in fee passed.

In the first place, was the deed wholly inoperative? If so, it must be because the title of the trustees was extinguished before the conveyance by a payment of the debt. The debt was paid on the 12th of July, 1836, and the deed to Webster bears date July 13th, the day following. If it be admitted that the mortgage title was extinguished by the payment of the debt, and that no reconveyance was necessary to revest the title in Spring, the mortgagor (*Gray v. Jenks*, 3 Mason, 520), it is still true, that it is the payment of the debt that has the operation to revest the title in a mortgagor. Now the money was advanced by Webster, and the conveyance was made to him by the direction of Spring. The payment was the consideration of the deed, and in order to carry into effect the manifest intent of the parties, both must be considered as parts of one transaction, and the deed as operating from the time of the payment. If the deed bears a later date, so as to give time for the

estate to revest in Spring before the execution of a deed, and thus defeat its operation, the day of the date must be considered as a mistake, otherwise it will operate as a fraud on Webster. Indeed King in his deposition, who fixes the day of the payment, says that it was the 12th of July, the day when the deed was executed. There is, therefore, no doubt either that King is mistaken in the day of the payment, or that there is a mistake in the date of the deed. The deed must therefore be considered as having an operation to convey whatever title was vested in the trustees.

What then was the title that was transferred? The plaintiff's argument is that, if anything, it was only a title in mortgage, at least as to this lot; because there was no valid entry to foreclose the lot in question. If the deed operated merely as an assignment of the mortgage, then Webster, as mortgagee, had no interest in the land which could be taken on execution, and of course the defendant took nothing in this lot by the levy, however it might be with respect to the other lands set off. *Blanchard v. Colburn*, 16 Mass., 345; *Eaton v. Whiting*, 3 Pick., 484. The entry of the bank was into the mansion house only, and the land in controversy is a separate lot, not adjoining the one on which the entry was made. Whether the entry was sufficient to operate on this lot, the facts being admitted, is a question of law, and if the case is properly before the court, it may as well decide the question sitting in equity as it may sitting as a court of law, and, in my opinion it was sufficient. It was open and peaceable, and the only objection is, that a special entry was not made on this lot. But it is well settled law, that where a party having title enters on one parcel in the name of all lying within the same county, it is a valid entry to give him seizin of the whole, unless there are several tenants in possession claiming a freehold in several parcels. *Litt.*, § 417; *Co. Litt.*, 252, b; *Green v. Lister*, 8 Cranch, 250. This lot, though not adjoining the mansion house, was in the same town and in the possession of Spring. If the entry then was good to foreclose the mansion house, it was good to foreclose the mortgage of this lot.

The entry on the land was made either on the 9th of May or on the 9th of June, 1833, and the time of redemption expired as early, therefore, as the 9th of June, 1836. The title of the trustees then became a fee unless there was a waiver of their rights. It is said that if there was a foreclosure, the forfeiture was waived and the title brought back to a mortgage, by the trustees receiving, after the time for redemption had expired, other collateral securities for the debt. The argument proceeds on this ground, that as the foreclosure was by entry in the presence of witnesses, that is by matter *in pais*, it may be waived by matter *in pais* and the absolute title cut down to a mortgage, and that the trustees, by receiving additional securities for the debt after the foreclosure, virtually admitted and acknowledged their title to be a mortgage. Now if it be admitted that these securities might be received under such circumstances as would amount to a waiver of the forfeiture, and give the mortgagor further time to redeem, I think it difficult to be maintained that they might not have been deposited with the trustees under such circumstances and on such terms as would not amount to a waiver of the forfeiture; and King, who transacted the business, says in his deposition that he did not intend to do anything that would prejudice the rights of the trustees under the foreclosure. Taking then the case as it is put by the plaintiff's counsel, as this is a question of legal title depending on matters *in pais*, and to be determined on the weight and effect of evidence, if the evidence is not quite clear,

it is precisely such a case as a court of equity is in the habit of sending to a jury. But without going into an examination of the evidence at large, it may be safely said that it is far from being clear and free from doubt in favor of the plaintiff, and therefore I think the defendant has a right to have his title submitted to a jury. If this bill then is to be considered as in the nature of a bill *quia timet*, and to be governed by the analogy of bills brought for the delivery up and cancellation of void instruments, my opinion is, that the defendant's title ought to be ascertained to be void, by a trial at law and the verdict of a jury, before a court of equity is called upon to enjoin him from setting it up.

§ 2178. *What necessary to maintain a bill of peace.*

But this suit appears to me to come more properly within the analogy of one species of another class of bills, technically called bills of peace. Of these bills there are two species; one where a party is in possession of a right, which may be successively controverted by many persons, as a person's claim of tithes, or a person claiming an exclusive right to a fishery, or claiming tolls. He may in a single bill, by making a sufficient number of persons parties who claim adversely, have his right established against the whole. 2 Story's Eq., § 854. Another case is, where a person is in possession of lands and his possession is disturbed by another claiming title; he may in some circumstances maintain a bill, against the party that disturbs him, for the purpose of quieting his possession, and to enable him to have that undisturbed enjoyment to which in conscience and right he is entitled. The relief granted in such a case is that which is prayed by the present bill.

But to maintain a bill of this kind, three circumstances must concur. The plaintiff must have the possession; that possession must have been disturbed; and his right must have been previously established at law. It is not enough that he may fear that his possession may be disturbed, or that his right may be controverted or brought into litigation. This doctrine is clearly stated by Lord Redesdale, in the case of *Devonsher v. Newenham*, 2 Sch. & Lef., 208. Whenever a person, he says, claims title against another, who is in possession and his enjoyment disturbed, a suit may be entertained by the latter for the purpose of quieting the possession, and he illustrates this doctrine by the case where several ejectment suits have been successively tried. In such cases, after the title has been sufficiently established at law, a bill of peace will be sustained and a perpetual injunction granted, to put an end to vexatious litigation. But he adds, "when the question is merely whether A. or B. is entitled to the property, and there has been no actual suit between them, there has been no instance where such a suit has been entertained." He refers to the case of *Welby v. The Duke of Rutland*, 6 Bro. Parl. Cas., 575, as precisely in point to show that a mere adverse claim, and that asserted by an act which does not disturb the possession and actual enjoyment of the party, is not a sufficient foundation for a bill, simply because it may at some future time bring a cloud over the plaintiff's title. In that case, Welby, the plaintiff, claimed a manor, of which he had the possession, and the Duke of Rutland, the defendant, also claimed title to it, and appointed a game-keeper. It was said in answer to the bill, that if Welby was disturbed in his possession, he might bring an action and have his title established at law, and when that was settled have an injunction. But there must first be such a disturbance as would support an action, and then the title ascertained at law. The naked assertion of a title, or the doing an act in support of that assertion, which did

not interfere with the plaintiff's possession and enjoyment of the property, would not authorize a court of equity to inquire into the foundation of the title and enjoin a party claiming adversely from prosecuting his rights at law.

The case of *Welby v. The Duke of Rutland* is precisely parallel to the case at bar, with this distinction against the present bill, that this plaintiff has not, and never has had, the possession. Spring, a third person, has the possession, not holding under either of the parties to this suit, but, so far as appears from the record, adversely to both. Both parties also set up titles by which, if they have any rights, they have against him a right to the immediate possession. The object of this bill is to obtain a decree, not to quiet and protect the plaintiff's possession, nor to establish his own title against a number of persons who might, in separate suits, controvert it, but to have the defendant's title declared void as against him. It is in fact to have the court decide which of these two parties, each having color of title, has the better right, when, for anything which the court can say in this suit, a third party, who has the actual possession, may have a title paramount to both. The defendant might, with just as good cause, file a bill against the plaintiff, and, with precisely the same reason, ask the same relief against him. He might allege that the deed of 1832 threw a cloud over his title, and ask the court to declare that deed void and inoperative to affect his rights, and that he might be enjoined from setting it up. To sustain a bill under such circumstances would, I apprehend, be a perfect novelty in jurisprudence.

§ 2179. *Bill to perpetuate testimony, when the only resource.*

If the plaintiff were in actual possession of the land, and the defendant threatened to disturb him by setting up a paramount title, this bill could not be maintained, unless his possession and enjoyment had been actually disturbed, and his title established by a suit at law. The only bill which the plaintiff would then be entitled to would be a bill, not to establish his title, but to perpetuate the testimony, if there were danger of its being lost. But even such a bill he could not maintain without first obtaining the possession. Then, being in possession and not having the power to bring a suit at law to have the right determined, if his title was denied and he was in danger of having it litigated at a future time, when his proof might be lost by the deaths of witnesses, he would be entitled to a bill to perpetuate the testimony. 2 Story's Eq., § 1002; *Angel v. Angel*, 1 Sim. & Stu., 83; *Lord Dursley v. Berkley*, 6 Ves., 251, in which all the cases on perpetuating testimony are critically examined. *Jervis v. White*, 7 Ves., 413. My opinion is that the bill must be dismissed with costs for the defendant.

CRAFT v. LATHROP.

(Circuit Court for Pennsylvania: 2 Wallace, Jr., 108-116. 1851.)

STATEMENT OF FACTS.—The material facts in this case are that the defendant and those under whom he claims had brought against the complainant several successive actions of ejectment, some in the state courts of Pennsylvania and some in the federal courts, to recover the land in controversy, of which complainant, at the time this bill was filed, had been in possession over fifteen years. In some of these suits there had been verdicts for the defendant; in others the plaintiff after testing the chances had taken a nonsuit. The prayer of the bill is that the defendant be enjoined from further litigation for

the property in question, and that the title deeds under which he claims be delivered up and canceled.

§ 2180. *As a general rule the judgment of a court is conclusive.*

Opinion by GRÆR, J.

It is a maxim of the civil as well as the common law, and a rule absolutely necessary for the maintenance of the public welfare, "that the judgment of a court of competent jurisdiction, while it remains unreversed, is conclusive between the parties and privies thereto, so as to estop them from again litigating a fact once tried or found." If it were otherwise there would be no end to litigation. This rule is equally applicable to suits which affect the title to real as to those respecting personal property. A verdict and judgment in a writ of entry or a writ of right were as conclusive in their effects as they were in actions of debt, trespass or trover.

§ 2181. *A judgment in an action of ejectment is not conclusive. Purely technical reasons only for the exception.*

But when the action of ejectment was substituted for real actions by the ingenious fiction of a lease, entry and ouster, and the recovery of a fictitious term of years, it is plain that though in fact the same issue might be tried between the same real parties, yet the record would exhibit an entirely different issue between different parties; so that the verdict and judgment on a lease, entry and ouster of John Doe would not technically be pleaded in bar to another ejectment, where the lease, etc., were to Richard Roe. From such technical reasoning upon the fictitious forms of the action of ejectment has arisen this anomaly in the common law, and not (as has been sometimes mistakenly asserted) from any distinction made by the common law in favor of real property. Indeed no good reason can be given why the solemn judgment of a court of competent jurisdiction should be conclusive on personal rights valued at millions, and inconclusive when the title to realty worth but an hundred is in litigation.

§ 2182. *Equity will interfere by injunction to restrain successive actions of ejectment.*

But great as the evils of endless and vexatious litigation thus introduced by means of legal fictions were, courts of equity were *at first* slow to interfere, Lord Cowper having in a celebrated case (*Lord Bath v. Sherwin*, Prec. in Ch., 261; S. C., 10 Mod., 1) refused to interfere by injunction where five several verdicts and judgments in ejectment had been rendered in favor of one party. But this decision was overruled by the house of lords, and a perpetual injunction was decreed. 4 Bro. Cases in Parl., 373 (2d ed., 1803). The ground of the decision undoubtedly was that this was the only adequate means of suppressing oppressive litigation and hindering irreparable mischief. This doctrine has ever since been steadily adhered to by courts of equity, and now wherever a right has been satisfactorily established at law, a court of equity will interfere to prevent further litigation, without inquiring particularly what number of trials in ejectment have taken place. *Leighton v. Leighton*, id., 378, and 1 P. Will., 671-673. See Story's Eq. Juris., § 859. In Pennsylvania (till lately) they had no courts of general equity jurisdiction which could give a remedy against vexatious litigation by injunction, or by compelling the transfer or cancellation of an outstanding fraudulent or void deed, which might cast a shadow over the title of the true owner, and be used to his annoyance.

§ 2183. *Pennsylvania remedy for vexatious litigation in ejectment.*

To remedy in some measure this evil arising from the want of tribunals

with sufficient powers to administer equity, the act of the legislature of April 13, 1807, was passed, which constitutes the real ground of defense in this case. It is not necessary to criticise the very peculiar language of this act. It has been construed to mean that two verdicts and judgments between the same parties or privies and on the same title shall be conclusive of the right and a bar to any further actions. By thus making two verdicts and judgments in favor of one party a bar or estoppel which might be pleaded in a court of law to another action between the same parties, a partial remedy was afforded for the evils arising from want of a court of equity. But in this court, which has full powers to give an equitable remedy against oppressive litigation, it by no means follows that a party can have no other remedy than that given by a court of law under this statute. A litigious claimant of land may annoy the owner forever, and evade the estoppel provided by this act, by pursuing the course which the respondent in this case has seen fit to pursue. He may bring his ejectment, have a full hearing before a court and jury, and when the court has pronounced his title insufficient in law to entitle him to a verdict, he may take a nonsuit and renew his litigation; speculating on the possible chances of a change of judges or of the law, or hoping to extort from his adversary the price of peace. The act of 1807 was not passed to confer a right of harassing another forever with litigation, provided the party can evade two verdicts and judgments, but to give a legal remedy, defective indeed, but better than none.

§ 2184. *Defective equity tribunals in Pennsylvania.*

Equity is a part of the common law of Pennsylvania, but for want of proper tribunals it is often very defectively administered. Hence (till lately) partnership accounts could be settled only in the antiquated action of account-render; there was no mode of compelling a discovery; there was no power to order the delivery or cancellation of fraudulent deeds. Specific execution of a contract could not be enforced except by conditional verdicts in actions of covenant and ejectment. Certain of the courts of law have lately been intrusted with powers to remedy some of these defects arising from want of a court of general equity jurisdiction; but as to most of them, equity is still administered with the defective and cumbrous machinery of a court of law.

§ 2185. *This court will, if necessary, exercise the fullest equity powers in Pennsylvania, never having adopted the practice of that state.*

But the courts of the United States, laboring under none of these difficulties, through defect of power, have always administered equity in this state as fully as in others, and have, therefore, never adopted the practice of the Pennsylvania courts, of endeavoring to administer it indirectly and defectively through the forms of legal actions. Hence we decree and compel the specific execution of a contract as a court of chancery, and not by an action of ejectment on an equitable title, or pursuing any of the other special and defective methods of giving equitable remedy, which necessity has compelled the legislature or courts of Pennsylvania to invent or adopt.

§ 2186. *Where a title has been three times declared valid by courts of law, a court of equity will stop further litigation by injunction.*

Our inquiry in the present case will, therefore, be, not what remedy the courts of Pennsylvania *could* give to the complainant, or whether he has shown a statute bar as against the respondent (for then he would have no need to come into a court of equity), but whether he has shown a case which entitles him to relief from this court sitting as a court of chancery with full

power to administer equity. Or, in other words, has the complainant so satisfactorily established his title at law as to entitle him to invoke the aid of this court to suppress and prevent further litigation of the same question? That the complainant is entitled to the remedy prayed for in his bill, we think, cannot admit of a doubt. His title has, *in fact*, been three times declared valid by the courts of law as against the claim set up by the respondent. The complainant is now harassed with a fourth ejectment on the desperate speculation that possibly the courts of the United States may be persuaded to overrule and reverse the decision of the supreme court of Pennsylvania on a question of title to real property depending on the peculiar laws of that state. The purchase and sale of stale and desperate claims for the purpose of speculation and litigation, by persons out of possession, has become so frequent that we have constant cause for regret that Pennsylvania has not adopted the ancient doctrine of the common law on the subject of maintenance and champerty.

We are of opinion, therefore, that the complainant is entitled to the relief prayed for —

1st. Because his title, as against that under which the respondent claims, has been thrice tried at law and decided in his favor — twice by the supreme court of Pennsylvania and once by this court.

2d. Because the judgment of the supreme court affirming the title of complainant and adjudging the deed of Mr. Wilkins to be void has been made the foundation of a settlement in a chancery suit, and its correctness acknowledged by the administrator and his pretended assignees, under whom the respondent here claims.

3d. Because Mr. Wilkins, after the proceedings we have stated, is estopped from setting up a claim to the land as his own, or affirming the validity of the deed to him; and the respondent, in so doing, is making a fraudulent use, or rather abuse, of the assignment which has been purposely drawn in such form as to show that Mr. Wilkins, the administrator, laid no claim to this property and did not consider himself as transferring any.

4th. Because this court fully concur in the correctness of the decisions at law on the title in question.

HARMER v. GWYNNE.

(Circuit Court for Ohio: 5 McLean, 313-318. 1851.)

Opinion of the Court.

STATEMENT OF FACTS.—This is a bill to quiet title. In December, 1829, the plaintiffs recovered, by an action of ejectment in this court, certain lots in the city of Cincinnati, on which a judgment was rendered, which judgment was affirmed on a writ of error by the supreme court at January term, 1833. The bill states that the lots claimed were conveyed to the ancestor of the complainants by John C. Symmes, on the 6th of May, 1791, and that the deed was regularly recorded. That Gen. Harmer, shortly after the deed was executed, took possession of the lots and remained in possession until his death, in 1814. That when Gen. Wilkinson commanded the garrison at Fort Washington, he had the parade ground enlarged so as to include the lots, by which means their boundaries became obliterated and lost.

Judge Symmes did not obtain the patent for his Miami purchase until 1794. The deed to Gen. Harmer being prior to that time it was supposed that the legal title remained in Symmes, and it was levied on and sold under an execution, as his property, to Ethan Stone. In 1811, Gen. Harmer filed a bill in

the supreme court of Ohio, and obtained a decree that the said Stone should release to his heirs all his pretended title. This was in 1820, Gen. Harmer having died in 1814. The heirs of Gen. Harmer, on his death, came into the possession of the premises. The release executed by Stone, under the decree of the court, described the lots as lying south of Front street, they being situated north of it.

At the death of Gen. Harmer, his heirs were minors. After they became of age, in 1828, they brought an action of ejectment in this court for the lots and recovered possession of them, which they have ever since maintained. The bill alleges that the defendant, who claims by descent from his father, who was one of the defendants named in the ejectment writ, has lately commenced an action of ejectment in the superior court of Cincinnati, which was removed by the defendants to this court.

The bill further alleges that the boundaries of said lots, and many other facts proven in the action of ejectment, cannot now be proved, by reason of the death of the witnesses; and they pray that they may be quieted in their title by enjoining the defendant; and that if the court shall be of the opinion that the defendant is entitled to another trial at law, he may be required to receive the depositions and evidence used in the former case. The defendant demurred, generally, to the bill.

§ 2187. *Injunction may be granted against ejectment suits when the right of the complainant has been established by law.*

The remedy claimed in this case may be resorted to to suppress oppressive litigation, and prevent irreparable mischief. And an injunction may be granted to quiet the possession of an owner of land against ejectment suits where the right of the complainant has been satisfactorily established by law. And in some cases it has been held immaterial what number of trials has been had. 2 Story's Eq., sec. 859. This jurisdiction was formerly much questioned. Lord Cowper refused an injunction where five verdicts had been rendered for the plaintiff. But the house of lords overruled this decision and established the jurisdiction. 26 Com. Law Rep., 859.

The power to grant injunctions is confided to the discretion of the court of chancery, to be exercised in all cases where that court shall deem it necessary for the furtherance of justice. Trustees of Huntington v. Nicoll, 3 Tenn., 586. In that case there was one trial for trespass, and, under the circumstances, it was held that the court ought to quiet the title. It has not been usual to exhibit a bill in chancery for quieting a title between two individual claimants until after several verdicts at law. But it seems not to have been held that any precise number of verdicts at law [is necessary] before a bill of peace can be sustained. The better rule would seem to be, that the title at law has been fully and fairly established by one or more trials. 2 Term R., 601.

In Leighton v. Sir Edward Leighton, 1 P. Wms., 672, there were two verdicts for the defendant, and afterwards two for the plaintiff, and the court perpetually enjoined further litigation, quieting the plaintiff in his possession. By a note in that case it is said that, in a cause much litigated, the defendant shall not be concluded by one verdict. That case was affirmed on an appeal to the house of lords. 2 Bro. Par. Cases, 21.

§ 2188. *After the right of the plaintiff has been satisfactorily established his title will be quieted.*

After the right to real estate has been satisfactorily established at law, equity will quiet the title against further disturbance. It is immaterial what

number of trials have been had, whether two or more, so that the right be satisfactorily established. *Marsh v. Rees*, 10 Ohio, 347. In *Wilber v. Smeaton*, 1 Bro. Ch., 573, the demurrer was allowed, as the right had not been established at law. In that case the lord chancellor said, if, after trial, the party should begin again, and commit new trespasses, it is possible a case might be made to induce this court to interfere by way of injunction; but merely where one party claims and another denies the right it is impossible to entertain the bill. On the part of the defendants it was contended that the general rule on this subject required two or more trials at law before chancery would restrain the defendant from prosecuting an action at law, to recover the possession of the premises; and the following authorities were read in support of the position assumed: *French's Precs. in Ch.*, 262; 1 Bro. Par. Cases, 266; 2 *id.*, 217; 2 *Atk.*, 48; 3 *John.*, 586, 590; 1 *Wms.*, 672.

§ 2189. — *other circumstances to be considered.*

In the case before us the facts have been tried once only by a jury; but exceptions were taken as to the admission of the facts in evidence before the jury, and the principles of law which belong to the case have been twice considered and decided; first in the circuit court, and then in the supreme court. This, in such a case, is entitled to consideration. Long continued possession is also a matter not to be disregarded in the case. From lapse of time, a presumed acquiescence in the first decision may be drawn. And in addition to the above consideration, all the points which could be raised were made and deliberately considered in the circuit court, and also in the supreme court, which, we are inclined to think, might afford ground on which to quiet the title. But there is another ground on which this proceeding may be sustained, and which has not been advocated in the argument.

By the ninth section of the practice in chancery act of 1824, of this state, it is provided, "That any person having both the legal title to and possession of land may institute a writ against any other person setting up a claim thereto; and if the complainant shall establish his title to such land, the defendant shall be decreed to release his claim thereto, and to pay the complainant his costs; unless the defendant shall, by his answer, disclaim all title to such lands, and offer to give such release to the complainant, in which case the complainant shall pay to the defendant his costs, except, for special reasons appearing, the court shall otherwise decree."

In the case of *Clark v. Smith*, 13 *Pet.*, 195, under an act of Kentucky of 1796, which contained the same provisions as are in the Ohio act, the supreme court held it afforded ground of relief. They say, "the state legislatures have no authority to prescribe the forms and modes of proceeding in courts of the United States; but having created a right, and at the same time prescribed a remedy to enforce it, if the remedy prescribed is substantially consistent with the ordinary modes of proceeding on the chancery side of the federal courts, no reason exists why it should not be pursued in the same form as in the state courts." Under the above statute it is not perceived why relief may not be given to the complainants, if they shall show themselves entitled to it. It is a new right so far as the form of the action is concerned, which can be enforced only by a court of chancery. And in such a case the supreme court have held relief may be given.

§ 2190. *A court of equity cannot compel a court of law to receive evidence unless where it directs an issue at law or a new trial.*

In regard to the alternative prayer of the bill to require the court of law, if

the injunction shall not be granted, to receive the evidence in behalf of the complainants that was used on the trial of the former ejectment, I am inclined to doubt the power of the court.

§ 2191. — *rules of evidence same in law and chancery.*

Where chancery directs an issue at law, such an order may be made. But can the chancellor in this manner control the judgment of a court of law? In directing or granting new trial, this may be done as a condition of granting the motion. But the rule of law, in regard to the admission of evidence, is the same at law as in chancery. It is true, the answer of the defendant, responsive to the bill, is evidence which must be contradicted, but in every other respect the rule in both courts is the same. The demurrer is overruled, and leave is given to the defendant to answer the bill.

PEAY v. SCHENCK.

(Circuit Court for Arkansas: 1 Woolworth, 175-191. 1868.)

Opinion by MILLER, J.

STATEMENT OF FACTS.—This is a bill in chancery brought by the complainant to quiet his title to certain real estate, as against Peay, and for partition thereof, as against Bliss. The title which he asks to have quieted and confirmed is derived from a sale for taxes levied upon the real estate mentioned in the bill, under the act of congress of 1861, and the amendatory act of 1862, passed to enforce the collection of the tax in the insurrectionary districts.

The defendant Peay files his answer and cross-bill when the proceedings under which the plaintiff claims were had, in which he states that he was, and still is, the true owner of the lots in controversy; that for several reasons detailed in the answer and cross-bill, the proceedings were void and conferred no title on Bliss, the purchaser at the tax sale; and that the plaintiff, who purchased from Bliss, is therefore without title. He makes Bliss, as well as the plaintiff, a defendant to this cross-bill, and prays that the tax sale may be declared void, and his title quieted, and the possession of the property, which had been delivered to Bliss by the tax commissioner, restored to him. He also prays for the appointment of a receiver pending the litigation, and for other relief. The plaintiff and Bliss filed a demurrer to this cross-bill, based on the proposition that the bill cannot be entertained in this court, because Peay and Bliss are both citizens of the state of Arkansas.

§ 2192. *In a suit in a federal court by a non-resident against two residents, a cross-bill by one of them against the other and against the non-resident complainant will not be dismissed for want of jurisdiction.*

If this were an original bill brought by the plaintiff therein, as an independent measure of relief, it could not be sustained. Bliss was the sole purchaser, at the tax sale, of the property in dispute, and the certificates of sale are in his name, and Schenck, who alleges a right in himself to only an undivided fourth part, derived his claim by purchase from Bliss. It is clear, therefore, that as between Peay as plaintiff, and Bliss as defendant, both being citizens of Arkansas, no original and independent suit of this character can be maintained in the federal courts.

On the other hand, it is insisted that Schenck, who is a citizen of Ohio, and the plaintiff in the original bill, asks, as against Bliss, merely a partition of the premises, and that Peay has no interest in this branch of the case; that the principal relief sought by him is a decree quieting his title as against Peay;

and that in this branch of the case, Bliss' interests consist with the plaintiff's, and that it thence appears that the interests of Schenck and Bliss are equally adverse to Peay's. It is also said that the matter of the cross-bill is strictly defensive, and necessary to be presented in order to bring before the court fully the defenses of the plaintiff therein to the original bill.

If this be true, the demurrer must be overruled, for it is the established doctrine of this court, that where a party defendant finds it necessary for his defense, and to prevent an injustice resulting to him from the position in which the case stands, he is at liberty to file a cross-bill, if the case is pending in chancery, or an original bill, if the case is one at law, although the parties defendant to said bill, or some of them, may be citizens of the same state with himself. The only limitations to this principle are, that the bill must be necessary to the defense of the party filing the bill, and it must be filed against parties already before the court, and subject to its jurisdiction, either as plaintiffs or defendants in the original suit. *Dunn v. Clarke*, 8 Pet., 1; *Clarke v. Mathewson*, 12 Pet., 164 (Cours., §§ 634-35); *Cross v. De Valle*, 1 Wall., 1.

And in determining whether a bill is original and independent, or is ancillary and auxiliary to a matter already before the court, we are not confined to the line which, in chancery pleadings, divides original bills from cross-bills and supplemental bills, but may look to the essence of the matter, and to principles which, as regards parties, the federal courts have adopted in reference to their jurisdiction. *Minnesota Co. v. St. Paul Co.*, 2 Wall., 632 (Conv., §§ 1315-19); *Freeman v. Howe*, 24 How., 450 (Cours., §§ 255-60).

The main question raised by the original bill is the validity of the title conferred by the tax sale, and the relief sought is to have that title quieted and confirmed. The cross-bill refers only to matters connected with the validity of the same tax title, and prays, as its sole relief, to have it set aside and declared void. In reference to the partition, the cross-bill is silent, and the relief asked concerning a receiver is purely incidental to the progress of the suit, and could be had without the aid of the cross-bill on mere petition. It seems to us, therefore, that the cross-bill is essentially a mode of defense appropriate to the case; that it is necessary to a complete determination of the controversy brought before the court by the original bill; that it is ancillary to the main cause; and that, as it brings no new parties before the court, it is not liable to the objection taken by the demurrer. The demurrer is therefore overruled.

§ 2193. *A receiver will be appointed on a disputed equity with reluctance.*

The application for the appointment of a receiver is urged upon the ground that Bliss is insolvent, except as to the property held under these tax sales; that the property in controversy is covered with valuable buildings, is located in the city of Little Rock, and is paying large rents, of which Bliss is the reoipient; that the title of defendants is not only void in law, but that the tax proceedings were accompanied by such positive acts of fraud on the part of Bliss and one of the tax commissioners, that, for these reasons alone, the sale should be held to be void. These allegations of the cross-bill are well supported by depositions taken in the suit.

In reply to this, it is urged that the defendants in the cross-bill are in possession of the property under the legal title; that the questions of fraud remain to be investigated, and are denied generally by affidavit; that the defendants have not yet answered, nor been required to answer, the cross-bill, because the demurrer has thus far remained undecided; that it is contrary to

the rules of courts of equity to appoint a receiver when the defendant is in possession under the legal title, and that the parties should be permitted to remain *in statu quo* until the case is decided upon the merits.

It is undoubtedly true that, where the relief sought is founded upon a disputed equity, a court of chancery will, with great reluctance and hesitation, take the possession from a defendant holding the clear legal title. But under proper circumstances this may be done, and there is no absolute rule against it. *Huguenin v. Baseley*, 13 Ves. Jr., 105. And if the motion before us presented a case where the legal title was in the defendants and could be declared void only by reason of fraud in the sale, we should hesitate very much before appointing a receiver.

The defendant in the cross-bill is himself plaintiff in the original bill, and in that bill has set out in detail the facts on which his title depends, and has on that statement asked the judgment of this court as to its validity. If in this statement he has shown that the proceedings, under which alone he claims title, have conferred no title, he stands in a different attitude from a defendant whose legal title and possession are assailed, and who has admitted nothing which tends to prove the truth of the matters alleged against them. We are of opinion that the plaintiff in the original bill has disclosed a fatal defect in his own title.

§ 2194. *Proceedings for the purpose of divesting title to real estate sold for taxes must strictly follow the statute.*

The act of June 7, 1862 (12 U. S. Statutes, 422), after directing that the president shall declare, on or before the 1st day of July thereafter, in what states or parts of states the insurrection exists, authorizes him to appoint three persons for each of said states, who shall constitute a board of tax commissioners for said state. It is made the duty of these commissioners, as the federal armies shall advance into the insurrectionary limits, to assess upon the real estate within the districts, as they are successively occupied, the portion of the direct tax imposed on the state by the act of 1861 which that real estate should properly bear. The entire proceeding for the collection of this tax, including the sale and delivery of possession to the purchaser of the lands on which it was assessed, was confided by the law to this board.

The original bill alleges the proclamation of the president, including Arkansas as an insurrectionary state; the occupation by the federal forces of the county of Pulaski, in which the lots in controversy are located; and the appointment, by and with the advice and consent of the senate, of Hulings Cowperthwaite, Enoch H. Vance, and Daniel P. Tyler, as a board of direct tax commissioners for the state of Arkansas; and then adds, "That said Tyler, one of the members of said board of tax commissioners, appointed as aforesaid, did not qualify and enter upon the discharge of the duties of his office until some time after the sale of the real estate hereinafter mentioned and described for taxes." It then goes on to allege the assessment of the direct tax on the lots in question by the other two commissioners, their sale of the lots to Bliss, and that after his purchase they put him in possession.

We understand it to be well settled that where authority of this kind is conferred on three or more persons, in order to make its exercise valid, all must be present and participate, or have an opportunity to participate, in the proceedings, although some may dissent from the action determined on. The action of two out of three commissioners, to all of whom was confided a power to be exercised, cannot be upheld when the third took no part in the transac-

tion, and was ignorant of what was done, gave no implied consent to the action of the others, and was neither consulted by them, nor had any opportunity to exert his legitimate influence in the determination of the course to be pursued.

Such is the uncontradicted course of the authorities, so far as we are advised, where the power conferring the authority has not prescribed a different rule. 2 Kent's Comm., 298, note *a*, 638, and authorities cited there, note *b*; Commonwealth v. Canal Commissioners, 9 Watts, 466; Green v. Miller, 6 Johns., 39; Kirk v. Ball, 12 Eng. L. & E., 385; Crocker v. Crane, 21 Wend., 211; Dougherty v. Hope, 1 Comst., 79; 252; id., 3 Denio, 252, 259.

The case before us goes even beyond this; for according to the statement of the bill, there never was a board of commissioners in existence until after the proceedings in regard to his title were completed. The law required three commissioners. A less number was not a board, and could do nothing. The third commissioner for Arkansas, although nominated and confirmed, did not qualify or enter upon the duties of his office until after the sale of the lots to the defendants. There was therefore no board of commissioners in existence authorized to assess the tax, to receive the money, or to sell the property. If congress had intended to confide these important functions to two persons, it would not have required the appointment of the third. If it had been willing that two out of the three should act, the statute could easily have made provision for that contingency, as has since been done by the act of 1865.

Nothing is better settled in the law of this country than that proceedings *in pais* for the purpose of divesting one person of title to real estate, and conferring it on another, must be shown to have been in exact pursuance of the statute authorizing them, and that no presumption will be indulged in favor of their correctness. This principle has been more frequently applied to tax titles than to any other class of cases. We cannot presume, therefore, that congress intended that less than three commissioners could conduct these proceedings, and still less that they intended that, in regard to the important matters confided to the board, any action should be taken when there was no legally organized board in existence.

§ 2195. *The act of March 3, 1865, section 3 (13 U. S. Statutes, 502), amendatory of the act of June 7, 1862 (12 Statutes at Large, 422), does not retroact so as to supply deficiencies in proceedings under the latter before the former was enacted.*

It is said, however, that this defect is cured by section 3 of the act of March 3, 1865 (13 U. S. Statutes, 502), which declares, "That a majority of a board of tax commissioners shall have full authority to transact all business and to perform all duties required by law to be performed by such board, and no proceeding of any board of tax commissioners shall be void or invalid in consequence of the absence of any one of said commissioners." As this act was passed after the proceedings relied on by complainant as conferring title on him, we must give it a retroactive effect, in order to reach the case.

The law concerning retrospective statutes has been so much discussed in this country and in England that it would be an affectation of learning to cite authorities upon the subject. It is undoubtedly within the power of congress to pass retrospective statutes which do not come within the definition of *ex post facto* laws. As this prohibition of the constitution relates exclusively to criminal laws, it does not affect the power of congress to pass such a law in regard to the matter before us. But when we are called upon to construe

statutes claimed to be retroactive, the rule is firmly settled that we can only give them that effect when there is something on their face putting it beyond doubt that the legislature so intended; or, to express it in other words, the legislature must have expressly declared the statute to be applicable to past transactions, or the intent must appear by an unavoidable implication.

No such inference can be drawn from the statute before us. The first declaration is in the future tense, that a majority of the board shall have authority to transact business, and the second branch of the provision, that no such proceedings shall be void or invalid, in consequence of the absence of any one of the commissioners, has very natural reference to the exercise of the power granted for the future to a majority of the board. It is not by such language as this that titles defective, on account of past transactions, are cured. The language of a statute which so violates the rule of policy against retrospective laws, as in effect to take the title from one man and give it to another, must be much more clear and explicit in stating that intent than the one under consideration. No fair and natural construction of its terms will justify attaching to it such an effect.

But if the section we have cited could be held to have a retroactive effect, the case before us does not come within its purview; for it requires a board of tax commissioners to be in existence, and then provides that a majority of that board can act. We have already shown that, according to the allegations of the bill, no such board was in existence; that none had ever been organized when the two commissioners assessed the tax and sold the defendant's property. The act of 1865 does not pretend to hold that the sale shall be valid where there is no board in existence, where one of the commissioners never qualified, and where, consequently, no authority was ever vested in three which might be exercised by two.

We are therefore of opinion that the original bill shows on its face that the complainant has no title to the property which he claims, of which he is in possession, and from which he has for several years received the rents and profits. And as this showing accompanies the assertion of the legal title on which he relies to defeat the appointment of a receiver, that title can have no such effect. As the circumstances disclosed in the depositions are all such as should incline us to use the discretionary power of the court in favor of the appointment of a receiver, the order will be made for such appointment; and also for an injunction restraining the defendants in the cross-bill, Schenck and Bliss, from interfering with the receiver, or exercising control over the property until the further order of the court.

§ 2196. Possession and title, how far necessary.—To maintain a bill to remove a cloud from a title, the title of the complainant must be a legal and equitable title connected with possession, and the title alleged as a cloud must be clearly invalid and inequitable, and such as may either at the present or in the future embarrass the legal owner in controverting it. *Chamberlain v. Marshal*, 8 Fed. R., 398.

§ 2197. In order to justify an application for a bill of peace, the complainant must be in possession, or show a better title than the respondent, or a defect in some deed asked to be given up. *Shapley v. Rangeley*,* 1 Woodb. & M., 213.

§ 2198. The jurisdiction of equity cannot be invoked to restrain parties from interfering with lands to which the complainants have no legal or equitable title. *Selz v. Unna*, 6 Wall., 334.

§ 2199. Persons in possession of land, claiming under an appointment made under authority of a power contained in a deed of trust, are entitled to come into equity for relief against actions of ejectment brought against them by persons claiming under subsequent appointments. If their estate be regarded as an equitable one, their right to protection in a court of equity is

undoubted, no matter where or in whom the legal estate may be. If by statute the equitable estate has been converted into a legal estate, a court of equity has jurisdiction to remove the cloud upon their title created by the subsequent appointments. *Bowen v. Chase*, 4 Otto, 812.

§ 2200. — under the statute of Ohio.—By a statute of Ohio it is provided that an action may be brought by any person in possession of real property against any person who claims an estate or interest therein adverse to him, for the purpose of determining such adverse estate or interest. It is held that a decree of a court of equity, on a bill brought for this purpose under this statute, settling the title between the parties, is conclusive of the question determined between the same parties. *Parrish v. Ferris*, 2 Black, 606.

§ 2201. — under the statute of Minnesota.—The General Statutes of Minnesota of 1878 provide that "an action may be brought by any person in possession, by himself or his tenant, of real property, against any person who claims an estate or interest therein, or lien upon the same, adverse to him, for the purpose of determining such adverse claim, estate, lien or interest; and any person having or claiming title to vacant or unoccupied real estate may bring an action against any person claiming an estate or interest therein adverse to him, for the purpose of determining such adverse claim, and the rights of the parties respectively." It is held that this statute enlarges the class of cases in which equity affords relief in quieting title and possession of real estate, by dispensing with the necessity of obtaining repeated judgments at law on the part of the complainant; and that an action thereunder may be maintained on the equity side of the federal court. *Leggett v. Cole*,* 1 McC., 515.

§ 2202. A suit under section 278 of the Oregon code, declaring that "any person in possession, by himself and his tenants, of real property, may maintain a suit in equity against another, who claims an estate or interest therein adverse to him, for the purpose of determining such claim, estate or interest," is one to ascertain and quiet the title to the premises as between the parties, by the final decree in which all questions or matters affecting such title are concluded as between the parties. If either omits to set forth and prove all the grounds of his right, or his adversary's want of it, he cannot correct his error by bringing another suit upon the portion or fragment of the case omitted. It is immaterial that the complainant was compelled by the court to elect upon which of two inconsistent causes of suit contained in his bill he would proceed. *Starr v. Stark*, 1 Saw., 270.

§ 2203. Section 500 of the Oregon code, declaring that any one "in possession, by himself or his tenants, may maintain" a suit to quiet title, does not authorize such a suit upon mere naked possession. Such a bill will be dismissed where it appears that the defendant is the legal owner of the land, and the complainant, although in possession, has no interest in or right to the premises. *King v. French*, 2 Saw., 441; *Stark v. Starrs*, 6 Wall., 418.

§ 2204. Void judicial sale.—Equity will interfere to remove a cloud on a title created by a void judicial sale though the defendant is in possession, if such possession was not taken until after the commencement of the suit. *Morton v. Root*,* 2 Dill., 812.

§ 2205. Instrument void on its face.—The jurisdiction of a court of equity to remove or perhaps prevent a cloud being cast upon title to real property is confined to instances where the instrument or proceeding complained of appears to be valid upon its face, but is in fact void or invalid for some reason or matter which can only be shown by extrinsic evidence. *Coulson v. City of Portland*, Deady, 481.

§ 2206. Whether a court of equity has jurisdiction to prevent the levy and collection of a tax which is void at law, although such invalidity is apparent, upon the ground that such proceeding, if allowed to be completed, would cast a cloud upon title, is not definitely determined in this case, but the court is of opinion that the apparent invalidity of the proceeding or matter complained of does not necessarily affect the jurisdiction of a court of equity to prevent by injunction the imposition and collection of an illegal tax or assessment upon real property. *Ibid.*

§ 2207. A judgment recovered against a debtor, after he has made a valid general assignment for the benefit of creditors, constitutes no such cloud upon title as will enable an assignee in bankruptcy of the debtor, under proceedings instituted subsequent to the docketing of the judgment, to maintain a bill in equity to remove it. *Belden v. Smith*,* 16 N. B. R., 802.

§ 2208. Where a deed is void upon its face, being executed by a married woman without the separate examination required by law, and it has been so solemnly adjudged by the supreme court, a court of equity will not order it to be delivered up and canceled as constituting a cloud upon title. It is otherwise where the deed is void on account of matters extrinsic. *Elliott v. Piersoll*, 1 McL., 11.

§ 2209. Adequate remedy at law.—Where a tract of land has been divided into several lots, the occupants may maintain a bill in equity to relieve their title from the embarrassments of adverse claims and restrain a multiplicity of suits, although the complainants hold the legal title to the premises and have a remedy by suits at law. *Crews v. Burcham*, 1 Black, 352.

§ 2210. An action to remove a cloud upon title, based on section 5779 of the Revised Statutes of Ohio, which declares that "an action may be brought by a person in possession, by himself or tenant of real property, against any person who claims an estate therein adverse to him, for the purpose of determining such adverse estate or interest," cannot be brought in the circuit court of the United States, where there is nothing in the case calling for equitable interference. On account of the distinction between equitable and legal proceedings in that court, the plaintiff cannot maintain a bill on the equity side when there is an adequate remedy at law. *Chamberlain v. Marshal*, 8 Fed. R., 898.

§ 2210a. In the federal courts, law and equity are distinct, and procedure in equity is not affected by state statutes; nor by the fact that no state court of chancery exists in the state in which the federal court sits. So it was held that an action at law would not lie to remove a cloud from title and to quiet possession. The right given by a state statute to one in possession of real estate to institute a proceeding to determine an adverse claim is an equitable right, and if suit is brought in a federal court it must be proceeded in according to the principles of equity. *Loring v. Downer*,* McAl., 380.

§ 2210b. It seems that the common law writs, known as "*Brevia participantia*," and which issued to prevent possible mischief, are no longer recognized; and it is doubted whether they existed as a part of the common law in 1850. *Ibid.*

§ 2210c. A proceeding to cancel a forged deed, and thus remove a cloud from complainant's title, is properly brought in equity, there being no question of title between the parties, but only as to the genuineness of the deed. And the fact that the invalidity of the deed does not appear on its face, and can only be made apparent by extrinsic evidence, brings the case clearly within the cognizance of a court of equity. *Bunce v. Gallagher*,* 5 Blatch., 481.

§ 2210d. In such a case, there being no question of title involved, complainant is not required first to establish his title at law, and obtain possession by ejectment. *Ibid.*

§ 2210e. Where one is in possession of land under a forged deed, executed by an impostor in the name of the owner, the owner is entitled to a decree for the delivery up and cancellation of the deed, declaring the record of the same void, and to an injunction enjoining the defendant from assuming to sell the property. *Ibid.*

§ 2211. Federal jurisdiction.—The federal courts have equity jurisdiction to cancel a fraudulently issued deed, which, by a state law, is *prima facie* evidence of title, upon complaint by a person showing seizin and a perfect title to support it, and peaceable possession for seven years. *Bayerque v. Cohen*,* 1 McAl., 118.

§ 2212. In the federal courts the question whether a case is one at law or in equity depends on the case stated in the petition. If the petition shows a mere contest of legal titles, and that the defendant is in possession, the remedy is at law. If it shows that the plaintiff is in possession, or that neither party is in possession, and that equitable relief is necessary and proper, then the remedy is in equity. So a suit to quiet title under the statutes of Iowa, being equitable in its character, the proceeding will be in equity. *Balmear v. Otis*,* 4 Dill., 558.

§ 2213. Lands in Kentucky were sold as the property of A. by judicial sales which were upheld in successive actions; besides this the sureties on the judgment on which the lands were sold, and to whom the lands were assigned as indemnity, released their claims to the purchaser, and in addition the son-in-law and attorney of A., in order to save a part of his estate for his family, in his name, and presumably by his authority, confirmed the title to the purchaser, and the purchaser was in possession for thirty years. A. afterwards asserted claim to the land. Held, that under those circumstances a federal court would interfere to quiet the title, and in granting that relief would regard the statute of Kentucky providing that in all cases where a person holds both the legal title and possession of land he may institute a suit against any person setting up a claim thereto, and that if the complainant shall establish his title the defendant shall be decreed to release his claim. *Wickliffe v. Owings*,* 17 How., 47.

§ 2214. Where a bill was filed in the United States circuit court to remove a cloud upon title to real estate, and the statutes of the state provided that one in possession of real estate might bring an action against a person out of possession and claiming title, to require him to commence his suit at law to settle the question of his rights, which statute the courts of the state had held not to give an exclusive remedy at law so as to oust the jurisdiction of a court of equity in a case brought to remove a cloud from title, the jurisdiction in equity was sustained, but the respondent was permitted to bring an action at law to determine the question of title, if he so desired, the court declaring that, when the action at law was commenced, the court would then determine whether the suit in equity would be stayed until after the trial of the action at law. *Duncan v. Greenwalt*, 8 McC., 378.

§ 2215. A bill to quiet title to real estate, and to remove a cloud therefrom, is properly brought on the equity side of a federal court. *Ibid.*

§ 2216. A statute of the state of Nevada declares that "an action may be brought by any one in possession, by himself or tenant, of real property, against any person who claims an

estate or interest therein adverse to him, for the purpose of determining such adverse claim, estate or interest." The term "action," in that state, includes both proceedings at law and suits for equitable relief. It is held that this statute enlarges the classes of cases in which equity jurisdiction was formerly exercised in quieting the title and possession of real estate; that it dispenses with the necessity of the previous establishment of the right of the plaintiff by judgment at law; and that, to that extent, it confers upon the possessor of real property a new right—one which enables him, without the delay of previous proceedings at law, to draw to himself all outstanding inferior claims. And, in a bill by the Central Pacific Railroad Company against a large number of citizens of Nevada, to determine the estate and interest claimed by them in the land over which the road was constructed, it was held that the national courts would enforce this statute in the same manner in which they would enforce other equitable rights of parties. *Central Pacific R. Co. v. Dyer*, 1 Saw., 641.

§ 2217. *Volunteer purchaser of litigated claim.*—Hubbard, a person speculating in lands and taking the title in his friends, contracted to sell certain lots to Schram. The latter being unwilling to take Hubbard's bond for title, or that of Butler, who had the management of Hubbard's affairs, Knab was prevailed upon to enter into a bond with Butler that a good title would be made to Schram. Knab was unwilling to do this without security; and for this purpose the land in dispute was conveyed to him by one who held the legal title for Hubbard. Knab thereupon gave a bond to convey the land to Butler, when the bond to Schram should be satisfied. Hubbard conveyed, for a nominal consideration, all his interest in this land to one under whom Smith, the complainant in this suit, claimed. A short time before this Butler assigned to Orton, the defendant in this suit, the title bond given by Knab, the consideration being paid without any notice of any secret equity in Hubbard. The bond to Schram having been satisfied, Orton filed his bill in chancery in a state court against Knab for a conveyance of the legal title according to the exigency of his bond. During the pendency of this bill the complainant Smith purchased the real or supposed equity of Hubbard, and also obtained from Knab the transfer of the legal title for a nominal consideration. The fraud charged against Knab because he made his title bond to Butler and not to Hubbard was not sustained, it being immaterial to Knab who held the bond. In this condition of things, Smith, the complainant, filed this bill in the circuit court of the United States against Orton, the defendant, in the nature of a bill of peace, praying an injunction against Orton from setting up his claim and thereby casting a cloud upon the complainant's title. It was held (1) that the complainant, being a volunteer purchaser of a litigious claim, could not maintain the bill; and (2) that the relief asked must be refused also upon the ground of interference and collision with the jurisdiction of the state court. *Orton v. Smith*,* 18 How., 263.

§ 2218. *Joinder of parties.*—The interest that will allow several parties to join in a bill of peace is not only an interest in the question, but an interest in the subject-matter of the suit. A bill founded on the idea that all persons in business as brokers, charged with a tax under section 99 of the internal revenue act of June 30, 1864, have such a unity of interest in contesting it that all may join in the bill for that purpose; and that as the parties are so numerous as to make it inconvenient to join all of them, a determinate number may appear in the name of themselves and for the rest, cannot be maintained. *Cutting v. Gilbert*, 5 Blatch., 250.

§ 2219. *Tax deed as cloud on title.*—A tax deed does not cast a cloud upon title where the statute authorizing the sale does not make the deed an instrument of evidence. *Minturn v. Smith*, 3 Saw., 142.

§ 2220. Where a statute makes a tax deed *prima facie* evidence of the regularity of all the proceedings, the deed casts a cloud upon the title, since it would only be necessary for the plaintiff to produce his deed to show title, and the defendant would have to prove affirmatively, by evidence *dehors* the deed, such defects as make the deed void. *Huntington v. Central Pacific R. Co.*, 2 Saw., 503.

§ 2221. A tax deed executed under a sale in pursuance of a void assessment, which is, under the statute, *prima facie* evidence of title, an introduction of the prior proceedings not being necessary, is a cloud upon title. The test is, would the owner of the property, in an action of ejectment by the adverse party founded on the deed, be required to offer evidence to defeat the recovery? *Huntington v. Central Pacific R. Co.*, 2 Saw., 503; *Tilton v. Oregon Central M. R. Co.*, 3 Saw., 22.

§ 2222. *Proceedings under Arkansas tax law.*—The statute of Arkansas, under which a purchaser at a tax sale may maintain a petition on the chancery side of the court, in the nature of a bill to confirm and quiet title, having provided that the judgment or decree confirming the sale shall operate as a complete bar against any and all persons who may afterwards claim the land in consequence of informality or illegality in the proceedings, it is held that a decree confirming the title in the purchaser, which expressly sets forth a compliance with every requisite prescribed in the statute, is conclusive of the question of the regularity of all the proceedings. *Thomas v. Lawson*, 21 How., 331.

§ 2223. A petition for the purpose of quieting title, filed by a purchaser at a tax sale under the statute of Arkansas authorizing such a purchaser to institute proceedings by public notice in some newspaper, describing the land, stating the authority under which it was sold, and calling on all persons who can set up any right to the land so purchased, in consequence of any informality or irregularity or illegality connected with the sale, to show cause why the sale so made should not be confirmed, is but an application of a well known chancery remedy, and may be brought in a court of the United States. If, in such a proceeding, the proceedings are found to be illegal, the tax deed will be annulled. *Overman v. Parker*, Hemp., 692.

§ 2224. Land patent, when a cloud on title.—An act of congress passed July 23, 1866, having granted to the St. Joseph & Denver City Railroad Company the odd sections of public land lying along its route, and the company having filed a map of its route with the secretary of the interior, it was held that a patent granted by the United States to a person who had subsequently entered a portion of the lands so granted constituted a cloud upon the title of the company, which equity had jurisdiction to remove. *Van Wyck v. Knevala*, 16 Otto, 360.

§ 2225. Remedy by injunction.—A court of equity will enjoin the casting of a cloud upon title in cases where the cloud itself, when cast, would be removed. It will enjoin a sale for taxes when the assessment is void, and the tax deed, being *prima facie* evidence of title under the statute, would cast a cloud upon the title. *Huntington v. Central Pacific R. Co.*, 2 Saw., 509; *Tilton v. Oregon Central M. R. Co.*, 3 Saw., 29.

VIII. MASTER IN CHANCERY.

SUMMARY—*Statements in report conclusive*, § 2226.—*Failure to claim credits before master*, § 2227.—*General claim for expenses*, § 2228.—*Objections must be made before master*, § 2229.—*Exceptions must be specific*, § 2230.—*Exceptions because evidence is not fully reported*, § 2232.—*Reference; taking testimony; directions and practice*, § 2232.—*Examination of witnesses*, § 2233.—*Practice in Louisiana*, § 2234.—*Exceptions to draft of report*, § 2235.—*Application to take testimony to establish incompetency of witness*, §§ 2236, 2237.—*A witness whose deposition has been read cannot be examined*, § 2238.

§ 2226. Statements of a master in his report are conclusive unless denied. *Story v. Livingston*, §§ 2239-51.

§ 2227. A party who has not claimed credits before the master, and refused to furnish any account of credits, cannot object to the master's report because proper credits were not allowed him. *Ibid.*

§ 2228. If a party before a master merely claims for general expenses, without stating particulars, nothing will be allowed him, nor can the refusal of such a claim furnish ground of exception to the master's report. *Ibid.*

§ 2229. In chancery practice, no exceptions can be made to a master's report which were not taken before the master, the object being to save time and to give him an opportunity to correct his errors, or reconsider his opinion. A party neglecting to bring in objections cannot afterwards except to the report, unless the court, on motion, see reason to be dissatisfied with the report, and refer it to the master for review, with liberty to the party to take objection to it. *Ibid.*

§ 2230. Exceptions to the report of a master are in the nature of a special demurrer, and must state, article by article, those parts of the report which are intended to be excepted to; the part not excepted to will be taken as admitted. *Ibid.*

§ 2231. An objection to a master's report, that it does not show that it reports all the evidence taken before the master, must be accompanied by a specification of the particulars in which it is deficient. On such an exception, supported by the oath of the party making it, or without oath if the opposite party joins in the exception without requiring it to be verified by affidavit, the court will call upon the master to report the evidence. But if the truth of the exceptions do not appear on the face of the proceedings, and are not supported by affidavit or otherwise, the court cannot notice them. *Ibid.*

§ 2232. In a reference to a master for any purpose, the order need not particularly empower him to take testimony, if the subject-matter is only to be ascertained by evidence. And in taking evidence, though the better plan is to take the answers in writing upon written interrogatories, he may examine witnesses *viva voce*, the parties to the suit being present personally or by counsel, not objecting to this course, and joining in the examination. *Ibid.*

§ 2233. Under the twenty-eighth rule of practice for the courts of equity of the United States, providing for the bringing of witnesses before the master, for their compensation, for an attachment for contempt, and allowing the examination of witnesses *viva voce* when produced in open court, witnesses may be examined *viva voce* before the master. *Ibid.*

§ 2284. The courts of the United States in Louisiana possess equity powers under the constitution and laws of the United States, and where there are rules prescribed by the supreme court for the government of the courts of the United States in equity, those courts, when sitting in Louisiana, must act under them in referring cases to a master, and in hearing and determining exceptions to the master's report, though chancery practice has been abolished by the district court of that state. *Ibid.*

§ 2285. It seems to have been the practice in England, before the adoption of our equity rules, that a party should never except to the report of a master, unless he had first objected to the draft of the report before the master; and this being the practice, the unsuccessful party was entitled to notice that the report was in draft. In references for the purpose of taking accounts, making computations, making inquiries, and reporting facts, drafts of the reports were usually prepared before argument, and the arguments were heard before the master only on objections to the drafts. But where a reference is made embracing questions of law as well as of fact, and, after hearing the testimony and the arguments of counsel, the master prepares a report of his findings, there is no reason for observing the formalities of the old practice, and the master need not notify the parties that the report is in draft before filing it with the clerk in accordance with rule 88. This is not required by the practice in this circuit [the 7th], nor by the equity rules. These rules dispense with the old formalities incident to settling the master's report. Rule 88 requires the master to return the report to the clerk's office as soon as it is ready, and it is ready within the sense of the rule when it is made. The rule gives one month thereafter for filing exceptions. *Hatch v. Indianapolis & Springfield R. Co.*, §§ 2252-53.

§ 2286. Where a cause is before a master under a decretal order, an application to the master to take the testimony of witnesses to establish the incompetency of a witness who has been examined in the cause, and whose deposition was before the court when the decretal order was made, must be by petition in writing verified by affidavit. If the application for the order to take the testimony is founded on a suggestion which is incorrect, the order should be superseded. *Gass v. Stinson*, §§ 2254-59.

§ 2287. It is not permissible to examine witnesses before a master as to the credit of a person whose testimony was read at the hearing without objection, the objection to his competency and credibility being at the time fully known. *Ibid.*

§ 2288. A witness whose deposition has been read at the hearing cannot be examined anew before the master without a special order of the court. *Ibid.*

[NOTES.—See §§ 2260-2323.]

STORY v. LIVINGSTON.

(18 Peters, 859-877. 1839.)

Opinion by MR. JUSTICE WAYNE.

STATEMENT OF FACTS.—This cause having been before this court at its term in 1837, it was then decreed that the decree of the district court, dismissing the bill of the complainant, should be reversed; that the cause should be sent back for further proceedings in the court below, with directions that it should be referred to a master, to take an account between the parties. The mandate then recites the principles upon which the account was to be made; provides the time within which any sum that may be found to be due to either of the parties should be paid after the entry of a final decree in the court below; directs, if a sum shall be found due to the complainant, a surrender and reconveyance of the property from the defendant to the complainant, or to such person or persons as shall be shown entitled to the same; and further orders, in the event of a sum being found to be due to the defendant, if it shall not be paid within six months after a final decree of the district court upon the master's report, that the property shall be sold by order of the district court, at such time and notice as the court shall direct; and that the proceeds be first applied to the payment of the balance due the defendant, and that the residue thereof be paid to the complainant.

In pursuance of the mandate, the district court appointed Duncan N. Hennen master, to examine into and report upon the account according to the

rules and principles established in the judgment of this court. The master was sworn in open court, faithfully to perform the duties of his appointment. On the same day the master ordered a meeting to be held on the 6th of March, which was adjourned to the 8th; when he commenced the reference by taking testimony in behalf of the complainant, and it was adjourned to the next day. The meeting was then adjourned to the 24th March, when other testimony was taken; was then adjourned to the 1st April; thence, on the application of the defendant, was adjourned to the 15th April, and the reference was closed the day after. All the meetings were attended by the parties; the complainant being represented by counsel, and the defendant having been personally present, aided by counsel. After these proceedings were had, the defendant's counsel, in November following, obtained an order from the court upon the complainant, to show cause why the "suit should not be stricken from the docket, the bill of the complainant dismissed, or the suit abated;" which rule was returnable on the 1st December. The grounds relied upon to sustain this motion were: 1. That Edward Livingston, the former complainant, departed this life on — day of —, and before the hearing of the cause in this court at the spring term thereof in 1836.

2. The said Livingston departed this life before the making or enrollment of the decree at the spring term of the year 1836; consequently the court could not then entertain any jurisdiction of the cause.

3. This cause has never been regularly revived in the name of the present complainant; nor could it be so revived by the laws and usages of chancery practice, Mrs. Livingston claiming as a devisee. This rule was continued from time to time under sundry orders of the court, until the 18th of December, when the court rejected and overruled the motion. This motion we have noticed, not only because it was a singular attempt to oust the jurisdiction of the court over the cause after it had been decided on its merits in the supreme court, and the court below was acting under its mandate, but because from the time when it was made, and when the rule was granted, the defendant having not before objected to the reference to the master, and having joined in all the proceedings under that reference, it cannot be viewed in any other light than an attempt to prevent the master's report from being returned to the court, instead of contesting its conclusion, and the master's proceedings under the mandate, by regular exceptions. It presents an anomaly without any parallel in the history of chancery proceedings; placing an inferior tribunal, acting under the mandate of a superior, in the attitude of reversing the judgment of the latter; calling upon it to disregard the mandate altogether; to revoke its own proceedings under such mandate; and, in effect, to act in contradiction to the sole authority by which the district court was in possession of the cause. But the motion being overruled, on the same day the master presented his report to the court, which was read and filed. The following exceptions were then made to the report of the master by the defendant:

1. That chancery practice has been abolished by a rule of the court, and such proceeding is unknown to the practice of the court.

2. The master has erred in not allowing to the defendant the \$1,000, with interest, paid to Morse, or some part thereof.

3. The master's report does not show that it reports all the evidence taken before the master.

4. The master, in making his estimates and calculations, has not pursued the mandate of the court.

5. It appears, from the master's report, that the stores were rented from November to November; and he erred in assuming the 1st of April as the period of payment of annual rent.

6. A reasonable allowance should have been made to Story for the costs and risk of collecting rents.

7. The master erred in all his charges against the defendant; and failed to allow the defendant his proper credits.

All of these exceptions, except the third, are irregularly taken, and might be disposed of by us without any examination of them in connection with the master's report.

§ 2239. *Exceptions to the report of a master in chancery should be specific, showing wherein the party has suffered wrong.*

They are too general; indicate nothing but dissatisfaction with the entire report; and furnish no specific grounds, as they should have done, wherein the defendant has suffered any wrong, or as to which of his rights have been disregarded.

§ 2240. *Strictly, in chancery practice, no exceptions to a master's report can be made which were not taken before him.*

Strictly, in chancery practice, though it is different in some of our states, no exceptions to a master's report can be made which were not taken before the master; the object being to save time and to give him an opportunity to correct his errors or reconsider his opinion. Dick., 103. A party neglecting to bring in objections cannot afterwards except to the report (Harr. Ch., 479), unless the court, on motion, see reason to be dissatisfied with the report, and refer it to the master to review his report, with liberty to the party to take objection to it. 1 Dick., 290; Madd., 340, 555. But without restricting exceptions to this course, we must observe that exceptions to a report of a master must state, article by article, those parts of the report which are intended to be excepted to. Exceptions to reports of masters in chancery are in the nature of a special demurrer; and the party objecting must point out the error, otherwise the part not excepted to will be taken as admitted. Wilkes v. Rogers, 6 Johns., 566.

§ 2241. *A master may amend his report after it is brought in, by permission of the court.*

The court directed the master to amend his report, so as to state that it contained all the evidence given under the reference, which the master did by his certificate; and this disposes of the defendant's third exception. To that certificate the defendant's counsel did not object. In the subsequent proceedings in the court, upon the report, it was treated by both parties as conclusive of the fact that all the evidence had been disclosed in the report as it was originally made. The report was then before the court upon exceptions by the defendant, which were argued by the counsel of the respective parties; and the court overruled the exceptions on the 15th January, and decreed the defendant to pay to the complainant, within six months from that day, \$32,958.18, the sum found by the master to be due by the defendant to the complainant; and further "decreed that the master's report be in all other respects confirmed, and that the defendant conform to the decree of the supreme court in the case." After this decree was made, the defendant filed a petition for a rehearing. The grounds taken in the petition are reasons against the confirmation of the report on account of the court's proceedings upon it, by which the defendant alleges he had been deprived of an opportunity to except to the

report as it had been amended. That the cause upon the report had not been docketed regularly for trial, on account of the master's having taken testimony *viva voce*, when it should have been by depositions upon interrogatories; that the court in its decree had not disposed of the question of costs; and that the court, in its general direction to the defendant to do all things directed by the mandate of the supreme court, had left it uncertain to whom the defendant was to surrender and to convey the property. The court, after this petition had been answered by the complainant, heard an argument upon the motion. The judge finally overruled the application for a rehearing; and decreed that the defendant should surrender and reconvey the property described in the bill of complaint, to Louisa Livingston, widow and executrix, and devisee of Edward Livingston, deceased, and to Cora Barton, daughter and forced heir of said Edward Livingston, in conformity to the decree of the supreme court of the United States, and to the decree heretofore made, in pursuance thereof, by this court. This decree was made on the 6th February, 1837. The cause is now regularly before this court, on an appeal from the decree of the district court, overruling the defendant's exceptions to the master's report, and confirming the same.

§ 2242. *Where the supreme court renders a decree and sends the mandate to the court below, a petition for a rehearing of any matters decided by the supreme court will not be granted.*

But before we consider the exceptions, we think it proper to notice the petition for a rehearing. Upon any matters in that petition, not directly touching the master's report, but assuming what this court did or did not decide or direct to be done by its mandate, it is only necessary to repeat what this court said in *Ex parte Story*, 12 Pet., 343. "The merits of the controversy were finally decided by the court, and its mandate to the district court required only the execution of its decree." As to the objection that the defendant had not an opportunity to except to the master's report as it was amended — it is founded upon a misconception of the fact; for the defendant's third exception, that the report did not show that it reports the evidence — the court simply allowed the master to certify that it did. If this certificate had not been allowed by the court, the exception could not have prevailed, unless the several allegations, that the evidence did not appear in the report, had been accompanied by a specification of the particulars in which it was deficient.

§ 2243. *Action of court on exceptions.*

On such an exception, supported by the oath of the party making it, or without oath if the opposite party joins in the exception without requiring the exception to be verified by affidavit, the court would call upon the master to report the evidence. We have noticed this exception as a point of practice. The truth of the exceptions not appearing on the face of the proceedings, and not being supported by affidavit or otherwise, the court cannot notice the exceptions. *Thompson v. O'Daniel*, 2 Hawk., 307.

§ 2244. *Evidence taken before a master in chancery need not be in writing.*

The next objection in the petition for a rehearing, that the master, under the order of the court, did not possess the power to take testimony; and that, if he did possess such power, then it was irregularly exercised, because it should have been by depositions upon interrogatories, we notice also, as points of practice, not now to be settled, but which have been long since determined. In a reference to a master for any purpose, the order need not particularly empower him to take testimony, if the subject-matter is only to be ascertained

by evidence. And in taking evidence, though the better plan is to take the answers in writing, upon written interrogatories, he may examine witnesses *viva voce*, the parties to the suit being present, personally or by counsel, not objecting to such a course (as was the case in this instance), and joining in the examination. Such is the general rule in chancery. In many, if not in most, of the states in this Union, however, it is the practice for the master to examine witnesses *viva voce*, and to take down their answers in writing. But the objection in both its parts is answered and overruled by the twenty-eighth rule of practice for the courts of equity of the United States. That rule provides for bringing witnesses before the master for their compensation, for an attachment for a contempt, when a witness refuses to appear upon subpoena; and the last clause of it, allowing the examination of witnesses *viva voce*, when produced in open court. We think the same reasons which allow it to be done in open court permit it to be done by a master.

§ 2245. *Provision for payment of costs need not be embraced in a decree or judgment.*

But it is said the decree of the district court does not provide for the payment of costs. This, too, is a point of practice which, we remark, need not be a part of the decree or judgment, though it often is so; as the payment of them in most cases depends upon rules, and when rules do not apply, upon the court's order, in directing the taxation of costs.

§ 2246. *Rules of the supreme court govern proceedings in equity.*

We now proceed to examine the exceptions taken by the defendant to the master's report. The first: "That chancery practice has been abolished by a rule of the district court of Louisiana, and that such proceeding is unknown to the practice of the court," is not an exception to the report, but a denial of the propriety of the reference to the master; also of the court's authority to make such a reference under the mandate, and involves the assertion that the rule, if any such exist, may control the mandate and set it aside as a nullity. No such rule appears in the record. If any such exist, it certainly was disregarded in this instance (as it should be in every other by the court), or was not deemed applicable to a case like the one before it. We think the occasion, however, a proper one for this court to remark, if any such rule has been made by the district court in Louisiana, that it is in violation of those rules which the supreme court of the United States has passed to regulate the practice in the courts of equity of the United States. They are as obligatory upon the courts of the United States in Louisiana as they are upon all other United States courts; and the only modifications or additions which can be made in them by the circuit or district courts are such as shall not be inconsistent with the rules prescribed. Where the rules prescribed by the supreme court to the circuit courts do not apply, the practice of the circuit and district courts shall be regulated by the practice of the high court of chancery in England. The parties to suits in Louisiana have a right to the benefit of them; nor can they be denied by any rule or order without causing delays, producing unnecessary and oppressive expenses, and, in the greater number of instances, an entire denial of equitable rights.

§ 2247. *Federal courts of Louisiana have equity powers under the constitution and laws of the United States.*

This court has said upon more than one occasion, after mature deliberation upon able arguments of distinguished counsel against it, that the courts of the United States in Louisiana possess equity powers under the constitution and

laws of the United States; that if there are any laws in Louisiana directing the mode of procedure in equity causes, they are adopted by the act of the 26th of May, 1824 (4 Stats. at Large, 62), and will govern the practice in the courts of the United States. 9 Pet., 657. But if there are no laws regulating the practice in equity causes, we repeat what was said at the last term of this court in *Ex parte* Poultney v. City of La Fayette, 12 Pet., 474: "That the rules of chancery practice in Louisiana mean the rules prescribed by this court for the government of the courts of the United States, under the act of congress of May 8, 1792, chapter 137, section 2 (4 Stats. at Large, 275). These rules recognize the appointment of a master. The court below, in making this reference, acted under them and the mandate, and it could not therefore sustain the exception to the master's report. On the second exception we need only remark that the master apprehended rightly the decision and mandate of the court. The payment to Morse by the defendant was not considered an expenditure on account of the property nor on account of Livingston. It was intended to be excluded from the credits to which the defendant was entitled.

The third exception has been already disposed of. It was only a permission to the master to certify that his report contained all the evidence taken under the reference.

The fourth and seventh exceptions, on account of their generality and indefiniteness, may be considered in connection. The first of them is that the master, in making his estimates and calculations, has not pursued the mandate of the court; and the seventh is that the master erred in all his charges against the defendant, and failed to allow the defendant his proper credits. In what particular the mandate has not been pursued is not stated. It is a general objection to the whole report, imputing to the master a misconception of the principles upon which the account was to be taken, and amounts to this, that, if the court shall see, upon the face of the report and the master's proceedings, error against the defendant, it will correct it, though no exception has been filed. In this view of it the defendant shall be protected, if the court shall detect error in the report. As to error in charges, and a denial of proper credits to the defendant, we remark that, without some specification of erroneous charge, and of disallowed credit, it is impossible to determine what the defendant objects to as a charge or claims as a credit. Was any credit refused which was claimed except that of the \$1,000 to Morse? That, we have said, was rightly refused. Was he not allowed all other credits on the general account of expenditures? Did the defendant, whilst the reference was in progress, or after the report upon it was made, claim any credit by the exhibition of any account? Did he ask to introduce any evidence to the master in support of any credit? Did he claim any other credit than such as are to be found in the account, giving on his own oath a statement of his expenditures, and of the rents of the property from 10th August, 1822, to the 26th January, 1829? Nothing of the kind appears.

§ 2248. *Statements of the master in his report are conclusive, if not denied.*

On the contrary, there is in the report a statement by the master which is conclusive of the fact, as it has not been denied, that the defendant, though repeatedly called upon, and after having repeatedly promised to give an account, and having had five weeks to furnish it, refused to give any account.

The parties were summoned to the reference, by the master, on the 6th of March. On the 8th, the defendant Story appeared in person, accompanied by counsel. Upon his suggestion, however, that one of his counsel was absent

from the city, and that he had been so much occupied as not to have had leisure to complete his account, with his request that the hearing should be postponed, though it was opposed by the complainant's counsel, the master adjourned the reference to give the defendant time to furnish his account, and to surcharge the account of the expenditures and rents up to the last of January, 1829. The right to correct any errors in that account was conceded to him; the account was given in evidence subject to such concession. Two witnesses were then sworn on the part of the complainant without objection and were examined by both parties. The meeting was then adjourned to the next day, the parties again attended, but the witnesses who had been summoned not being present, the defendant again suggested the propriety of adjourning for a few days, when he should be ready to present his account, which he had almost ready. It was assented to. The meeting was adjourned to the 24th of March. On that day the parties appeared before the master, a witness was examined on the part of the complainant, and the defendant again declared he had been prevented by important business from completing his account; and he requested a little more time to make it complete. The complainant's counsel consented to an adjournment to the 5th of April. On that day the defendant again requested further time; the case was continued to the 15th of April, and then defendant said he did not intend to furnish any account; but urged that, as the account of expenditures and rents up to the last of January, 1829, had been received as evidence, it must be considered as conclusive of the expenditures which had been made on account of the property. This was allowed to be correct. We have then the refusal of the defendant to furnish an account, and proof that he did not claim any other credit than those in that account. With what propriety can a denial of credits be urged as an exception to the report? The defendant was the only person who could furnish an account of the credits to which he supposed himself to be entitled. He refused to do so. To allow him to say that there is error in the report, in this respect, would permit him to take advantage of his own wrong, and to defeat the complainant's rights by artifice. Nor is the account of expenditures and receipts up to the last of January, 1829, now examinable (except as to mere errors in computation), either as regards the principal or interest; the defendant being concluded by his admission of it, when he claimed the expenditures as a set-off against his own statement of the rents.

What has been said of the fourth and seventh exceptions applies to the fifth, which is, that a reasonable allowance should have been made to the defendant for the costs and risk of collecting the rents. If under the mandate any such allowance could be made, the claim for it should have been presented to the master, supported by evidence of what was the customary compensation for such services, if the service is not compensated by a law of Louisiana. A mere claim for a reasonable allowance cannot give a right to any, and of course is no valid exception to the report. It is the case of a party before a master, who merely claims for general expenses, without stating particulars. Under such a claim he will be allowed nothing. *Methodist Episc. Ch. v. Jaques*, 3 Johns. Ch., 81.

Six of the exceptions having been disposed of, the seventh only remains to be considered. It is, "that it appears from the master's report that the stores were rented from November to November, and he erred in assuming the 1st April as the period of payment of annual rent." It was said in argument, that computing the payment of annual rent in extinguishment of the defend-

ant's debt, on the 1st April, is in effect to deprive him of interest for a part of the year, as the aggregate of the rent was not in fact received; that it is to allow interest upon rents and profits, contrary to the mandate and established decisions. This would certainly be so if the rent had only been received at the end of the year. But if the rents were payable at intervals in the year, and were actually so received; and if the half, or any other portion of the ascertained annual rent, shall extinguish the interest upon the debt when it was received and reduce the principal, why should the whole debt continue to draw interest? Surely, to allow this would be to vary the obligations of these parties to each other, differently from what would be their respective rights in any other case of a debt drawing interest, upon which a payment has been made, which paid the interest and a part of the principal. Is there any difference in the effect of a payment, whether made in person by the debtor or if it arises from the income of his property?

§ 2249. *The rule in general is that the creditor shall calculate interest whenever a payment is made.*

The correct rule in general is, that the creditor shall calculate interest whenever a payment is made. To this interest the payment is first to be applied; and if it exceed the interest due, the balance is to be applied to diminish the principal. If the payment fall short of the interest, the balance of interest is not to be added to the principal so as to produce interest. This rule is equally applicable whether the debt be one which expressly draws interest or on which interest is given in the name of damages. *Smith v. Shaw*, 2 Wash., 167; 3 Cow., note a, 87. This, then, being the rule, if the fact is probable in this case that the income of the property received at any time in the course of the year did pay interest and a part of the principal, the defendant cannot complain; he being the receiver of the money, and refusing to give any account of the aggregate or its parts when received, if the master has taken a date for the computation of the aggregate rent as payment, which places the parties upon an equality. Besides, the mandate does not restrict the right of the complainant to a credit for the aggregate of the rent at the end of the year. It does not allow interest upon the rent, but directs the rents to be applied to the payment of the sums incurred in building and repairing; secondly, to the interest on the sums which have been advanced on the loan, or in the improvement of the lot; and thirdly, to the discharge of the principal of the loan. The fair inference from the silence of the mandate, as to the time when the rents are to be credited, is, that they are to be so when they are received, if the interest and part of the principal are paid. This is the general rule for the application of payments, and is the rule of equity which does substantial justice. What, then, is the case of the defendant in this particular? He has a debt drawing five per centum interest, yielding annually \$1,135.55, and is in possession of the property of the complainant, giving a rent annually, after deducting \$700 for repairs and taxes, of \$8,000. But, it may be asked, by what means or evidence did the master ascertain the amount of rents, and that they were paid at such times and in such amounts as to justify the computation of the annual aggregate as a payment before the expiration of the year? First, he must have known that leases of houses are not made, either in Louisiana or elsewhere, for the payment of the entire rent at the end of the year; next he had an account made by the defendant, verified by his oath, showing that for seven years the rents of this property were received by him, principally in monthly payments; in the year 1828 altogether so; and then at

intervals of two, three or four months in sums over \$1,700 up to \$3,000. The rents received in January and February, 1828, exceeded the amount of interest upon the principal debt or loan by \$600. The rent in that account received on the 26th January, 1829, was \$950, and the account states \$1,000 as due on the 1st of February, 1829. The amount of the annual rent the master ascertained from the tenants, who were witnesses before him, not to be less than \$8,000. Let it be remembered that the question now is, not whether the defendant shall pay interest upon rents and profits, but the time when he shall credit a payment upon the debt which discharges the interest and a part of the principal. His debt was carrying interest, and therefore his receiving the rents of the property at any time, in a sum sufficient to pay the interest and a part of the principal, should be applied at the date when it was received. The defendant could not claim an exemption from the operation of this general rule, in virtue of any relation between himself and the complainant, as trustee, bailiff, attorney or agent of the latter; who was always ready to pay when called upon, who had not mingled the rents with his own money, and not used it as his own, or that it had been kept on hand to abide the decree of the court. If he had been in either of these attitudes, especially the latter, his own oath, if not controlled by other testimony and the circumstances of the case, would have entitled him to a continued accumulation of interest upon the debt, without any credit of the rent, until the final decree had directed a sum to be paid to the complainant. Under the circumstances of this case, the defendant refusing to give any account, yet admitting that he had received the rents at intervals in the year; when we consider such to be the usual way of renting houses, he having agreed that the certificates of the tenants should be received as evidence of the amount of rents respectively paid by them, the tenants having proved the amount of the annual rent of the premises, we conclude that the master did right in assuming an intermediate point in the year for the computation of the annual amount of rent, in the absence of all proof when its parts were paid; and that it was the fairest way of carrying out the substantial intention of the mandate of this court. But suppose, as was urged in argument, that the mandate had directed an annual application of the rent of the premises to the payment of the debt of the defendant, without specifying that the interest was to be calculated to a date contemporaneous with the last payment of the rent, and the debt was one carrying interest *de die in diem*. The mandate could only be executed according to the general rule in the case of such a debt by making every receipt for rent in discharge first of the interest, then of the principal. *Raphael v. Boehm*, 11 Ves., 92. The mandate is to be interpreted according to the subject-matter to which it has been applied, and not in a manner to cause injustice.

This is not like the case of a decree directing annual rents, with the view of compounding interest. The question now under consideration has been ruled as it is now decided, in *Bennington v. Harwood*, 1 Turn. & Russ., Ch. Rep., 477, a case upon a master's report of an account, under a decree that the master should set an annual value by way of rent upon the premises, the mortgagee being in possession; the master of the rolls decided that a mortgagee can never receive more than his principal and interest, and says: "Now if in the early part of the year a payment is made to him, exceeding the interest which is then due, and he is nevertheless allowed interest on the whole of his principal down to the end of the year, what is the profit which he derives from his mortgage, in the interval between the date of that payment and the

date of the annual rent? It is clear that a part of his principal has been repaid to him, and yet he receives interest upon the whole of it; in other words, he gets more than five per cent. on the sum for which he is actually a creditor. Suppose that the sum paid to Eadon on the 2d February had been equal to the whole of the £500, with the arrears of interest calculated to that day, would he have been entitled to interest up to the 5th of July? Is it possible that such should be the effect of a direction to make annual rents? The sums which a mortgagee in possession receives in respect of the mortgaged premises, at times intermediate between the dates of the annual rents, must be applied, when they exceed interest, to the reduction of the principal; and in the present case that course is clearly prescribed by the very words of the decree." Now, what was the decree in *Bennington v. Harwood*, 1 Turn. & Russ., 477? It was the usual decree against a mortgagee in possession, containing the common directions that the master should tax him the costs of suit, and so set an annual value by way of rent upon the premises, with further directions that the sums received in February, 1805, were to be applied forthwith, first to the discharge of the then existing arrear of interest, and next to the diminution of the principal. The master made the rest on the 5th July, instead of doing so in February; and the counsel contended in that case, as counsel have done in this, that a direction for annual rests excludes all rests which are not annual. But that position was not sustained by the master of the rolls, on general principles, though he concludes by saying in the present case, "that course is clearly prescribed by the words of the decree." The defendant here is substantially a mortgagee in possession, having a debt due to him, carrying interest *de die in diem*, and must abide the general rule for the application of payments to it.

This, then, is not a case in which the defendant has been deprived of a day's interest by the master's report, nor one in which interest has been allowed upon rents and profits; but a case in which the application of a sum received by the creditor is made to prevent his whole debt from drawing interest after a part of it was probably paid. Of this there is a violent presumption. The general principle is, as it was ruled in *Breckenridge v. Brooks*, 2 A. K. Marsh., 341, that a mortgagee in possession is not to pay interest upon rents; but as the chief justice said in that case: "We will not say there may not be special circumstances which would justify allowing interest upon rents received by a mortgagee. We say in this, that whenever a mortgagee in possession, having a debt due to him, carrying interest *de die in diem*, shall collect an amount of rent which will extinguish the interest and a part of the principal, that he is bound so to apply it." In *Fenwick v. Macey*, 1 Dana, 286, rents received by a mortgagee were directed to be applied as they accrued, to keep down the interest. In *Reed v. Lansdale*, Hard., 7, it was ruled that the equitable rule in redeeming, when the mortgagee is in possession, is to charge the profits of the mortgaged property against the principal and interest.

Having thus disposed of the exceptions to the report, and considered the principal argument of counsel against its confirmation, we remark that there is nothing on the face of the report adverse from the defendant's rights which should cause it to be set aside. Even with the computation of the rents as a credit on the 1st April, he is still a gainer; for the difference between the calculation so made, and what would have been the amount he would have received if the rents had been credited on the 1st November, is more than compensated by the use of large sums of money received by him as rent, after

the total extinguishment of his debt. The complainant, however, took no exception to the report, and it must stand good against her.

We notice in conclusion an objection to the report urged in the defendant's petition for a rehearing, and in the argument of the case. It is, that the decree of the court below is inconclusive as to whom the property is to be reconveyed. This is not an objection which the defendant can be permitted to urge. When he shall obey the decree in reconveying and surrendering the property, his responsibility will be at an end. As to the defendant, the decree of the court is conclusive against all persons who may legally claim from him any interest on the property as devisee or heir of Edward Livingston. As to those, the law of Louisiana fixes their respective rights, and upon those rights this court has not, nor does it intend to adjudicate in this cause. The general rule certainly is, that all persons materially interested in a suit ought to be parties to it, either as plaintiffs or defendants, that a complete decree may be made between those parties. *Caldwell v. Taggart*, 4 Pet., 190.

§ 2250. *Where a decree can be made without affecting the interest of a person in the subject-matter, it may be made without joining him.*

But there are exceptions to this rule, and one of these is, where a decree in relation to the subject-matter of litigation can be made without a person who has an interest having that interest, in any way concluded by the decree. *Bailey v. Inglee*, 2 Paige, 278. See, also, *Joy v. Wirtz*, 1 Wash., 577, where the rule is comprehensively expressed in respect to active and passive parties; and where a party is not amenable to the process of the court, or where no beneficial purpose is to be effected by making him a party, such interest must be a right in the subject of controversy, which may be affected by a decree in the suit. Such is the case as to Cora Barton in this cause. The subject-matter is to obtain from the defendant money decreed to be due to Edward Livingston, and the surrender and reconveyance of property forming a part of the real estate of Edward Livingston. After his death his widow, as executrix, was made a party to the bill; and the decree in that suit cannot in any way determine the rights of Cora Barton in her father's estate.

§ 2251. *Objection of want of parties must be made by plea or answer, when.*

Besides, if there was any force in the objection it comes too late; for where a complainant omits to bring before the court persons who are necessarily parties, but the objection does not appear upon the face of the bill, the proper mode to take advantage of it is by plea or answer. If the objection appears on the face of the bill the defendant may demur. *Mitchell v. Lenox*, 2 Paige, 280. The objection of a misjoinder of complainants should be taken either by demurrers or in the answer of the defendants; it is too late to urge a formal objection of this kind for the first time at the hearing. *Trustees of Watertown v. Cowen*, 4 Paige, 510. So, also, it was ruled in 3 Paige, 222. We might crowd this opinion with decisions to the same point from the English and American chancery reports. But further the objection cannot prevail, for it does not show that the process of the court could reach Cora Barton. In *Mallow v. Hinde*, 12 Wheat., 193, it was ruled that wherever the case may be completely decided as between the litigant parties, an interest existing in some other person whom the process of the court cannot reach, as if such person be a resident of another state, will not prevent a decree upon the merits. And in the same case it was decided, where an equity cause may be finally decided as between the parties litigant without bringing others before the court, who would, generally speaking, be necessary parties, such parties may be dispensed

with in the circuit court, if its process cannot reach them, as if they are citizens of another state. But when the rights of those not before the court are inseparably connected with the claim of the parties in the suit, the peculiar constitution of the circuit court is no ground for dispensing with such parties. 12 Wheat., 194. In whatever point of view, therefore, the objection is considered, whether as to the interest of Cora Barton in the suit, the time when the objection has been made, or the manner in which it is made, in not showing that the process of the court could have reached her, is of no moment in this case.

This court, in regard to her, only directs her name to be inserted in the reconveyance, it having been ascertained by the master that she is a forced heir of Edward Livingston, and that fact being admitted by the defendant, and the admission of its correctness being the foundation of his objection. The decree of the court below affirming the master's report, and directing a reconveyance of the property, is affirmed.

HATCH v. INDIANAPOLIS & SPRINGFIELD RAILROAD COMPANY.

(Circuit Court for Indiana: 9 Federal Reporter, 856-860. 1882.)

Opinion by GRESHAM, J.

STATEMENT OF FACTS.—The bill in this case alleged that the railroad company was indebted to the complainant in a large sum for labor and materials furnished in the construction of a part of the respondents' road; that certain stockholders, who were made defendants, had never paid their stock subscriptions; and that the company was insolvent and the road had been abandoned. The court was asked to ascertain and decree the amount due from the company to the complainant; also for a decree against the individual stockholders, requiring them to pay into court a sum sufficient to satisfy the complainant's demand and costs of suit.

After the case was put at issue it was referred to the master to take and report the testimony and a finding thereon. Both parties appeared before the master and took testimony, without objecting to the terms of the reference. Having heard the arguments of counsel on both sides, the master prepared his report and filed it in the clerk's office on the 24th day of August, 1880. This was done without notice to either party that the report was ready to be filed. The same day, or within a day or two thereafter, the complainant's counsel were furnished with a copy of the report. Nothing further was done in the case until the 23d day of September, when the complainant's counsel filed a written motion to recommit the report to the master for review, because the master had gone beyond the matters to him referred, had omitted to report upon divers matters properly included in the reference, and had filed his report without submitting the same in draft to the complainant, and allowing him opportunity to make his objections thereto, and thus lay the requisite foundation, under the rules and practice established by the supreme court, for taking valid exceptions to the report if the master should overrule any of said objections.

It is urged by the complainant's counsel that, after writing out his report, and before filing it in the clerk's office, the master should have notified counsel that it was in draft, thereby affording them opportunity to point out supposed errors, and make objections to his conclusions, so as to give him an opportunity of considering and correcting his report, and that no exceptions,

according to correct chancery practice, can be heard by the court which have not been carried in before the master.

It is also further urged by the counsel that the equity rules do not cover all the details of equity practice, and that this is evident from rule 90, which adopts the English practice in omitted cases, as it was known and understood when the equity rules were adopted. These rules were promulgated by the supreme court and took effect on the 2d day of August, 1842. It seems to have been the practice in England, for some time before our equity rules were adopted, that a party should never except, unless he had first objected to the draft of the report before the master, and when there was no objection brought in it was allowed good cause to discharge the exception. That being the practice, of course the unsuccessful party was entitled to notice that the report was in draft. 2 Daniell (2d Am. ed.), 1483. This seems to be recognized as the correct practice in some of the courts of this country. *Troy, etc., v. Corning*, 6 Blatch., 328; *Gaines v. New Orleans*, 1 Woods, 104; *Church v. Jaques*, 3 Johns. Ch., 77; *Gleaves v. Ferguson*, 2 Tenn. Ch., 589; *Gordon v. Lewis*, 2 Sumn., 143 (Conv., §§ 852-61); *Byington v. Wood*, 1 Paige, 145.

In *Story v. Livingston*, 13 Pet., 359 (§§ 2239-51, *supra*), the court say: "Strictly, in chancery practice, though it is different in some of our states, no exceptions to a master's report can be made which were not taken before the master; the object being to save time and to give him an opportunity to correct his error or to reconsider his opinion. Dick., 103. A party neglecting to bring in objections cannot afterwards except to the report (*Harr. Ch.*, 479), unless the court, on motion, see reason to be dissatisfied with the report, and refer it to the master to review his report, with liberty to the party to take objection to it. 1 Dick., 290; *Madd. Rep.*, 340, 555. But, without restricting exceptions to this course, we must observe that exceptions to a report of a master must state, article by article, those parts of the report which are intended to be excepted to."

While the practice contended for by the complainant is here referred to as correct, according to strict rule, the court declined to enforce it against the excepting party. *McMicken v. Perin*, 18 How., 507 (CONTRACTS, §§ 578-80), was decided in 1855, some years after the adoption of the equity rules, and without alluding to rule 83. After referring to *Story v. Livingston* as deciding that no objections to a master's report can be made which are not taken before the master, the court says: "The court will not review a master's report upon objections *taken here* for the first time." The exceptions to the master's report had not been taken in the circuit court, but for the first time in the supreme court. The practice contended for by the complainant was referred to in *Story v. Livingston* as being correct according to strict rules, without, however, being enforced; and in *McMicken v. Perin* the question was not before the court.

§ 2252. *Rights of parties to inspect drafts of master's report and be heard thereon.*

Masters are usually employed in taking accounts and making computations, and in making inquiries and reporting facts. In references of this character drafts of the reports have been prepared before argument, and argument was heard before the master only on objections to the drafts. In such cases it is clear the parties were entitled to inspect the reports and to be heard on such parts of them as were objected to. But if a reference is made embracing questions of law as well as fact, and after hearing the testimony and the argu-

ments of counsel, as was done in this case, the master prepares a report of his findings, I can see no good reason for observing the formalities of the old practice. It resembles a trial before a referee when the parties are fully heard, and their respective points and positions are fully stated to and understood by the trier. This case was argued at great length before the master, and he, no doubt, comprehended the exact points in controversy. If the complainant's motion should be sustained, his counsel would probably go before the master, and, in support of objections to the draft, again repeat the arguments that he urged in the first instance.

§ 2253. *Other points of practice with reference to masters' reports.*

It is not the practice in this district, nor, as I understand, in this circuit, for the master, after hearing full argument, to prepare a draft of his report and then notify the parties and summon them to make objections. When the case has been fully argued in the first instance, the legal right of the unsuccessful party to go before the master, make objections to the draft of the report, and argue those objections, is not recognized in practice.

The equity rules provide for conducting references before masters in a simple and expeditious manner. It is fair to assume that in adopting these rules the supreme court meant to dispense with the old formalities incident to settling the master's report. Rule 77 provides that the "master shall regulate all the proceedings in every hearing before him, upon every such reference," . . . and "the master," says rule 83, "as soon as his report is ready, shall return the same into the clerk's office, and the day of the return shall be entered by the clerk in the order book. The parties shall have one month from the filing of the report to file exceptions thereto; and if no exceptions within that period are filed by either party, the report shall stand confirmed the next rule-day after the month is expired. If exceptions are filed, they shall stand for hearing before the court, if the court is then in session; or, if not, at the next sitting of the court which shall be held thereafter."

Nothing is said here, or in any of the other rules relating to practice before masters, about notice to parties that the report is in draft, and to appear before the master and settle it. "As soon as his report is ready," "the master shall return it into the clerk's office," and "the parties shall have one month from the filing of the report to file exceptions thereto." The report is ready, within the meaning of rule 83, when it is written.

It is not necessary to refer to the practice of the high court of chancery in England, as it existed in 1842, for the formalities attending the settlement or making of masters' reports, and the entering of exceptions thereto. These matters are provided for in the equity rules. I have considered the only question that seemed to be relied on in the argument of the motion. During the argument the complainant's counsel, inasmuch as they might have been misled as to the practice in this district, were offered leave by the court still to file exceptions to the report, notwithstanding the fact that the time limited by the rule for taking exceptions had elapsed. This offer they declined. In declining it counsel said they preferred to stand upon their legal rights. Motion overruled.

GASS v. STINSON.

(Circuit Court for Massachusetts: 2 Sumner, 605-612. 1887.)

STATEMENT OF FACTS.—This cause was before the master upon an interlocutory order, and an application was made to examine witnesses impeaching the

competency of Noah James, a witness whose testimony had been before the court upon the hearing. There was an order made by the judge at chambers to take the depositions *de bene esse*, and the cause came up on a motion to supersede that order.

Opinion by STORY, J.

As the original application to the master was made orally, the precise grounds on which it was made do not appear, except from the master's certificate. This was a great irregularity; and the application should have been by petition in writing, verified (if not ordinarily, at least in a case of this sort) by affidavit. See *Troup v. Sherwood*, 3 John. Ch., 558, 566. The irregularity, however, was not then brought to my notice. The interrogatories proposed to be put to the witnesses were, however, filed in writing before the master; and an exception has now been taken to their purport and character. I shall presently have occasion to comment on them.

§ 2254. *Where an application to take testimony is founded on a suggestion that is incorrect, the order for taking the testimony will be superseded.*

The application to supersede the order relies upon various grounds. The first one is that the application was founded upon a suggestion which is wholly incorrect, to wit, that James had not received a plenary pardon; whereas in fact he had received such a pardon, as appears by a copy of the instrument of pardon. This removes at once the whole of the original ground of the application, and undoubtedly entitles the plaintiff to have the order for taking the depositions superseded, since the witness was clearly competent.

§ 2255. *The best record evidence of a trial and conviction of a person for an offense will be required.*

But an attempt has been made to sustain the order upon the ground that the facts to be stated by the witnesses would go to affect the credibility of James. Upon looking into the interrogatories filed, it is impossible that they can be sustained for this or any other purpose applicable to the cause. The first three interrogatories are merely introductory, and point solely to the identification of James; and, in other respects, are immaterial and irrelevant. All the other interrogatories seek to establish, by the parol evidence of witnesses, that there was an indictment, trial, conviction and sentence of James for larceny; facts which should be proved by a production of the record itself, and which are not, in their character, proper to be established by the mere oral statements of witnesses. There is no ground upon which a party can be permitted to testify orally to the contents or purport of an indictment, or verdict, or judgment; for the best evidence is the original paper, or a certified copy. So that, if the interrogatories had been originally examined, they must have been suppressed, whether they applied to competency or to credibility.

§ 2256. *The proper mode of objecting to the competency or credibility of witnesses in courts of equity.*

But it is proper to say a few words as to the time and manner of presenting objections to the competency or credibility of witnesses in courts of equity. The general course of practice is that, after publication has passed of the depositions (though it may be before), if either party would object to the competency or credibility of the witnesses whose depositions are introduced on the other side, he must make a special application by petition to the court for liberty to exhibit articles, stating the facts and objections to the witnesses, and praying leave to examine other witnesses to establish the truth of the allegations in the articles by suitable proofs. 1 Harris. Ch. Pr. (by Newland), pp. 282, 283;

Hinde's P. Ch., 374, 375; 1 Newl. Ch. Pr., 289, 290; Gilb. For. Roman., 147, 148. Without such special order, no such examination can take place; and this has been the settled rule ever since Lord Bacon promulgated it in his Ordinances. Ord. 72; Beames' Ordin. in Ch., pp. 32, 187; Mill v. Mill, 12 Ves., 406. Upon such a petition to file articles, leave is ordinarily granted by the court, as of course, unless there are special circumstances to prevent it. There is a difference, however, between objections taken to the competency and those taken to the credibility of witnesses. Where the objection is to competency, the court will not grant the application after publication of the testimony, if the incompetency of the witness was known before the commission to take his deposition was issued; for an interrogatory might then have been put to him directly on the point. But, if the objection was not then known, the court will grant the application. 1 Harris. Ch. Pr. (by Newland), 282, 283; 1 Newl. Ch. Pr., 289, 290, 291; Hinde's Ch. Pr., 374, 375; Purcell v. McNamara, 8 Ves., 324; Vaughan v. Worrall, 2 Madd. Ch. Pr., 322; S. C., 2 Swanst., 400. This was the doctrine asserted by Lord Hardwicke in Callaghan v. Rochfort, 3 Atk., 643, and it has been constantly adhered to ever since. See Purcell v. McNamara, 8 Ves., 324; Vaughan v. Worrall, 2 Madd. Ch. Pr., 322. The proper mode, indeed, of making the application in such case seems to have been thought by the same great judge to be, not by exhibiting articles, but by motion for leave to examine the matter, upon the foundation of ignorance at the time of the examination. *Id.* But upon principle there does not seem to be any objection to either course; though the exhibition of articles would seem to be more formal, and perhaps, after all, more convenient and certain in its results.

§ 2257. *Proper practice where an objection is made in an equity case to the credibility of a witness.*

But where the objection is to credibility, articles will ordinarily be allowed to be filed by the court upon petition, without affidavit, after publication. Watmore v. Dickinson, 2 Ves. & Beam., 267. The reason for the difference is said by Lord Hardwicke (in Callaghan v. Rochfort, 3 Atk., 643) to be, because the matters examined into in such cases are not material to the merits of the cause, but only relative to the character of the witnesses. And, indeed, until after publication has passed, it cannot be known what matters the witnesses have testified to; and, therefore, whether there was any necessity of examining any witnesses to their credit. Russel v. Atkinson, 2 Dick., 532. This latter is the stronger ground; and it is confirmed by what fell from the court in Purcell v. McNamara, 8 Ves., 324.

When the examination is allowed to credibility only, the interrogatories are confined to general interrogatories as to credit, or to such particular facts only as are not material to what is already in issue in the cause. The qualification in the latter case (which case seems allowed only to impugn the witness' statements as to collateral facts) is to prevent the party, under color of an examination as to credit, from procuring testimony to overcome the testimony already taken in the cause, and published in violation of the fundamental principle of the court, which does not allow any new evidence of the facts in issue after publication. The rule and the reasons of it are fully expounded in Purcell v. McNamara, 8 Ves., 324, 326; Wood v. Hammerton, 9 Ves., 145; Carlos v. Brock, 10 Ves., 49, 50, and White v. Fussell, 1 Ves. & Beam., 151. (The very form of the order is given in a note (g) to Watmore v. Dickinson, 2 Ves. & Beam., 268. See, also, 1 Madd. Ch. Pr., 320 to 325; Piggott v. Croxhall, 1 Sim. & Stu., 467.) It was recognized and enforced by Mr. Chancellor

Kent, in *Troup v. Sherwood*, 3 John. Ch. R., 558, 562 to 565. When the examination is to general credit, the course in England is, to ask the question of the witnesses, whether they would believe the party sought to be discredited upon his oath. See *Purcell v. McNamara*, 8 Ves., 324; *Carlos v. Brock*, 10 Ves., 49, 50; *Anon.*, 3 Ves. & Beam., 93; *Watmore v. Dickinson*, 2 Ves. & Beam., 267. But see *Gill v. Watson*, 3 Atk., 522. With us the more usual course is to discredit the party by an inquiry, what his general reputation for truth is; whether it is good or whether it is bad.

§ 2258. *The proper time for examinations as to the credit of witnesses.*

But examinations to the credit of witnesses are required to be made before the hearing; and it is quite too late to make the application after the hearing, and *a fortiori* after an interlocutory decree has passed upon the hearing, upon the footing of the evidence in the cause. So the doctrine was laid down by Lord Eldon in *White v. Fussell*, 1 Ves. & Beam., 151. The case of *Piggott v. Croxhall*, 1 Sim. & Stu., 467, manifestly implies the same doctrine; though the application was there made before the hearing. It seems to me, therefore, that upon this ground alone, the defendant is not now at liberty to examine witnesses before the master, to the credit of a person, whose testimony was read at the hearing without objection, the objection to his competency or credibility being then fully known. The defendant, by his conduct upon that occasion, waived the objection, and he cannot in any subsequent stage of the cause renew it.

But it is said that, upon a rehearing, or an appeal from the decree at the rolls to the chancellor, new evidence is admissible to be read which was not read at the original hearing. That may be true under particular circumstances, as where it is evidence originally in the cause, but not read; or where it is evidence newly discovered since the hearing. On this subject, however, I do not dwell, because it was recently considered in this court in a case which underwent a good deal of consideration. I allude to the case of *Wood v. Mann*, 2 Sumn., 316. The case of *Needham v. Smith*, 1 Vern., 463, has also been relied on to show that a confession of a witness, which has come to the knowledge of the other party since the hearing, and which goes to his competency or credibility, is admissible on an appeal from the rolls. On that occasion it was also said, that if, after the hearing, a witness is convicted of perjury, the objection may be taken advantage of upon a rehearing. But, giving the fullest effect to this doctrine, it only applies to a case strictly of a rehearing (for an appeal from the rolls is only a rehearing. *East India Company v. Boddam*, 13 Ves., 421; *Buckmaster v. Harrop*, 13 Ves., 456), where the whole cause is opened anew; and where the evidence is already in the cause, or has been brought out since the former hearing. The present is not such a case.

§ 2259. *How far a cross-examination of a witness waives objections to his competency.*

It has been suggested by the counsel for the plaintiff, that if a defendant cross-examines a witness, knowing his interest, it is a waiver of the objection. The case of *The Corporation of Sutton Colfield v. Wilson*, 1 Vern., 254, certainly supports this proposition. It has been thought to go farther, and to decide that a mere cross-examination upon the merits is a waiver of any objection to his competency. But this has, as a matter of general practice and doctrine, been overturned by the more recent decision in *Moorhouse v. De Passou*, 19 Ves., 433; *S. C.*, Coop., 300; in which it was held that in equity the cross-examination of a witness, in utter ignorance of his having given an

answer to an interrogatory, showing that he has an interest in the cause, cannot amount to a waiver of the objection to his competency. In our practice at least, where the objection is actually known, and may be taken at the time of the cross-examination, it might deserve consideration whether the case in *Vernon* ought not to be adhered to. But I do not, as it is unnecessary, give any opinion on this point. But see on this point *Harrison v. Courtweld*, 1 Russ. & Mylne, 428, and *Pigott v. Croxall*, id., 428, note.

It is suggested, in the argument of the defendants' counsel, that James is to be examined anew before the master, without any special order of the court. If this is so, certainly it is an irregularity, and his examination upon a proper motion may be suppressed. The case of *Rowley v. Adams*, 1 Mylne & Keen, 548, is directly in point. But if his former deposition, only, is to be read in the hearing before the master, that is all proper, for the evidence already in the cause is for the consideration of the master.

Upon the whole, my opinion, in every view of the matter, is, that the order ought to be superseded; and it is accordingly superseded.

§ 2260. *Reference to master.*—A complex and intricate account is an unfit subject for examination in a court of equity, and ought always to be referred to a master to be examined by him and reported, in order to a final decree. The decree in this case was reversed because this was not done, and the cause was remanded with directions to refer the account to a master. *Dubourg de St. Colombe v. United States*, 7 Pet., 625.

§ 2261. Where a sale of the property and franchises of a railroad company, under a decree of foreclosure, was set aside as a fraud upon creditors, on account of the acts of the directors and purchasers, the case was referred to a master, the evidence being uncertain as to the amount of the property sold. *Drury v. Cross*, 7 Wall., 299 (Conv., §§ 1643-45).

§ 2262. Where a purchaser of land from the United States gave a bond, and a mortgage on the land to secure it, the interest on the bond, which was executed several months after the purchase, accruing, according to the contract, from the time of the purchase, the court, on a foreclosure bill, referred the account to a master to state the amount due. *United States v. Williams*, 4 McL., 567.

§ 2263. In matters of debit and credit, where the court has not the means before it of stating the account, a master is generally appointed, if desired and convenient. But where the court has the means before it, and is willing to state the account, a master need not be appointed unless it is desired by the parties. *Jewett v. Cunard*,* 3 Woodb. & M., 277.

§ 2264. The practice of referring the petition to a master before any decree settling the rights of the parties upon the issues made by the pleadings is inconvenient and perplexing and should not be resorted to. *Ward v. Paducah & Memphis R. Co.*, 4 Fed. R., 863.

§ 2265. *Oath of master.*—Although a court of equity may order a master in chancery to be sworn, yet when such oath is not required by statute, by rule of the court or the order of reference, the fact that the master was not sworn, and that his report is not under oath, is no sufficient ground for exception thereto. *Thompson v. Smith*,* 2 Bond, 320.

§ 2266. *Extent of master's jurisdiction.*—A master in chancery cannot examine into and report upon a matter *dehors* his commission, even though both parties consent to the submission thereof to him. *Gordon v. Hobart*,* 2 Story, 243.

§ 2267. Masters in chancery have no right to review, reject or disregard the decision, orders or directions of the court contained in the decretal order under which they are appointed. They are bound to obey, follow and carry into effect all such decisions, orders and directions. *Felch v. Hooper*,* 4 Cliff., 480.

§ 2268. Where it was alleged as error that before the cause was ready for a decree, and without settling the rights of the parties, the court referred it to a master for an account, and the master took and stated an account according to his own view of the law and facts, and virtually decided the case instead of the court, it was decided that, inasmuch as no objection was taken to the order of reference, no exception taken before the master, and all the evidence was presented that was desired by either party, and full justice in this respect was obtained, the allegation of error was not well grounded. *City of Memphis v. Brown*, 20 Wall., 289 (Corp., §§ 2213-23).

§ 2269. A master in chancery is right in refusing to open a settled account, where no leave is given to surcharge or falsify, and the circumstances show that the account has already been adjudicated by the court in a former suit. *Dexter v. Arnold*, 2 Sumn., 106 (Conv., §§ 862-70).

§ 2270. Where, by an interlocutory decree, it was referred to a master to ascertain and report the amount of the defendant's claim which was declared to be a charge upon the land stated in the bill, it was decided that the answer of the defendant was not conclusive as to the amount of the claim, and that the master should have inquired into all the evidence in the cause, which might be adduced in support of or contradictory to the answer. *Chickering v. Hatch*, 1 Story, 516.

§ 2271. The receiver of a certain railroad company was discharged, but by virtue of certain orders and decrees made in the case the court was authorized to enforce against the road and the present owner all claims for damages resulting from personal injuries, the actions being regarded as common law actions, and the chancery powers of the court being invoked only after judgment for the purpose of enforcing the judgment as provided by the orders and decrees. On a petition to the court to sue the receiver, the matter was referred to a master to inquire into the facts and report upon the question whether the leave to sue should be granted. It was held that it was not competent for the parties, by stipulation, to confer upon the master jurisdiction to hear and determine the merits and agree that his report should stand as the verdict of a jury. *Farmers' Loan & Trust Co. v. Central Railroad of Iowa*, * 1 McC., 332.

§ 2272. A decree in equity declared that the complainants were confirmed in their right to divert and use the water of a certain river, through a canal, for mill and other purposes, subject to the right of the respondent to use the water of the river for irrigation only, in accordance with a reservation in a deed under which the complainants claimed, and also with an agreement made with the grantor. A reference was had to a master, and the decree made it his duty to ascertain and report the amount of damage, if any, sustained by the complainant in consequence of the insertion by the respondent of a flume or culvert in the bank of the canal, as admitted in the answer; and also to report what structures were proper and needful to enable the respondent to enjoy the right to divert the water for purposes of irrigation, in accordance with the reservation contained in the deed and the agreement. It was held that the authority of the master was conferred by the decree in the cause, and that in the performance of his duties he was bound by its terms. It was further held that a conclusion of the master, that the complainant was not entitled to any damages, was inconsistent with the decree, and that it was also the duty of the master to report such structures, if practicable, as would conform to the rights of both parties. *Lonsdale Co. v. Moies*, 2 Cliff., 533.

§ 2273. While an accounting is pending before a master in chancery, he may make an order for the taking of depositions of witnesses before a commissioner named in another state. This is fully authorized by the provisions of equity rule 77. *Bridges v. Sheldon*, 18 Blatch., 507.

§ 2274. Procedure before master.—Where accounts are referred to a master or commissioner, the principles applicable to the accounting must be brought before the court on exceptions to the report, and will not be settled before taking an account. *Vanderwick v. Summerl*, 2 Wash., 41.

§ 2275. Where the decretal order of the court directs the account to be made up by the defendants, the master ought not to proceed *ex parte*. If he does so, the court will, on motion, permit the defendants to repair their fault, especially if their non-appearance can be excused. *Coates v. Muse*, 1 Marsh., 529.

§ 2276. Sale by master.—Where property is sold under an order or decree in chancery, and the sale is directed to be made with the approbation of a master in chancery, to whom the execution of the decree or order is in that particular confided, the sale is invalid without the approval of the master. *Williamson v. Berry*, 8 How., 495.

§ 2277. Where a mortgage has been treated as good and subsisting for the full amount of the debt stated therein, in an account settled between the parties; and the bill does not charge that the consideration of the mortgage was nominal or less than the amount stated therein, nor that there is any error or mistake therein, nor asks for an examination into the original consideration upon any alleged error or mistake, the master is right in not inquiring into the original consideration. *Dexter v. Arnold*, 2 Sumn., 108 (Conv., §§ 862-70).

§ 2278. Evidence.—It is not proper for a master to admit a party as a witness to support items in an account which can be proved by other competent evidence. *Harding v. Handy*, 11 Wheat., 103 (§§ 779-89).

§ 2279. In a bill in equity for an account against an administrator, where the accounts had been referred to a master for report, it was held that he had committed an error in giving to an *ex parte* report, made by certain county commissioners during the pendency of the equity suit, the same effect as would be given to such report if it had been made before the institution of the suit in equity; and that the master ought to have required vouchers for the items in such report. *Backhouse v. Jett*, 1 Marsh., 500.

§ 2280. The seventy-seventh rule prescribed by the supreme court for the observance of the circuit courts in equity, allowing an examination of the parties on a reference to a master, upon the application of the adverse party, was intended to obviate the necessity of providing

for this specially in each order of reference. It was not intended to allow the examination of parties in any other cases than those in which such examination was allowed before under the order in the particular case. This examination is allowed merely for the purpose of compelling an adverse party to give testimony against himself, and is only a mode of discovery. This rule does not allow a defendant to be examined by his own counsel in his own behalf, against the objection of the plaintiff. It makes no difference whether he was called by his own counsel or the master; nor can he volunteer testimony in his own behalf when called by the opposite party. *Foot v. Silsby*, * 3 Blatch., 507.

§ 2281. **Receiver's accounts.**—Where a receiver's accounts are referred to a master, exceptions to the master's report not taken before him cannot be taken before the court. This rule would not, however, deter the court from directing an account to be reformed which contained manifest errors or plainly improper charges. *Cowdrey v. The Railroad Company*, 1 Woods, 831.

§ 2282. A receiver is an officer of the court as well as the master, and states his own accounts and submits them to a master for inspection under the order of the court; the master acting in place of the court, in a judicial rather than a ministerial capacity. Strictly speaking, exceptions to his report in such cases do not properly lie. Nevertheless, if the master adopts any erroneous principle in allowing a receiver's account, the court, upon the petition of the proper parties, will refer the matter back to him for correction. *Ibid.*

§ 2283. When a report is submitted by a master upon the accounts of a receiver, the duty of the court consists in reviewing the principles and rules adopted and followed by the master in allowing the receiver's accounts, rather than in examining the items of the account in detail, or the evidence on which those items are severally founded, the latter being more especially the province of the master acting in his judicial capacity. *Ibid.*

§ 2284. **Receiver's allowance.**—The question of allowance to a receiver for his services is one that properly belongs to the master's office and not to the court. *Ibid.*

§ 2285. **Master's report.**—The presumptions are in favor of the conclusions of a master, and his report will not be disturbed unless it is shown to be erroneous. *Lockhart v. Horn*, 3 Woods, 542.

§ 2286. The report of a master in chancery, though it is presumed to be correct, may be re-examined. *Webb v. Powers*, 2 Woodb. & M., 497.

§ 2287. Where the question of the amount of the defendant's liability is submitted to a master, and there is no exception to the master's report, there is no further question as to the amount. *Mount Pleasant v. Beckwith*, 10 Otto, 527 (Corp., §§ 2191-2208).

§ 2288. When a master's report is returned, the court will not re-examine, retry or recommit questions of fact which do not involve questions of law, unless reasons exist which would justify the setting aside of a verdict. There must have been a clear mistake or a palpable abuse of power. *Mason v. Crosby*, * 8 Woodb. & M., 258.

§ 2289. The report of a master in chancery on a question of fact referred to him by the court, and confirmed by the court, is proper evidence in a subsequent litigation between the same parties, not only of the fact that such report has been made, but also of the matter which it professed to decide. *Hopkins v. Lee*, 6 Wheat., 109.

§ 2290. According to the ordinary mode of proceeding in courts of chancery, instead of setting aside the report of a master and rendering a decree in favor of one of the parties, the court should pass judgment upon the exceptions to the report, or remand the account to the master with additional directions as to the principles upon which it is to be stated. But where a retiring partner was entitled, under the agreement of dissolution of the firm, to a certain sum as soon as the remaining partners collected enough for that purpose after payment of the firm debts, and it was not, therefore, necessary to ascertain the precise amount which the remaining partners had collected over and above the debts paid, it was held that the action of the lower court setting aside the report of the master and entering a decree in favor of the retiring partner must be affirmed, if it appeared from the evidence that the sum mentioned had been received by the remaining partners, the evidence, and accounts and exceptions being all in the record and furnishing a means for determining this question. *Kelsey v. Hobby*, 16 Pet., 269 (§§ 72-78).

§ 2291. **Exceptions to report must be taken below.**—Exceptions to the report of a master in chancery must be taken in the court below, or objections to it cannot be considered in the supreme court. *Hudgins v. Kemp*, 20 How., 45; *Canal Company v. Gordon*, 6 Wall., 561.

§ 2292. — **points must be raised before master.**—No exceptions to a master's report will be heard by the court, which have not been taken before the master. In the absence of special circumstances the court will feel bound to enforce this rule. *Gaines v. New Orleans*, 1 Woods, 104.

§ 2293. An exception should be made to each ruling of a master in chancery at the time it is made, if the party wishes to contest the ruling. The exception need not then be drawn up

in form, but it should be taken by giving notice to the master, and it is his duty to note the fact in his minutes. *Troy Iron & Nail Factory v. Corning*, 6 Blatch., 328.

§ 2294. Exceptions to the final report of a master for rulings on evidence cannot be considered where they were not made at the time or against the draft report. *Ibid.*

§ 2295. Any questions arising upon objections made during a hearing before a master in chancery, and reserved by him, should be embraced in the objections filed with him to his draft report. *Ibid.*

§ 2296. Whatever is insisted on before a master, by way of argument or objection, is considered as waived or abandoned if it is not made matter of exception, unless, indeed, it manifestly appears upon the face of the report itself that the master has committed an error which ought to be corrected. *Gordon v. Lewis*, 2 Sumn., 143 (Conv., §§ 852-61).

§ 2297. — must be specific.— Exceptions to a master's report should be so framed as not merely to allege error in general terms, but should be sufficiently definite and explicit to enable the court understandingly to decide on each point in dispute. Allegations of error, without pointing out any particulars, are clearly insufficient. *Greene v. Bishop*, 1 Cliff., 186.

§ 2298. A general assignment of errors on exceptions to a master's report comes to nothing when no specific errors are shown in the argument. *Dexter v. Arnold*, 2 Sumn., 108 (Conv., §§ 862-70).

§ 2299. It is not the province of a court of equity to investigate the items of an account upon which a master has made a report. The report is to be taken as true when no exception is taken; and the exceptions are to be regarded so far only as they are supported by the special statements of the master, or by evidence which ought to be brought before the court by a reference to the particular testimony on which the person excepting relies. *Harding v. Handy*, 11 Wheat., 108 (§§ 779-89).

§ 2300. The exceptions to a master's report should be precise and raise well defined issues. If they require of the court the performance of duties which properly belong to the master and counsel, they will be overruled. Where the accounts of a receiver of a railroad are referred to a master, an exception to the master's report that he has allowed extravagant salaries to the auditor, treasurer and general superintendent, and other officers and agents employed by the receiver, is too vague and general, and will be overruled. *Stanton v. Alabama, etc., R. Co.*, 2 Woods, 506.

§ 2301. Where exceptions to a master's report do not point out wherein the master has erred, and the counsel have not in their argument directed the attention of the court to the evidence which establishes the error of the master in this respect, and the evidence has not in any way been brought before the court, the exceptions will be overruled. *Turrill v. Illinois Central R. Co.*, 5 Biss., 844.

§ 2302. If an exception to a master's report distinctly points out the findings and conclusions of the master which it seeks to reverse it is sufficient, and brings up all questions of law and fact arising upon the report relative to that subject. Such an exception is not in the nature of a special demurrer. *Foster v. Goddard*,* 1 Black, 506.

§ 2303. — evidence must be preserved.— Where exceptions are taken to the report of a master, the evidence which furnishes the ground of the exception should be required by the party excepting to be stated by the master. Unless this be done, the court will not enter at large into the evidence to ascertain whether the master was wrong in his conclusion. *Greene v. Bishop*, 1 Cliff., 186; *Donnell v. Columbian Ins. Co.*, 2 Sumn., 366.

§ 2304. Exceptions to a master's report must be made to matters apparent upon the face of the report, or upon the accompanying documents and proofs laid before the court upon the allegations and objections of the parties. *Dexter v. Arnold*, 2 Sumn., 108 (Conv., §§ 862-70).

§ 2305. On the hearing of exceptions to a master's report the complainants cannot introduce further evidence where there has been no notice to the opposite party, unless they are willing that the same privilege should be extended to the other side. *Mason v. Crosby*,* 3 Woodb. & M., 358.

§ 2306. Time of filing.— Where thirty days are given within which to file exceptions to a master's report, the same do not begin until a report is definitely filed, to which exceptions can properly be addressed. *Bridges v. Sheldon*, 18 Blatch., 507.

§ 2307. Action of court on report.— A court of equity has power to revise the report of a master by supplying material facts which are shown by the evidence but not stated in the report, by setting aside the findings of facts not shown by any evidence, or which are contrary to the evidence, and where errors of law have influenced or controlled the finding of material facts. But this revisory power of the court has never been considered as including a right to hear an appeal from the finding of the master, upon conflicting testimony, upon disputed questions of fact. Thus where a pure question of fact arose upon the pleadings, and either party might have had it tried and determined upon evidence taken according to the usual course before the cause went to the master, and it had been tried and determined by him as a question

of fact arising upon conflicting testimony, the court refused to review his decision. *Bridges v. Sheldon*,* 18 Blatch., 295.

§ 2308. A court of equity will not interfere with the report of a master, where, under conflicting evidence, he has placed the highest valuation on certain property, unless there is some circumstance to show that the witness making the lowest estimate was more entitled to credit. It is the duty of the party making the objection to satisfy the court that the report is wrong in this particular. *Pullan v. Cincinnati & Chicago Air Line R. Co.*, 5 Biss., 237 (Conv., §§ 1268-74).

§ 2309. The court will not set aside the finding of a master, upon conflicting evidence, and claimed to be wrong in view of the evidence, where it is not claimed that the finding is wholly without evidence to support it, or is against the great weight of evidence, or that the master acted from partiality or other wrong motive. And this, although the court may differ with him as to the weight of evidence. *Bridges v. Sheldon*, 18 Blatch., 507.

§ 2310. The report of a master will not be reversed on a question of fact, where the whole evidence on which the report is based is not before the court, and the report is based not alone upon the evidence, but also upon a personal inspection by the master, in the presence of the parties, of the apparatus of the defendant charged to be an infringement of a patent right. *Piper v. Brown*, 1 Holmes, 196.

§ 2311. A master's report will be allowed to stand unless some particular matter is pointed out in which the master has committed an error, or unless it be shown that he has adopted some erroneous principle upon which his account or calculation is based. *Gaines v. New Orleans*, 1 Woods, 104.

§ 2312. An exception to a master's report, unaccompanied by any suggestion or imputation of fraud, and which merely alleges that the master has arrived at a wrong conclusion upon the evidence, without pointing out any specific portion of the testimony to support the allegation, cannot, in general, be regarded as sufficient to put the finding of the master in issue, or require the court to review the same in a matter of the weight of evidence. *Greene v. Bishop*, 1 Cliff., 186.

§ 2313. An error of a master in taking as settled by the decree what he ought to decide on evidence will not justify the setting aside of the report where such error has not led to any error or mistake in the results. *Mason v. Crosby*,* 3 Woodb. & M., 258.

§ 2314. Where the question of accounting for supplies of materials for the repair of a vessel was referred to a master, who reported an amount due but stated no account, which report was excepted to as erroneous, it was held in the supreme court that the respondent, if he wished to contest any of the specific charges of the account, should have had the report referred back to the master with direction to state an account, to which account he should then have made specific objections, and that the court would not reverse the finding. *Simpson v. Baker*, 2 Black, 581.

§ 2315. Courts of equity, in certain cases, may give the parties a new hearing, but nothing of the kind will be allowed in the hearing of exceptions to a master's report. Applications for review in law or equity, and hearings upon exceptions to a master's report, are altogether different proceedings, and cannot be blended together either in argument or decision. *Felch v. Hooper*,* 4 Cliff., 489.

§ 2316. When an appeal arises upon exceptions to the master's report only, and not to the original judgment, it is only where the master, or the judge in acting on his report, has departed from the order of the judgment, or has omitted to enforce its provisions, that a just objection can arise. *New Orleans v. Gaines*, 15 Wall., 624.

§ 2317. Setting aside report and ordering new reference.—A court of equity has power to set aside the report of a master for any manifest error, either in law or in fact, and to recommit it for further proceedings, or to correct it if the means of correction are furnished. *Steam Stone Cutter Co. v. Windsor Manufacturing Co.*, 17 Blatch., 24.

§ 2318. Where the report of a master did not furnish means to enable the court to compute readily the interest upon items and balances allowed and disallowed, the cause was recommitted for the purpose of having the computation made. *Bridges v. Sheldon*,* 18 Blatch., 295.

§ 2319. If a master finds an amount due, but states no account, and the respondent wishes to contest any of the specific charges in the account, he must have the report referred back to the master, with direction to state an account. *Simpson v. Baker*, 2 Black, 581.

§ 2320. Where a cause had been twice referred to a master, and the exceptions taken to the reports had made it necessary for the court to adjudicate the whole controversy to the same extent as if no reference had been made, and thus perform work properly belonging to a master, a reference of the whole matter was again made. *James v. Atlantic Delaine Co.*,* 3 Cliff., 622.

§ 2321. Where a master's report, made under an interlocutory order of reference, discloses facts properly heard by him under the order which in the opinion of the court should be further

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investigated, it is competent for the court to direct such an investigation. *Magic Ruffle Company v. Elm City Company*, 14 Blatch., 109 (§§ 1171-75).

§ 2322. A new order of reference will not be made because of the allowance by the master of erroneous credits to the complainant. *Thompson v. Smith*,* 2 Bond, 330.

§ 2323. Accounts will not be referred back to a master, after he has once reported, on the suggestion of a party that he has since obtained documents and evidence in support of his exceptions, and that he expects to be able to discover new credits. *Camac v. Francis*, 3 Wash., 106.

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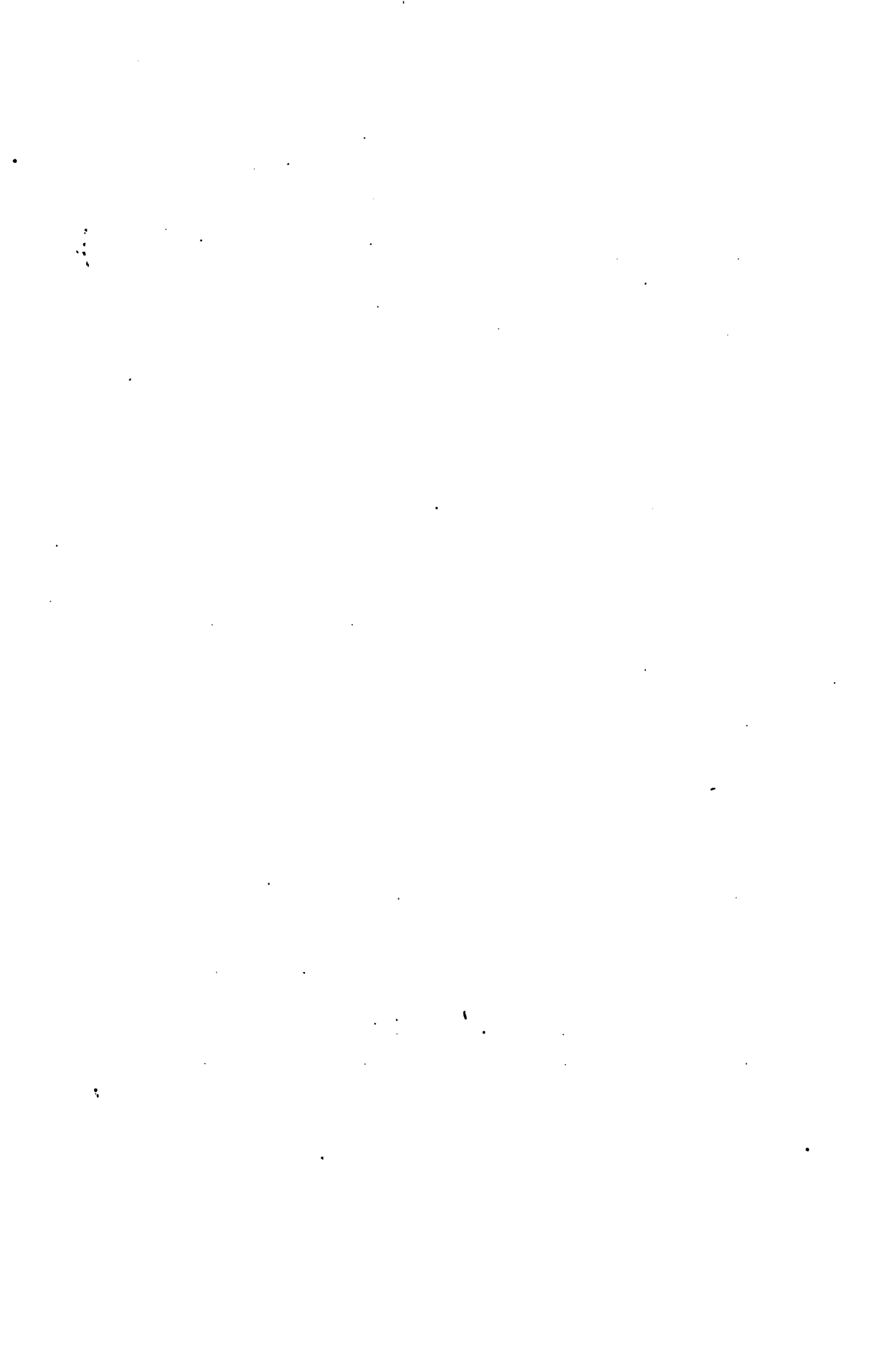


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have no equity jurisdiction except in bankruptcy. Eq., § 1069.

DISTRICT OF COLUMBIA.

when circuit court has no jurisdiction in equity; parties. Eq., § 1047.

DIVERSION. See *Injunctions*, 1, a.

DIVORCE.

after divorce *a mensa*, wife may sue in equity to enforce decree for alimony. Eq., § 401.

DOCUMENTS. See *Production of Documents*.

DOWER. See *Husband and Wife*.

equity cannot allow a sum in lieu of, unless by consent of parties. Eq., § 453.

assignment of, in equity, where partition must be made. Eq., § 414.

none in trust estate. Eq., § 770.

DURESS. See *Cancellation and Rescission; Equity*, 2.

equity will not uphold a release extorted from one under arrest. Eq., §§ 77, 78.

how far debtor under arrest may contract with creditor for liberty. Eq., §§ 165-66.

defined; when sufficient to avoid a deed. Eq., §§ 798-99.

E.

EASEMENTS. See *Nuisances*.

EJECTMENT. See *Equitable Ejectment; Injunctions*, 1, h; *Quieting Title*.

not maintained on an equitable title in Maryland. Eq., § 381.

equity will not take jurisdiction of contest between donee and devisee. Eq., § 439.

not sustained on an equitable title in federal court, though it is otherwise by state laws. Eq., §§ 1037-38.

remedy at law adequate; account will not give equitable jurisdiction. Eq., §§ 1136-37.

numerous suits of, may be consolidated at law; bill in equity to stay some suits dismissed. Eq., §§ 1103, 1146a.

is an adequate remedy to remove trespassers. Eq., §§ 1104, 1152-53, 1209.

EJECTMENT — continued.

- adequate to remove tenants under trustee, when. Eq., § 1216.
- objections to tax deed available in. Eq., § 1226.
- practice on bill to quiet title brought in action of. Eq., § 1240.
- remedy at law on equitable title merged in legal is by. Eq., § 1242.
- judgment not conclusive; successive suits; bill of peace. Eq., §§ 2181-82, 2186-89.

ELECTION.

- of creditor to proceed in probate court does not prevent subsequent bill for administration of estate. Eq., §§ 10, 66-71.
- from alternative remedies, by bringing bill, praying specific relief. Eq., § 190.
- ratification of act of receiver irregularly appointed held binding. Eq., § 402.

ELECTIONS.

- not restrained. Eq., §§ 1527-28.

ELEVATED RAILWAYS. See *Nuisances*.**EMBEZZLEMENT.**

- when injunction to retain money in bank not granted. Eq., § 1207.

EMINENT DOMAIN.

- taking possession enjoined until compensation tendered. Eq., § 1544.

EQUITABLE ASSETS. See *Bonds; Creditors' Bills*, 1.

- what are. Eq., §§ 828-29.

EQUITABLE CONVERSION. See *Equity*, 2, g.

- purchase money goes to personal representatives. Eq., § 895.

EQUITABLE DEBTS. See *Sureties*.

- what are not. Eq., § 1507.

EQUITABLE EJECTMENT.

- when not maintained; rents and profits recovered. Eq., §§ 888-84.

EQUITABLE LIENS. See *Liens*.

- not set up in action at law. Eq., § 1089.

EQUITABLE MORTGAGES. See *Mortgages*.**EQUITABLE TITLES.**

- equitable owner may sustain bill for title. Eq., §§ 27, 120, 128-43.
- priority between, and between them and legal title. Eq., §§ 147, 201, 268, 287, 300, 301.
- protected in equity. Eq., § 888.
- no adequate remedy at law. Eq., §§ 1218-19.
- no remedy in equity when title merged in legal title. Eq., § 1242.

EQUITIES. See *Assignment*.

- equal and unequal, etc., see *Equity*, 2.
- naked, dependent on decree, not an interest in land. Eq., § 2051.

EQUITY. See *Administration; Application of Payments; Arbitration and Award; Assignment; Auctions; Bill to Redeem; Bonds; Boundaries; Cancellation and Rescission; Chancellor, The; Compensation and Damages; Compromises; Contracts; Churches; Copyrights; Debtor and Creditor; Divorce; Election; Equitable Conversion; Equitable Titles; Equities; Estoppel; Fiduciary Relations; Fraud; Fund in Court; General Average; Improvements; Injunctions; Interest; Interpleader; Joint Tenancy; Judgments; Jurisdiction; Laches; Legacies; Marriage Settlements; Married Women; Master in Chancery; Mistake; Municipal Corporations; Ne Exeat; Notice; Nuisances; Partition; Partnership; Patents for Inventions; Payment; Penalties and Forfeitures; Pennsylvania; Perpetuation of Testimony; Production of Documents; Public Policy; Purchase for Value; Railroads; Receivers; Set-Off in Equity; Shipping and Admiralty; Specific Performance; Speculative Contracts; Statutes of Limitation; Sureties; Taxes; Tenancy in Common; Trusts; Uses and Trusts; Usury; Voluntary Assignments; Wills; Writ of Sequestration.*

- stipulations as to time, see *Specific Performance*, 1.

as to enforcing decrees, see *Decree*.

breaches of trust in affairs of corporations, see *Stockholders*.

1. IN GENERAL.

2. MAXIMS OF EQUITY.

1. IN GENERAL.

- relation of, with the law; will not dispense with legal forms, or relieve against defective execution of power created by law. Eq., §§ 54, 209, 330, 450.
- cannot compel court of law to receive evidence, except when issue directed. Eq., § 2190.
- a court of equity will not shirk or disown its jurisdiction, on account of proceedings in another jurisdiction. Eq., § 94.
- nor solve abstract questions, when the bill sets up no equity. Eq., § 101.
- general principles. Eq., §§ 194-221.
- the rules of equity are as fixed as legal rules are. Eq., § 221.
- the distinctions between law and equity are kept distinct in the federal courts. Eq., §§ 988-96.
- acts only on the conscience, when. Eq., § 228.

EQUITY — continued.

2. MAXIMS OF EQUITY. See *Laches*.

- a. *He who seeks equity must do equity.*
illustration and application of the rule to the case of betterments. Eq., § 57, p. 81.
to the case of tender, in bill to redeem. Eq., §§ 82, 150.
to the case of a bill brought by consignees, for indemnity. Eq., § 205.
to specific performance. Eq., §§ 255-74.
general application of the maxim. Eq., §§ 217, 293-94, 308-11, 333, 344, 397, 407,
474, 485, 496, 581-82, 686, 1052, 1129.
to the case of a bill by a stockholder. Eq., § 284.
- b. *A party must come into equity with clean hands.* See *In Pari Delicto*.
meaning and application of the maxim; applies only to his conduct in that particular transaction, not a general depravity. Eq., §§ 21, 103-4, 194, 334, 389, 416,
441, 889, 1870, 2005, 2054.
duress of wife to sign mortgage will not prevent setting it aside. Eq., § 104.
discussion of similar legal maxims. Eq., § 129.
application to cases of fraud. Eq., §§ 635-36.
- c. *Prior in tempore, potior in jure.*
bona fide purchaser of equity not protected. Eq., § 147.
maxim applied. Eq., §§ 287, 588.
- d. *Among equal equities the eldest prevails.*
although one held as a *bona fide* purchaser. Eq., §§ 147, 301.
judgment liens not superior to prior equities. Eq., §§ 553-54.
unequal equities; right under voluntary deed inferior to that of purchaser without
notice of subsequent equity. Eq., §§ 268, 287.
- e. *Where there is equal equity the law prevails.*
one having such an equity may buy in the legal estate. Eq., § 200.
reason and application of rule. Eq., §§ 228, 300, 301, 583.
how this rule is affected by notice of prior equity by legal holder. Eq., § 375.
what is a sufficient legal title to give preference. Eq., § 200.
- f. *Equity regards the substance or intent, not the form.*
descriptio personarum. Eq., § 212.
as to equitable mortgages. Eq., §§ 815-17, 588.
guarantors of rent of railway treated as the real owners. Eq., § 421.
- g. *Equity regards that as done which ought to be done.* See *Equitable Conversion*.
application of the principle. Eq., §§ 291, 584-90, 683, 801, 1042.
- h. *Equality is equity.*
creditor holding prior trust deed which is lost, shares equally with others. Eq.,
§§ 831, 834.
in Virginia creditors are paid by priority. Eq., § 1861.
in proceedings on creditors' bill, those having judgment and execution at law share
by priorities; others *pro rata*. Eq., §§ 1796, 1863.
single creditor may file creditor's bill to reach equitable assets; or may bring omni-
bus bill. Eq., §§ 1907, 1879.
when decree *pro rata* made. Eq., §§ 1880-81.
creditor's bill to enforce lien; sharing *pro rata*. Eq., § 1938.
- i. *Equity follows the law.*
illustration of this maxim. Eq., §§ 54, 309, 390, 1863.
as to aliens taking by descent. Eq., § 429.
as to equitable set-off. Eq., §§ 502, 504.

EQUITY OF REDEMPTION. See *Mortgages; Voluntary Assignments*.

EQUITY PLEADING. See *Pleading in Equity*.

EQUITY PRACTICE. See *Practice in Equity*.

ESSENCE OF CONTRACT. See *Time*.

ESTATES OF DECEDENTS. See *Executors and Administrators*.

ESTOPPEL. See *Injunctions*, 2, b.

- effect of decree of partition in chancery. Eq., §§ 62, 63.
- one consenting to decree not estopped as against volunteers. Eq., § 65.
- reversal of judgment is not an. Eq., §§ 67-71.
- equitable owner not bound by judgment *inter alios*, as to title. Eq., § 181.
- case tried at law not re-tried in equity. Eq., § 1232.
- in pais, what facts constitute. Eq., §§ 191, 412, 473, 818.
- fraud set up as a defense at law not set up in equity, when. Eq., § 211. See § 608.
- judgment affirmed on writ of error, equity will not pass on title. Eq., § 370. See § 608.
- dismissal of bill on the merits, is. Eq., § 436.
- none when the conduct proceeds from mistake. Eq., § 817.
- bill by stockholder not sustained, when same point determined in state court. Eq.,
§ 1074.

ESTOPPEL—continued.

none by intervention of creditor in state probate or insolvent proceedings. Eq., §§ 880, 946-48, 1169.

nor by judgment at law on purely equitable claim. Eq., §§ 1111, 1169.

creditor acquiescing in voluntary assignment cannot attack it. Eq., § 1959.

rules applied to equitable relief from judgments. Eq., §§ 1983, 2024, 2043.

EVIDENCE. See *Answer in Equity; Cancellation and Rescission; Depositions; Master in Chancery; Perpetuation of Testimony; Presumption; Reformation of Instruments; Witnesses.*

as to discovery, see *Jurisdiction in Equity*, 6.

a receipt thirty years old need not be proved by subscribing witnesses. Eq., § 140.

in cases of fraud. Eq., §§ 616-618, 620-23.

in cases of accounting of repairs and improvements. Eq., §§ 784-88.

in federal courts, is as administered in state courts. Eq., § 1119.

it seems that when parties compelled to testify bill for discovery will not lie. Eq., § 1163.

that it is voluminous is not a ground of equity jurisdiction. Eq., § 1213.

when case submitted on demurrer and answer, further evidence not taken, when. Eq., § 1372.

written contracts not altered by parol, at law or in equity. Eq., §§ 1973, 2007-9.

effect of acts making state statutes as to evidence applicable to federal courts. Eq., § 2151.

same at law and in equity; equity will not compel court of law to receive. Eq., §§ 2190-91.

EXCEPTIONS. See *Answer in Equity; Master in Chancery.***EXCLUSIVE JURISDICTION.** See *Bail; Creditors' Bills, 2; Jurisdiction in Equity; Restraining Judgments.***EXECUTION.** See *Injunctions, 1; 1, c; Judicial Sales; Jurisdiction in Equity, 5, b; Marshaling of Assets; Sheriff.*

an equity is not subject to, except by statute. Eq., §§ 322, 323, 773.

whether proceedings supplementary to maintained in federal court. Eq., § 993.

process restraining levy of is legal, not equitable. Eq., §§ 1080, 1155-57.

replevin is an adequate remedy for seizing personalty on. Eq., §§ 1105, 1155; *contra*, § 1197.

except in case of irreparable injury. Eq., §§ 1154, p. 453; 1301, 1367, 1475.

no equitable remedy for seizure on ground which might have been urged at law. Eq., § 1217.

marshal need not hold the sixty days before return. Eq., § 1338.

return conclusive, except in action against officer. Eq., §§ 1891-92.

EXECUTORS AND ADMINISTRATORS. See *Descent; Judicial Sale; Jurisdiction in Equity, 5, c; Sureties.*

purchase money on outstanding contract goes to executors. Eq., § 803.

purchase from executrix at inadequate price, with agreement to hold for her, void. Eq., § 124.

administrator may be compelled to account, in any state. Eq., § 422.

commissions not forfeited for misconduct of trustee. Eq., § 397.

may be applied to debt due from executor to the estate. Eq., § 480.

equity has concurrent jurisdiction in cases of account by. Eq., § 542.

when they should act as trustees; payment to in Confederate money, void. Eq., §§ 602, 603.

equitable jurisdiction over. Eq., §§ 881, 946-49.

creditor may bring bill for account, though decedent resided in another state. Eq., § 1084.

allegation that license to sell procured by fraud must be fully proved. Eq., § 621.

distributee may sue in federal court for mismanagement and an account. Eq., §§ 861, 871, 913-18.

foreign creditor may sue administrator, notwithstanding pendency of probate proceedings. Eq., §§ 880, 946-48.

are trustees; equity jurisdiction. Eq., § 947.

jurisdiction of federal courts in respect to. Eq., §§ 1053-55, 1068.

are not assignees within the judiciary act. Eq., § 1120.

judgment on plea of *plene administravit* not relieved in equity, when. Eq., §§ 2080-83.

EXECUTORY CONTRACTS. See *Contracts.***EXTORTION.** See *Duress.***F.****FALSE REPRESENTATIONS.** See *Cancellation and Rescission; Fraud; Fraudulent Conveyances.***FEDERAL COURTS.** See *Jurisdiction; Jurisdiction in Equity, 9.*

FEES. See *Costs; Executors and Administrators.*

of counsel, not recovered in suit on injunction bond. Eq., §§ 1594, 1607.

FEIGNED ISSUE. See *Jury Trial.*

FELONY. See *Crimes.*

FERRIES.

when remedies in respect to at law and when in equity. Eq., § 1288.

injunction to protect. Eq., §§ 1585-86.

FIDUCIARY RELATIONS. See *Attorney and Client; Attorneys; Cancellation and Rescission; Fraud, 3.*

sheriff holds none towards debtor in sale on execution. Eq., § 151.

one improving land by contract with its owner cannot buy up an outstanding title. Eq., § 145.

executors or trustees cannot deal for or with themselves. Eq., §§ 124, 337.

validity of deed from principal to agent; agent buying in judgment. Eq., §§ 350-51.

purchase by one holding, is in trust. Eq., § 390.

bill against trustees and their assignees, with notice, sustained. Eq., § 489.

an agent discovering defect in principal's title cannot misuse his knowledge to acquire title to himself; he will be a trustee. Eq., §§ 639, 644.

rule applied to agent, tenant in common, and husband. Eq., §§ 640-41, 648-50.

and to a trustee; nor can he buy the trust estate. Eq., § 774.

of trustee of insolvent firm. Eq., § 647.

payment of deposit of clerk in bank, of money wrongfully converted, not enjoined when. Eq., § 1808.

FISHING BILL.

what is a; what is not. Eq., §§ 1776, 1824, 2181.

FOLLOWING TRUST FUNDS.

money deposited by agent in his own name followed. Eq., § 852.

trust estate or fund disposed of by misconduct of trustee followed, except as to *bona fide* purchaser without notice. Eq., §§ 670, 672.

FORECLOSURE. See *Mortgages.*

FORFEITURES. See *Penalties and Forfeitures.*

FRAUD. See *Account; Auctions; Cancellation and Rescission; Debtor and Creditor; Equity, 2; Fiduciary Relations; Fraudulent Conveyances; Insurance; Judicial Sales; Relief against Judgments; Trusts.*

1. IN GENERAL.

2. ACTUAL FRAUD.

3. CONSTRUCTIVE FRAUD.

1. IN GENERAL.

influence of claim of, on courts and juries. Eq., § 53.

settlement of account may be impeached for. Eq., §§ 75, 470.

renders contract or conveyance voidable only. Eq., § 125.

equity will take cognizance of latent, in partition, when. Eq., § 458.

equitable jurisdiction in cases of. Eq., §§ 604-606, 635-37, 1148, 1203, 1222-23, 1226-27, 1236-37, 1340, 2054-55.

concurrent. Eq., §§ 607-11, 614.

of federal courts. Eq., §§ 612-13.

pleading and proof in cases of. Eq., §§ 616-18, 2046.

in judicial sales. Eq., §§ 628-30.

in land patents. Eq., §§ 631-32.

in corporate management. Eq., §§ 633-34.

acquiescence in. Eq., § 637.

committed by agents, see *Agency; Fiduciary Relations.*

if A. procures a third person to defraud B., A. cannot profit thereby in equity. Eq., § 2054.

2. ACTUAL FRAUD. See *Fraudulent Conveyances; Relief against Judgments*

when legal title obtained by, equity will compel transfer. Eq., § 374.

equitable relief against. Eq., §§ 379, 382.

taking deed as security and attempting to hold it as absolute. Eq., § 437.

abuse of legal process. Eq., § 478.

by trustee paying mortgage with Confederate money. Eq., §§ 599, 602.

misrepresentations; concealment of facts. Eq., §§ 624-25

and undue influence. Eq., §§ 148, 626-27.

enjoining transfer of goods obtained by. Eq., § 1525.

3. CONSTRUCTIVE FRAUD. See *Agency; Attorney and Client; Attorneys; Cancellation and Rescission; Executors and Administrators; Fiduciary Relations; Inadequacy of Consideration.*

as to betterments and improvements, see *Improvements.*

it seems that a *bona fide* purchaser is entitled to compensation for incumbrance paid by him. Eq., § 57, p. 33.

when deed from young heirs set aside. Eq., §§ 148, 626.

transfer by partner to partner. Eq., § 1857.

FRAUDULENT CONVEYANCES. See *Administration; Cancellation and Rescission; Creditors' Bills.*

financial condition of debtor at time of gift controls. Eq., § 135.

rule as to indorsements of grantor. Eq., § 136.

deed from father to son held not fraudulent. Eq., § 141.

are binding on grantor. Eq., § 416.

grantee ordered to reconvey, or to the officer of the court. Eq., § 417.

assignee in bankruptcy may sue to avoid. Eq., § 1066.

should heirs or devisees be made parties to bill to set aside that of ancestor? Eq., § 1848.

of partnership, when creditor at large may avoid. Eq., § 1850.

voluntary conveyance by debtor void. Eq., § 1851.

creditor's bill to avoid is ancillary. Eq., § 1864.

creditor after purchase on execution may avoid, but not as a creditor. Eq., §§ 1799, 1869-70.

interest of creditor is legal in Michigan. Eq., § 1868.

bill to avoid is on the ground of inadequate remedy at law, which cannot cancel the transfer. Eq., §§ 1748, 1866.

in general. Eq., §§ 1912-15.

FRAUDULENT REPRESENTATIONS. See *Jurisdiction in Equity*, 5, b.

effect on right to specific performance. Eq., § 266.

FUND IN COURT.

administration of, in equity. Eq., §§ 354-56, 474.

state law as to priorities followed. Eq., § 1862.

FUTURE RIGHTS.

equity will not generally declare; remedy at law. Eq., §§ 490-31.

G.**GAMING.** See *Speculative Contracts.***GARNISHMENT.**

bill to enjoin is a supplementary suit, not dependent on citizenship, when. Eq., § 1511.

defendant has same defenses as against creditor. Eq., § 2086.

GENERAL AVERAGE.

equity has jurisdiction. Eq., § 1048.

GEORGIA.

constitution held to impair contracts. Eq., §§ 1887-8.

GOOD FAITH. See *Purchase for Value.***GOVERNMENT.** See *States; United States.***GUARANTY.** See *Sureties.*

guarantors of rent of railway treated as the real owners and lessees. Eq., § 421.

construction of is the same at law and in equity. Eq., § 463.

GUARDIAN AND WARD. See *Infancy.*

defective guardian's deed in pursuance of valid power aided in equity. Eq., §§ 1334-37.

H.**HEIR.** See *Fiduciary Relations; Fraudulent Conveyances.***HEIRS AND DEVISEES.** See *Debtor and Creditor.***HIGH COURT OF CHANCERY.**

rules of binding on federal courts. Eq., § 1062.

HIGHWAYS. See *Nuisances.***HOMESTEAD.**

right cannot be asserted collaterally, after sale under decree. Eq., § 1831.

HUSBAND AND WIFE. See *Divorce; Fiduciary Relations; Marriage Settlements; Married Women; Parties; Statutes of Limitation.*

contract of husband specifically enforced. Eq., § 265.

wife's claim to distributive share of husband's estate not denied because dower barred by her adultery. Eq., § 824.

I.

IGNORANCE. See *Relief against Judgments*.

ILLEGALITY (OF CONTRACTS). See *Champerty; Consideration; In Pari Delicto; Speculative Contracts*.

promise to executrix to convey to her individually, void, when. Eq., §§ 115, 124.

contracts against public policy are void. Eq., § 127.

distinction as to executed and executory contracts. Eq., § 128.

equity will not enforce contracts against public policy. Eq., §§ 242-46.

act held not illegal because indirectly connected with aid of the rebellion. Eq., § 369.

interference with property acquired under illegal contract enjoined. Eq., § 1846.

as to coming into equity with clean hands, see *Equity*, 2.

ILLICIT RELATIONS. See *Conveyances*.

IMBECILITY. See *Cancellation and Rescission*.

IMPOSITION. See *Cancellation and Rescission*.

IMPRISONMENT. See *Arrest*.

IMPROVEMENTS. See *Liens*.

bona fide purchaser entitled to compensation for, in action of account against him. Eq.,

§§ 4, 57, 229.

also in equitable suit brought by him, it seems; but not so determined. Eq., §§ 57, 229.

practice and evidence in case of accounting. Eq., §§ 784-88.

one making, under contract with owner, is a trustee; he cannot buy in an outstanding title. Eq., § 145.

allowed as an offset for rent, when. Eq., §§ 752, 777-78.

and repairs, allowed to vendee obtaining deed by imposition. Eq., §§ 782, 828.

rests and interest. Eq., § 788.

INADEQUACY OF CONSIDERATION. See *Cancellation and Rescission; Judicial Sales*.

when sufficient to avoid a bargain, in equity. Eq., § 215.

INCOME TAX.

adequate remedy at law for irregular levy of. Eq., § 1205.

INCUMBRANCES. See *Equity*, 2, h; *Liens; Securities*.

it seems that a *bona fide* purchaser paying may have compensation. Eq., § 57, p. 33.

equitable rules in respect to. Eq., §§ 296-99.

land may be sold subject to, by creditor: incumbrancer not a necessary party. Eq., § 1878.

INDEMNITY. See *Injunctions*, 2.

INDIANA.

judgment liens in. Eq., §§ 155-7.

INDORSEMENTS. See *Accommodation Paper; Bills and Notes; In Pari Delicto; Virginia*.
of grantor, rule as to, in questions of fraud. Eq., § 186.

INFANCY. See *Parties; Statutes of Limitation*.

effect of decree of partition. Eq., § 62.

guardian cannot bind by consent or admission; powers of equity; trusts. Eq., §§ 497-500.

practice in suits by next friend. Eq., § 907.

INFIRMITY. See *Cancellation and Rescission*.

INFORMATION AND BELIEF. See *Injunctions*, 5.

INFRINGEMENT. See *Copyrights; Patents for Inventions*.

INJUNCTIONS. See *Accident; Churches; Corporations; Creditors' Bills; Nuisances; Relief against Judgments; Waste*.

1. IN GENERAL.

2. INJUNCTION BOND.

3. VIOLATION OF INJUNCTION.

4. DAMAGES.

5. PROCEDURE.

1. IN GENERAL.

a. Miscellaneous.

against title acquired by tenant *pendente lite*. Eq., § 56.

in favor of one having contract for command of vessel. Eq., §§ 172, 173.

the court may determine incidental questions of title. Eq., § 1040.

a summary statutory remedy for unlawfully seizing property on execution not enforced in federal court, in equity. Eq., §§ 1106, 1165-67.

distinctions between form and effect of, in England and the United States. Eq., §§ 1276, 1818.

INJUNCTIONS, IN GENERAL, *Miscellaneous* — continued.

- the United States, nor a state, can be enjoined. Eq., §§ 1297, 1350, 1363-65.
- general rules. Eq., §§ 1368-87.
- affecting interests of third persons. Eq., §§ 1386-89.
- right need not have been established at law. Eq., §§ 1312, 1378.
- otherwise in case of bridges. Eq., § 1409. See § 1411.
- not granted to enforce payment of money. Eq., § 1512.
- the United States may have obstructions to public improvement enjoined. Eq., § 1513.
- enforcing rights of author in manuscript. Eq., § 1520.
- political rights not protected by. Eq., § 1522.
- on ground of conflict of jurisdiction between state and federal court. Eq., § 1534.
- refused in respect to lease of right to take oil. Eq., § 1537.
- pleading the statute of limitations not enjoined. Eq., §§ 1539-40.
- miscellaneous cases. Eq., §§ 1589-91.
- bill for, not original. Eq., § 1638.
- creditor at large may have, in Virginia. Eq., § 1886.
- cloud on title enjoined. Eq., § 2225.
- to prevent irreparable injury. Eq., §§ 1277, 1317, 1458-61, 1532, 1544, 1551.
- in case of levy on goods of stranger. Eq., §§ 1154, p. 453; 1270, 1301, 1367, 1475.
- to protect equitable rights or interests. Eq., § 1324.
- trustees controlled. Eq., §§ 1514-15.
- to prevent violation of contracts; contract creditor cannot restrain bank from paying depositor, when. Eq., §§ 1272, 1307-8.
- contract between railroad and telegraph company. Eq., §§ 1286, 1346-48.
- enjoining interference with property acquired under illegal contract. Eq., § 1346.
- state officers restrained from violating contract in land grant. Eq., §§ 1293-95, 1355.
- in general. Eq., §§ 1463-69.
- in respect to corporations. Eq., §§ 433-34, 1070, 1277, 1315-17, 1320, 1390-94, 1494-96, 1499, 1530-31.
- in respect to real property. Eq., § 1543.
- in respect to partnerships. Eq., §§ 1454, 1524.
- in respect to leases. Eq., § 1469.
- restraining possession under condemnation proceedings. Eq., § 1544.
- to protect rights in personal property; fraud. Eq., § 1525.
- mandatory; not granted until after final hearing; as, to restore the possession of land. Eq., §§ 1271, 1303, 1526, 1636-37.
- in fact, but preventive in form and preliminary, may be granted to prevent irreparable injury. Eq., §§ 1664, 1670-72.
- preliminary; principles on which granted or refused. Eq., §§ 712, 1368, 1371, 1374, 1376-77, 1379-80, 1385-86, 1411-12, 1737.
- in state court, made final in federal. Eq., §§ 1299, 1366-67.
- law not declared invalid on. Eq., § 1492.
- may be mandatory in effect; authorities reviewed. Eq., § 1672.
- when notice of application for necessary. Eq., §§ 1689-1704.
- not granted on bill charging fraud on information. Eq., § 1727.
- are provisional merely. Eq., § 1741.
- demurrer to bill must be first heard. Eq., § 1746.
- adequate remedy at law must be plain, practical and efficient. Eq., §§ 1269, 1300, 1301, 1316, 1541-42, 1608.
- covenants in deed inadequate. Eq., § 1338.
- when a full and adequate defense can be made. Eq., §§ 1236, 1342-45.
- when execution defendant may have injunction. Eq., §§ 1367, 1475.
- in respect to water-courses; diversion; mining interests. Eq., §§ 1395-1401.
- in respect to mines. Eq., §§ 1395, 1398, 1459, 1476-78, 1502, 1506, 1537.
- obstructions to navigation; bridges and dams, when restrained. Eq., §§ 712, 717-21, 1049, 1402-10, 1480-82, 1513.
- patents for inventions. Eq., §§ 1411-15, 1466, 1493, 1517-18, 1750.
- use of label enjoined. Eq., § 1500.
- as to copyrights. Eq., §§ 1720, 1752-53.
- against public officers; government officers not enjoined in exercise of judicial and discretionary duties. Eq., §§ 1296, 1350, 1363-64, 1422-25, 1480.
- otherwise when duty plain, involving no discretion. Eq., §§ 1291-92, 1351-53, 1426-29.
- state officers enjoined from offering for sale lands embraced in railway grant. Eq., §§ 1293-95, 1355.
- and from enforcing unconstitutional law. Eq., §§ 1418-19.
- marshal restrained in use of process. Eq., §§ 1431-32.
- governor restrained from selling railway. Eq., § 1532.
- in respect to public money. Eq., §§ 1420-21.
- to protect a ferry. Eq., §§ 1535-36.
- to stay waste or trespass. Eq., §§ 1458-60, 1476-78.
- plaintiff cannot read affidavits in support of title. Eq., § 1735.
- practice on; disputed title first settled. Eq., § 1748.

INJUNCTIONS, IN GENERAL, *Miscellaneous* — continued.

- municipal bonds: suit on coupons not enjoined. Eq., § 1325.
- whether tax payers can sue, when town not derelict. Eq., §§ 1281, 1326.
- injunctions in respect to. Eq., §§ 1483-88, 1490-91.
- municipal corporation, see *supra*. Eq., §§ 1497, 1503, 1546.
- in respect to taxation; payment of bonds not enjoined. Eq., §§ 1485-87.
- diverting tax, when enjoined; when not. Eq., §§ 1490-91.
- illegal taxation or enforcement of taxes restrained. Eq., §§ 1549-88.
- in respect to fiduciary relations. Eq., §§ 1272, 1307-8.
- in respect to public lands; when not granted. Eq., §§ 1290, 1340-50.
- in respect to mortgages and trust deeds; enjoining sales, etc. Eq., §§ 1470-74, 1496.
- in bankruptcy cases. Eq., §§ 1498, 1519.
- in respect to slaves. Eq., §§ 1509-10.
- in respect to churches. Eq., §§ 424, 1538.
- b. *Restraining proceedings at law. See Relief against Judgments.*
- a part of the auxiliary jurisdiction. Eq., §§ 868, 874, 930-32.
- when jurisdiction exercised. Eq., §§ 1437, 1444.
- to restrain ejectment on fraudulent documentary title. Eq., §§ 1278, 1309-13.
- plaintiff need not first confess judgment at law. Eq., §§ 1275, 1312. See § 1440.
- to restrain ejectment, case retained on the ground of mistake, and to prevent useless litigation. Eq., §§ 1278, 1324.
- on the ground of aiding defective execution of a valid power. Eq., §§ 1262, 1337-38.
- to restrain successive ejectment suits, after title established. Eq., §§ 2182, 2186-89.
- to stay action on judgment. Eq., § 1417.
- for use and occupation. Eq., § 1469.
- by purchaser with notice, against holder of prior deed. Eq., § 1516.
- to prevent multiplicity of suits. Eq., §§ 1324, 1523.
- not to prevent suits on coupons, from year to year. Eq., §§ 1290, 1325.
- to stay execution, on ground of fraudulently getting jurisdiction. Eq., §§ 1284, 1340.
- executed judgment, when. Eq., § 2101. See §§ 1302, 2100, 2102.
- when jurisdiction not exercised. Eq., §§ 1438-43, 1445, 1504.
- writ of possession not enjoined, when. Eq., § 1505.
- execution against bail not stayed, when. Eq., § 1507.
- defective execution of power created by law. Eq., §§ 54-57, 1548.
- c. *Enjoining proceeding in state courts.*
- interpleader not granted so as to restrain suit in state court. Eq., § 106.
- state court not enjoined or supervised. Eq., §§ 1298, 1343-45, 1446-55.
- sale of property on execution not restrained; but after removal, a preliminary injunction in state court may be made final. Eq., §§ 1299, 1366-67.
- custody or process of, not enjoined or interfered with. Eq., §§ 1430, 1432-36.
- a sheriff may be restrained from proceeding against partnership, when. Eq., § 1454.
- state court cannot enjoin federal court. Eq., §§ 1456-57.
- creditor's bill held not to interfere with incipient proceedings in state court. Eq., §§ 1812, 1893-97.
- 2. INJUNCTION BOND.
- suit on, is equitable when; inadequate remedy at law. Eq., § 1248.
- is granted according to equity principles, not local law. Eq., §§ 1593, 1598-99.
- no suit or breach until judgment for damages; no judgment after injunction dissolved. Eq., §§ 1598-1601.
- damages; counsel fees not recovered. Eq., §§ 1594, 1607.
- when obligee holds legal title to fund, he may recover the full damages touching entire fund. Eq., §§ 1595, 1606.
- sureties cannot go behind the decree in the case in which it is given. Eq., §§ 1596, 1604.
- effect of release, sealed or unsealed. Eq., §§ 1597, 1605.
- remedy at law on is generally adequate; otherwise when the rights of several obligees must be settled. Eq., §§ 1603, 1608.
- questions of practice, etc. Eq., §§ 1609-16.
- death of surety releases liability, at law and in equity. Eq., § 1616.
- may be required of one seeking modification. Eq., § 1675.
- bond of indemnity in lieu of continuance of injunction. Eq., §§ 1676, 1678.
- 3. VIOLATION OF INJUNCTION.
- the proper practice is to move, on notice, for commitment; motion without notice overruled. Eq., §§ 1617, 1619-20.
- what amounts to a. Eq., §§ 1618, 1621-22, 1635, 1644.
- obedience peremptory until dissolved by authority granting it. Eq., § 1622.
- effect of subsequent legal authority. *Id.*, § 1641.
- through strategy of plaintiff, not. Eq., §§ 1630-31.
- practice on motion to commit. Eq., §§ 1623-26.
- original decree not impeached, except for fraud or want of jurisdiction. Eq., § 1634.
- punishment of individual and corporation. Eq., §§ 1627-29.

INJUNCTIONS, VIOLATION OF — continued.

advice of counsel, as a defense to. Eq., §§ 1632-33.

service of injunction. Eq., §§ 1636-38, 1642.

must be obeyed though unauthorized. Eq., § 1643.

effect of complainant intermeddling with subject-matter. Eq., § 1645.

in bankruptcy. Eq., §§ 1646, 1647.

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4. DAMAGES.

measure of, in suit on bond. Eq., §§ 1594-95, 1606-7, 1653-55, 1656-59, 1660-63.

none unless bond has been given, except costs. Eq., §§ 1655, 1656.

5. PROCEDURE. See *supra*, 2, 3, 4; *Appeals*.

as to preliminary and mandatory injunctions, see *supra*, 1, a.

federal courts not governed by state laws. Eq., §§ 1593, 1598-99, 1705-6.

question of citizenship not heard on affidavit. Eq., § 1733.

requisites of the writ. Eq., § 1735.

money penalty not inserted in. Eq., § 1749.

case referred to master, when. Eq., §§ 1752-53.

not granted on allegations on information and belief. Eq., § 2047.

when defendant non-resident or abroad. Eq., §§ 1035, 1075, 1304.

are special in the circuit court, and only granted on due notice; one day generally not sufficient. Eq., § 1309.

notice at office of defendant corporation good. Eq., § 1318.

when only one allegation of bill denied, every intendment is against defendants. Eq., § 1315.

notice of application for, when necessary; when not. Eq., §§ 1669-1704.

what is reasonable notice. *Id.*

effect of service of notice for. Eq., § 1747.

is constructive only to directors. Eq., § 1319.

service of unnecessary; but defendant not liable on doubtful notice. Eq., §§ 1636-38.

on officer of corporation. Eq., § 1637.

on law partner; after lapse of term of court. Eq., §§ 1639-40.

on the attorney in the action at law, good. Eq., § 1341.

by whom granted: authority of judges. Eq., §§ 1596, 1547, 1718-20.

pleading; not indispensable that bill contain prayer for discovery. Eq., § 1311.

may be granted in vacation. Eq., §§ 1722-23.

duration of, granted by district judge. Eq., § 1724.

the circuit court may impose terms before granting, and relieve from them, in absence of rule of court or act. Eq., § 1657.

do not operate as a *supersedeas*. Eq., §§ 1521, 1755.

not granted pending plea to the jurisdiction. Eq., § 1503.

nor when defendant beyond the jurisdiction. Eq., § 1517.

nor pending demurrer to bill. Eq., § 1746.

in respect to principal and agent; latter restrained, if in court. Eq., § 1320.

operate only on those served, or are constructively in court. Eq., § 1323.

delay in hearing. Eq., § 1736.

action at law. Eq., § 1341.

application for, practice on; as to notice, see *supra*.

affidavits; answer. Eq., §§ 1707-17, 1721, 1723, 1751.

complainant cannot read affidavits. Eq., § 1735.

on what evidence. Eq., § 1754.

as to preliminary injunctions, see *supra*, 1, a.

a decree for perpetual injunction is final. Eq., §§ 1738, 1740.

on removal of cause the court may modify a previous injunction. Eq., §§ 1666, 1673-75.

injunctions already granted continue. Eq., §§ 1363, 1416-17, 1742-45.

otherwise under act of 1789. Eq., §§ 1743-46.

discretion of court; what considered on application for, or motion to modify. Eq., §§ 1657, 1674, 1681, 1726.

injunction limited to such restraints as are necessary. Eq., §§ 1674, 1733.

generally continued when questions difficult: bond in lieu of continuance. Eq., §§ 1668, 1676.

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when bond of indemnity directed in lieu of continuance. Eq., §§ 1676, 1678.

security of him seeking, when required. Eq., § 1675.

effect of answer. Eq., §§ 1707-17, 1723.

effect of appeal. Eq., §§ 1730-31.

dissolution of injunctions.

denials on information and belief not sufficient to obtain. Eq., §§ 1665, 1672.

common injunctions, like those for not appearing, or for answering, are dissolved

when answer denies equity of bill. Eq., §§ 1669, 1679.

plaintiff cannot read affidavits. Eq., § 1680.

otherwise of special injunctions; irreparable injury. Eq., §§ 1669, 1680-81.

answer not denying material facts should not be used as the basis of applying for. Eq., § 1683.

defendants may repel affidavits filed after answer by counter affidavits. Eq., §§ 1684-85.

INJUNCTIONS, PROCEDURE — continued.

dissolution of injunctions.

- effect of answer. Eq., §§ 1707-17, 1728.
- Nevada statute construed. Eq., § 1725.
- by dismissal on division of opinion. Eq., § 1729.
- not by subsequent law authorizing act enjoined. Eq., §§ 1622. See § 1641.
- effect of appeal. Eq., §§ 1730-31.
- by removal to federal court, under act of 1789. Eq., §§ 1743-45.
- when made; when not; practice. Eq., §§ 1756-72.
- by insolvency, when. Eq., § 1444.

IN PARI DELICTO. See *Equity*, 1; *Illegality*.

- indorser of bill tainted with illegality cannot be relieved from judgment thereon. Eq., § 2005. See §§ 1988, 2031-34.

INSOLVENCY.

- effect of discharge in. Eq., §§ 919-23, 925.
- proceedings for, in probate court, do not affect suit of foreign creditor. Eq., § 948.
- proceeding in state court does not affect federal jurisdiction. Eq., § 1168.
- how far determination of commissioners to examine claims binding. Eq., § 1169.

INSURANCE. See *Life Insurance*.

- equity will relieve against fraudulent overvaluation. Eq., § 449.
- will compel delivery of policy after loss to aid remedy at law. Eq., § 468.
- will direct proper application of the money, in case of loss, among mortgagors. Eq., § 482.
- equitable remedy against land charged with assessments sold by executor of member. Eq., § 490.
- when the order for, by fraud or mistake, varies from the policy, the latter will be corrected. Eq., § 571.
- policy reformed, when. Eq., §§ 735-36, 742-45.
- after loss, the remedy for fraud in procuring is adequate by way of defense at law. Eq., §§ 1068, 1109, 1131-33, 1163-65.
- a condition limiting time for bringing suit is valid. Eq., § 1164.
- fraudulent judgment relieved in equity. Eq., §§ 1991-93, 2040-43.
- fraudulent overvaluation will avoid policy. Eq., §§ 1993, 2042.

INTEREST. See *Account*; *Usury*.

- excessive war interest, equity will abate, when. Eq., § 460.
- calculated whenever a payment is made. Eq., § 2249.

INTERLOCUTORY ORDERS. See *Appeals*.

INTERPLEADER.

- bank or bailee may have, against several claimants for same sum. Eq., §§ 24, 105.
- principles on which given; defect of jurisdiction of federal court. Eq., §§ 23, 106-7.

INTERPRETATION. See *Construction and Interpretation*.INTERROGATORIES. See *Jurisdiction in Equity*, 6.INTERSTATE COMMERCE. See *Regulation of Commerce*.

J.

JOINDER OF CAUSES OF ACTION. See *Pleading in Equity*.JOINDER OF PARTIES. See *Jurisdiction*; *Parties*.

JOINT TENANCY.

- equity protects interest of one tenant. Eq., § 465.

JUDGMENT LIENS. See *Liens*; *Marshaling of Assets*.

- are general only, and affect only the interest of the debtor at rendition. Eq., § 800.

JUDGMENTS. See *Assignment*; *Ejectment*; *Injunctions*, 1, b; *Partition*; *Process*; *Relief against Judgments*; *Satisfaction*.

- effect of reversal not *res judicata*. Eq., § 67.
- restraining judgments at law, see *Injunctions*, 1, b.
- powers of equity to correct amount of; this does not impair a contract. Eq., § 461.
- equitable interference with, at law. Eq., § 479.
- setting aside satisfaction of, in equity. Eq., § 1193.
- record not entitled to credit if no jurisdiction. Eq., § 1834.
- what is a satisfaction. Eq., § 1843.
- quære*, whether contracts. Eq., § 1845.
- foreign, are mere contract debts. Eq., § 1865.
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JUDICIAL SALES. See *Powers; Purchase for Value, 2.*

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 redeeming in equity after statutory period expired. Eq., § 154.
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 bill to enjoin judgment for purchase money, to the extent of a deficiency in amount of land, sustained. Eq., § 885.
 surety of purchaser compelled by attachment to complete the purchase by payment. Eq., § 885.
 equity will set aside for inadequate price caused by fraud of purchaser. Eq., § 466.
 objection to, waived by consent. Eq., § 471.
 effect of fraud in; what is fraud. Eq., §§ 628-30.
 when valid; bond, notice. Eq., §§ 1834-37.
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JURISDICTION (PERSON OUT OF). See *Absentees; Bill of Review; Bill to Redeem; Jurisdiction; Laches; Parties; Process; Relief against Judgments.***JURISDICTION.** See *Aliens; Assignment; Jurisdiction in Equity; Nuisances; Relief against Judgments, 5; Removal of Causes.*

duty of federal court when it conflicts with state court. Eq., § 95.
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 how far a court of equity may proceed, as to property in the hands of receivers of another court. Eq., §§ 16, 97.
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 ancillary; persons whose interests affected by litigation may sue in federal courts irrespective of citizenship. Eq., §§ 158, 1511.
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 so in case of bill to enjoin action at law. Eq., §§ 868, 930-32.
 also creditor's bill to avoid fraudulent conveyance. Eq., §§ 1864.
 a decree cannot transfer lands in another state. Eq., § 464.
 but fraud as to such lands may be inquired into. Eq., § 615.
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 of the federal courts, is special and limited. Eq., § 886.
 what sufficient to show. Eq., §§ 886, 906.
 unaffected by state laws. Eq., § 1163. See *Jurisdiction in Equity, 9.*
 next friend suing for infant is not a party within the judiciary act. Eq., §§ 867, 907.
 territorial limit, in federal courts, lands in another state. Eq., §§ 464, 870, 908-12, 1024-31, 1084-35, 1058-55, 1082.
 if joinder of a party would oust the, he may be omitted unless right affected by the decree. Eq., § 911.
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 citizenship. Eq., §§ 1008-16, 1842.
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1. IN GENERAL.
2. THE EXCLUSIVE JURISDICTION.
3. THE CONCURRENT JURISDICTION.
4. THE AUXILIARY JURISDICTION.
5. REMEDY AT LAW.
6. DISCOVERY.
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8. MULTIPLICITY OF SUITS.
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10. IRREPARABLE INJURY.

1. IN GENERAL. See *Partnership; Practice in Equity.*
 equity will not settle equities between a debtor and his debtor. Eq., § 203.
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JURISDICTION IN EQUITY, IN GENERAL — continued.

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2. THE EXCLUSIVE JURISDICTION. See *Cancellation and Rescission; Equitable Conversion; Equitable Titles; Improvements; Injunction; Interpleader; Laches; Receivers; Specific Performance*.

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doctrine of applied to case of intervention in state probate and insolvency proceedings. Eq., §§ 880, 946-48, 1169.

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4. THE AUXILIARY JURISDICTION. See *post*, 6, as to Discovery.

compelling delivery of policy after loss to aid action at law. Eq., § 468.

bill for discovery gives no power to make a final decree unless the relief is an incident thereto. Eq., § 888.

and so as to other branches of jurisdiction. *Id.*

bill to stay proceedings at law in federal circuit court purely auxiliary. Eq., §§ 868, 874, 930-32.

when such a bill may be brought. Eq., §§ 869, 930.

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5. REMEDY AT LAW. See *Cancellation and Rescission; Injunctions; Mortgages; Nuisances; Partnership; Relief against Judgments*.

a. In general.

objection as to raises a jurisdictional question, enforced *sua sponte*. Eq., §§ 889-90, 1158, 1188, 1245, 1602.

though adequate, equity will proceed if some recognized head of equity involved, as discovery, etc. Eq., §§ 1108, 1145, 1160-62.

inadequacy, the ground of the concurrent jurisdiction. Eq., § 1178.

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when equity will entertain bill by stockholders. Eq., §§ 275-84.

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equity will not, in general, declare future rights. Eq., §§ 430-31.

bill in respect to abuse of patent license dismissed. Eq., §§ 474-75.

tenants in possession, holding by no relation of notice, trust or fraud, cannot be turned out in equity. Eq., §§ 638, 645.

legal owner with right to redeem for taxes cannot intervene in equity. Eq., §§ 642, 646.

in general. Eq., §§ 895, 983, 1118, 1160, 1165, 1176-83.

none in case of fraud and misconduct of administrator. Eq., § 915.

legal jurisdiction subsequently acquired. See *New Trials*.

though bankrupt's assignee may recover money fraudulently paid by action at law, equity has jurisdiction, having had it originally. Eq., § 223.

rule applied to actions by assignee in bankruptcy. Eq., §§ 609-11, 970.

and to the insolvent act of Illinois. Eq., § 1915.

effect of sixteenth section of judiciary act.

the jurisdiction of the federal courts was limited by congress to cases where the remedy at law is not complete. Eq., §§ 886, 887.

but this is declaratory, and a mere affirmation of the well-known equity rule.

Eq., §§ 938, 1084, 1131, 1137-39, 1166, 1181, 1192.

equity has cognizance only of executory trusts, not those enforceable at law. Eq., § 895.

no jurisdiction of agency wholly closed. Eq., § 896.

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JURISDICTION IN EQUITY, REMEDY AT LAW — continued.

- b. *When remedy at law adequate.* See *Agency; Bankruptcy; Bonds; Certiorari; Creditors' Bills; Decree; Ejectment; Equitable Titles; Ferries; Injunctions, 2; Mandamus; Mortgages; Sureties.*
 must be adequate and complete. Eq., §§ 1085, 1121.
 remedy at law in any form sufficient. Eq., §§ 1087, 1127-29.
 mortgagee of chattels in possession cannot enjoin sale on execution. Eq., § 1128.
 what is a plain, adequate and complete remedy. Eq., §§ 1089, 1129, 1184-86, 1217.
 insurance company cannot proceed directly against policy-holder for fraudulent representations. Eq., §§ 1088, 1109, 1181-83, 1163-65.
 to recover legal title to land; ejectment. Eq., §§ 1184-87.
 must be as effectual as the equitable remedy. Eq., §§ 1094, 1095, 1187-40, 1184-87.
 in case of suit to recover damages for fraud. Eq., §§ 1102, 1143-44.
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 where defendants in possession of land are mere trespassers. Eq., §§ 1104, 1151.
 when case for quieting title or removing cloud not shown. Eq., §§ 1152-53.
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- c. — *when not.* See *Cancellation and Rescission; Executions; Fraudulent Conveyances; Patents for Inventions; Relief against Judgments; Replevin; Specific Performance; Wills.*
 to recover legacy from an executor. Eq., § 1122.
 in case of multiplicity of suits or irreparable injury. Eq., §§ 1095, 1132, 1139-40, 1214.
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 when full justice cannot be done at law. Eq., § 1140.
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 remedy of bondholder under trust deed. Eq., § 1198.
 cases of contracts. Eq., §§ 1200, 1206, 1208.
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 stockholders; contribution, discovery and account against. Eq., § 1210.
 to recover of remote indorser, in Virginia. Eq., § 1211.
 partition; cloud on title. Eq., § 1212.
 action on injunction bond. Eq., § 1603.
 instances. Eq., §§ 1252-53, 1258-59, 1263-68, 1300-1, 1316, 1338.
- d. *Remedy in state courts.* See *post*, 9, b.
 federal courts not ousted unless law side of state courts gives complete remedy. Eq., §§ 1098, 1123.
 legal remedy under state laws does not oust equitable jurisdiction. Eq., §§ 1189-91.
6. DISCOVERY. See *Administration; Injunctions, 5.*
- a. *In general; to obtain evidence to support the bill.*
 of crime, not compelled. Eq., §§ 327, 2040.
 nor can defendant be subjected to a penalty or forfeiture. Eq., §§ 2152-59.
 in bill for account against purchaser under void sale. Eq., § 380.
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 complainant may have, in bill to restrain judgment. Eq., § 2090.
 sec. 861, R. S., as to oral testimony in legal suits, does not apply to discovery by interrogatory or bill. Eq., §§ 2117, 2126-27.
 state statute in lieu of, is cumulative, and applies to actions at law in federal courts. Eq., § 2126.
 right of defendant to have, by cross-bill; mere witness cannot be joined for. Eq., §§ 2119, 2128.
 officer of corporation may be joined for purpose of; but not as to what matters. Eq., §§ 2119, 2128.
 must be material to plaintiff's own cause of action or defense; defendant cannot by cross-bill compel, except in aid of his own title. Eq., §§ 2120, 2129-32.
 bill lies when, in general. Eq., §§ 2133-43.
- b. *In the auxiliary jurisdiction.*
 in aid of future action at law. Eq., § 469.
 final decree cannot be made. Eq., § 883.
 plaintiff pays the costs, though defendant resist. Eq., § 889.

JURISDICTION IN EQUITY, DISCOVERY, *In the auxiliary jurisdiction* — continued.

if defendant might have demurred there can be no decree, unless the defendant has exclusive proof. Eq., § 890.

when parties compelled to testify, doubtful whether bill sustained. Eq., §§ 1163, 2150-51.

section 861. Revised Statutes, making proof in actions at law by oral testimony, does not refer to discovery. Eq., §§ 2117, 2126-27.

bill lies when; when not. Eq., §§ 2133-40, 2144-59.

bills for discovery distinguished from bills for discovery and relief. Eq., §§ 2114, 2122-25.

filed as a matter of right, in aid of proof or in lieu of it. *Id.*

answer to; not sufficient that another, who is interested, can testify. Eq., §§ 2123, 2125.

c. *As an independent source of jurisdiction; discovery and relief.*

when relief is incident to the discovery. Eq., § 888.

does not exist when adequate remedy at law. Eq., § 888.

in cases of account against agent, on the ground of his exclusive knowledge. Eq., §§ 889, 890, p. 350.

in cases of accident: lost deeds, etc. Eq., § 890.

will not lie when plaintiff has knowledge or means of proof or information, like public records. Eq., § 891.

it seems that damages will be given when discovery asked and obtained. Eq., §§ 1108, 1145, 1161.

discovery alone will not support jurisdiction to decree damages: there must be another ground of relief, or the remedy at law must be inadequate. Eq., §§ 1114, 1171-75, 1183.

it seems that discovery alone will support the jurisdiction if the facts of a purely legal claim are exclusively within defendant's knowledge. Eq., § 1266.

bill for discovery and relief distinguished from bill for discovery only. Eq., §§ 2114, 2122-25.

discovery improperly asked will not sustain further relief. Eq., §§ 2121, 2129-32.

d. *Pleading and practice.*

necessary allegations of bill of. Eq., §§ 2160-62.

of answer. Eq., §§ 2123, 2125, 2163.

demurrer. Eq., § 2159.

interrogatories. Eq., §§ 2164-65.

affidavit of loss of instruments. Eq., §§ 2166-67.

7. OVER PART, EXTENDS TO THE WHOLE.

equity may settle unliquidated damages in pending suit. Eq., § 76.

when it will not retain suit after bill dismissed to settle priorities between defendants, all residents of the state and district. Eq., § 210.

rule applied to foreclosure of railroad mortgages. Eq., §§ 320-21.

specific performance of agreement in foreclosure of trust deed. Eq., § 410.

money judgment in lieu of specific performance. Eq., § 470.

in lieu of delivery of bonds. Eq., § 481.

in general. Eq., §§ 484, 960.

rule applied to federal courts; decree between parties who could not have brought an original suit. Eq., §§ 876, 933-41.

title determined in action to restrain erection of buildings. Eq., § 1040.

also liability of property to attachment, when trustee of resulting trust conveys to purchaser. Eq., § 1041.

damages given incidentally, to prevent multiplicity of suits. Eq., §§ 1144, 1161. See §§ 1114, 1171-75.

if equitable relief fails, bill not retained to give damages. Eq., § 1238.

8. MULTIPLICITY OF SUITS. See *Nuisances; Quieting Title.*

fund in court so administered as to prevent circuitry of action. Eq., § 355.

what is not a. Eq., § 438.

illustration of the rule in respect to. Eq., §§ 881, 946-49, 1095, 1103, 1132, 1139-40, 1144, 1147, 1214, 1220-21, 1324, 2209.

bill to consolidate numerous ejectment suits will not lie; may be consolidated at law. Eq., § 1146a.

9. OF THE FEDERAL COURTS. See *Jurisdiction.*a. *In general.* See *supra*, 5.

general equity jurisdiction. Eq., §§ 206, 861, 913-18, 960-87.

can give no greater relief than that to be obtained in state courts. Eq., §§ 419, 2030.

but federal courts have equity powers in states having no system of equity. Eq., §§ 2183-85, 2247.

in respect to trusts. Eq., §§ 658-62.

under the sixteenth section of the judiciary act of 1798; powers of congress. Eq., §§ 859-860, 884, 887, 889, 897-99, 901.

usage no test of. Eq., § 886.

enlarged jurisdiction by means of discovery, see *supra*, 6, c.

in Louisiana. Eq., §§ 897-901.

remedies are at common law or in equity, as defined in the English system. Eq., §§ 898, 1037-38, 1083, 1115-19.

JURISDICTION IN EQUITY, OF THE FEDERAL COURTS, *In general* — continued.

- distinctions between law and equity kept distinct. Eq., §§ 988-96, 1126.
- adoption of state practice does not authorize union of legal and. Eq., §§ 1083, 1115-19.
- bill in equity must show jurisdiction of the parties. Eq., §§ 865, 905.
- none of naked title to lands in another district, disconnected with trust, contract, etc. Eq., §§ 870, 908, 909.
- construction of wills. Eq., §§ 877, 982.
- enforcement of mortgages. Eq., §§ 943-44.
- the jurisdiction in states having no equity courts. Eq., §§ 997-1001.
- auxiliary proceedings: citizenship. Eq., §§ 1004-16.
- as dependent on parties. Eq., §§ 1017-23.
- b. *As affected by state laws; probate courts. See Agreed Case.*
 - as to adequate remedy in state court, see *supra*, 5, d.
 - rule as to adoption of state remedies and practice. Eq., §§ 1096, 1115-19, 1157.
 - probate decree and its reversal do not affect federal jurisdiction. Eq., §§ 66-70.
 - how state laws affect jurisdiction as to charitable uses. Eq., § 206.
 - as to suits concerning lands. Eq., § 213.
 - as to fraud in settlement of probate account. Eq., § 612.
 - new remedies may be enforced in an equity proceeding. Eq., §§ 902-904.
 - state laws cannot restrain, govern or limit it. Eq., §§ 861, 918-18, 965-79, 1125-26, 1842, 1867.
 - pendency of proceedings to settle estate in probate court does not affect it. *Id.*; §§ 890, 946-49.
 - distributee may sue administrator for mismanagement and an account. *Id.*
 - federal courts not governed by state laws, as to injunctions. Eq., §§ 1593, 1598-99, 1705-6.
 - rights and remedies given by state laws are enforced in federal courts. Eq., §§ 862, 902-3, 943-44, 1002-3, 2216.
 - contract between A. and B., for C.'s benefit. Eq., § 945. See § 476.
 - jurisdiction limited by statute. Eq., § 1050. See *Chancellor*.
 - whether remedy legal or equitable depends on the case. Eq., § 1156.
 - summary proceeding in lieu of replevin, not enforced. Eq., §§ 1106, 1155-57.
 - creditor's bill may be based on state statute allowing proceeding to reach equitable assets. Eq., §§ 863, 904.
- 10. **IRREPARABLE INJURY.** See *Injunctions*, 1.
 - application of doctrine as to. Eq., §§ 1182-83, 1154, 1155, 1367, 1458-61, 1475, 1532.
 - by wrongful levy of execution, when; injunction. Eq., §§ 1270, 1301.

JURY TRIAL (IN EQUITY).

- equity may send question of unliquidated damages to a jury. Eq., § 76.
- when feigned issue awarded; weight of. Eq., §§ 591-98, 751, 1750, 2177.
- court of law directed to receive certain evidence. Eq., § 2190.

K.**KENTUCKY.**

- equitable titles, and rules as to land. Eq., §§ 375-76.

L.**LACHES.** See *Cancellation and Rescission; Relief against Judgments*, 4; *Statutes of Limitation; United States*.

- twenty-five years' delay, fifteen being during infancy, held fatal. Eq., §§ 1, 52, 53.
- thirteen years' delay in enforcing claim of set-off is fatal. Eq., § 100.
- six years' delay by non-resident, to bring bill to redeem, fatal. Eq., § 150.
- general rule. Eq., §§ 194, 687, 1146.
- one looking on and allowing prior rights to be perfected, is estopped. Eq., § 412.
- fifteen years in which to bring bill of review, or of revivor and supplement, is fatal. Eq., § 471.
- twenty years' delay in creditor's suit fatal. Eq., § 1817.
- miscellaneous cases of. Eq., §§ 508-27, 1539.
- of vendee, avoids land contract. Eq., § 801.
- of vendor, prevents specific performance. Eq., § 808.
- staleness may be relied on at the hearing. Eq., § 894.
- raised by demurrer. Eq., § 1819.
- creditor's bill not maintained without presenting claim against estate. Eq., § 1837.
- twenty years' delay is not, when. Eq., § 2056.

LAND. See *Conveyances; Covenants Running with Land; Equitable Titles; Liens; Mortgages; Public Lands; Real Property; Securities; Specific Performance*.

- LAND CONTRACT.** See *Specific Performance; Vendor and Purchaser.*
- LAND GRANTS.** See *Condition Subsequent.*
- LANDLORD AND TENANT.** See *Guaranty.*
forfeiture in payment of rent relieved, in equity. Eq., § 239.
- LAPSE OF TIME.** See *Cancellation and Rescission; Laches; Statutes of Limitation.*
- LAW, REMEDY AT.** See *Jurisdiction in Equity.*
relation with equity, see *Equity.*
- LEASES.** See *Landlord and Tenant.*
- LEGACIES.** See *Jurisdiction in Equity, 5, c.*
equitable remedies of legatees. Eq., § 393.
- LEGAL TITLE.** See *Equity, 2.*
- LETTERS PATENT.** See *Patents for Inventions.*
- LEVY.** See *Execution.*
- LIBEL.**
to business, injunction not sustained unless malicious. Eq., § 1493.
- LIENS.** See *Banks; Creditors' Bills, 1; Equity, 2, h; Judgment Liens; Marshaling of Assets; Priorities.*
though contract too indefinite for specific performance, it may amount to a lien. Eq., §§ 29, 132-33.
how equitable lien for improvements created. *Id.*; § 137.
in Indiana, by judgment. Eq., §§ 155-57.
equitable rules in regard to incumbrances. Eq., §§ 296-99.
fund in court administered according to the rights of the parties. Eq., § 354.
general rules, priorities. Eq., §§ 551-62.
specific and general. Eq., § 800.
given by state laws, may be enforced in equity in federal courts. Eq., §§ 902, 903.
but the jurisdiction stops with the statute. Eq., § 1050.
enforced by creditor's bill. Eq., §§ 1938-39.
conflicting; when creditor may have advantage of both. Eq., § 1956.
- LIFE INSURANCE.** See *Insurance; Jurisdiction in Equity, 5, b, c.*
time of payment of premium is of the essence of the contract; equity will not relieve against forfeiture. Eq., §§ 238-41. See §§ 240, 841.
rules for construction of policies. Eq., § 1130.
insolvency of company is *prima facie* evidence of fraud. Eq., § 1895.
creditor's bill against; appointment of receiver; who unsuitable. Eq., §§ 1896-97.
judgment set aside for fraud. Eq., §§ 1981, 2019-20.
- LIMITATIONS.** See *Laches; Statutes of Limitation.*
- LIS PENDENS.** See *Notice.*
- LITERARY PRODUCTIONS.** See *Copyright; Manuscript.*
- LIVERY-STABLE.** See *Nuisances.*
- LOSS OF INSTRUMENT.** See *Accident.*
- LOTTERIES.**
equity will not enforce judgment for prize in. Eq., § 242.
- LOUISIANA.**
jurisdiction and powers of federal courts, in equity. Eq., §§ 897-901.
equitable remedies on mortgages. Eq., § 944.
no distinction between law and equity in. Eq., § 996.
state officers enjoined from issuing bonds in violation of law. Eq., §§ 1293, 1351-53.
federal courts have equity powers, though those of local district court abolished. Eq., § 2247.

M.

- MAINE.** See *Taxes.*
who were settlers under the resolve of 1801. Eq., § 2057.
authority of commissioners. Eq., § 2058.
- MANDAMUS.**
bill to compel collection of tax not treated as a. Eq., § 1067.
is an adequate remedy to collect bonds. Eq., §§ 1250-57.
when will lie against public officers. Eq., §§ 1291, 1353. See §§ 1349-50, 1363-64.
from federal, not restrained by state court. Eq., §§ 1456-57.

MANDATORY INJUNCTIONS. See *Injunctions*, 1, a.

MANUSCRIPT.

enjoining unauthorized publication. Eq., § 1520.

MARITIME LAW. See *Shipping and Admiralty*.

MARRIAGE.

what is legal proof of. Eq., § 142.

law of, in the Spanish colonies. Eq., § 144.

when contract in consideration of, not enforced. Eq., § 181.

MARRIAGE SETTLEMENTS.

wife's equity to, postponed to right of subsequent purchaser without notice, of an equity. Eq., §§ 268-69.

fairly made, and conferring substantial benefit, upheld in equity. Eq., § 400.

MARRIED WOMEN. See *Husband and Wife; Statutes of Limitation*.

MARSHAL. See *Execution; Replevin*.

not enjoined by mortgagee from levying execution; the legal remedy is adequate. Eq., §§ 1101, 1184-86.

MARSHALING OF ASSETS. See *Equity*, 2.

land of debtor first sold, is first liable to judgment lien, when. Eq., §§ 35, 155-59.

earlier levy need not be exhausted before resort to later. Eq., § 157.

equitable rules as to incumbrances. Eq., §§ 296-99.

of corporation, by a creditor, when assets cannot be sold. Eq., § 357.

in case trustee attempts to sell property subject to conflicting liens. Eq., § 409.

MARYLAND. See *Ejectment*.

MASSACHUSETTS.

powers of probate courts in 1814. Eq., § 60.

distinction between statute of frauds of and English statute. Eq., § 121.

charitable jurisdiction in. Eq., § 427.

MASTER IN CHANCERY.

chancellor may set aside report and enter up decree in gross, when. Eq., § 78.

question of unliquidated damages sent to. Eq., § 76.

exceptions necessary; practice in account for repairs and improvements. Eq., §§ 788-789.

if report indicates necessity for further examination it will be ordered. Eq., § 1175.

reference to in lieu of injunction. Eq., §§ 1752-53.

sale and conveyance under decree in creditor's suit, good. Eq., §§ 1779, 1827.

powers of courts of Louisiana in respect to. Eq., §§ 2234, 2247.

new reference ordered, when. Eq., §§ 2817-28.

when reference to, made; long accounts. Eq., §§ 2260-64.

accounts before; claims for general expenses, without stating particulars, not allowed, nor ground of exception. Eq., §§ 2228, 2248.

procedure in respect to. Eq., §§ 2274-75.

allowing interest. Eq., § 2249.

oath unnecessary. Eq., § 2265.

evidence before; order need not particularly empower him to take. Eq., §§ 2232, 2244, 2278-80.

witness whose deposition read at hearing, not examined without special order. Eq., §§ 1122-38, 2254-59.

need not be written; oral method sufficient. Eq., §§ 2232-33, 2244.

practice on application to take, to show incompetency of witness already examined. Eq., §§ 2236, 2254-59.

objection to competency or credibility of witness waived. Eq., §§ 2237, 2256.

unfounded application to take, superadded. Eq., § 2254.

how incompetency by conviction of crime shown. Eq., § 2255.

report; statements of conclusive unless denied. Eq., §§ 2226, 2248.

exceptions must be specific; are like a special demurrer. Eq., §§ 2239, 2297-2302, 2312.

strictly, none made except those taken before him. Eq., §§ 2239, 2240, 2291-96, when filed. Eq., § 2306.

general rules as to. Eq., §§ 2285-90.

credits not claimed before him not ground of objection. Eq., §§ 2227, 2248.

evidence must be preserved in. Eq., §§ 2203-5.

exception that it does not contain all the evidence, how made. Eq., §§ 2231, 2242-43.

may amend after brought in, by permission. Eq., § 2241.

practice under rule 83; no notice necessary; nor objections to draft; old practice. Eq., §§ 2235, 2252-53.

action of court on; reviewing, setting aside, etc. Eq., §§ 2307-16.

setting aside and ordering new reference. Eq., §§ 2317-23.

extent of jurisdiction. Eq., §§ 2266-73.

sales by. Eq., §§ 2276-77.

practice on receivers' accounts and allowance. Eq., §§ 2281-84.

MASTER AND SERVANT.

violation of injunction by servant binds master, when. Eq., § 1644.

MAXIMS OF EQUITY. See *Equity*, 2.

MAYOR.

certiorari to correct judgment by. Eq., §§ 2059-60.

MENTAL WEAKNESS. See *Cancellation and Rescission*.

MICHIGAN. See *Fraudulent Conveyances*.

creditor's bill on return made before return day allowed in. Eq., § 1891.

statute as to creditor's rights construed. Eq., §§ 1800, 1868.

MINES. See *Injunctions*, 1, a.

MISCHANCE. See *Accident*.

MISCONDUCT. See *Executors and Administrators*.

MISJOINDER. See *Parties; Pleading in Equity*.

MISSOURI.

petition for review may be filed within three years. Eq., § 149.

MISTAKE. See *Improvements; Reformation of Instruments; Relief against Judgments*.

equity gives no relief for a mistake of law. Eq., §§ 160, 569-70, 574, 576, 579, 732-33.

but mistakes of law of land officers relieved against. Eq., § 814.

in quantity of land sold, corrected by injunction. Eq., § 385.

of surveyors of public lands, corrected. Eq., §§ 442-43.

agreement to prosecute claim then allowed, will be canceled. Eq., § 491.

when relieved against in equity. Eq., §§ 568, 571-73, 575, 577-78, 580, 1207, 1824, 2055.

MONEY. See *Fund in Court; Public Money*.

MONTANA.

organic act recognizes distinction between law and equity. Eq., § 992.

MORTGAGES. See *Jurisdiction in Equity*, 5, b; *Voluntary Assignments; United States*.

bondholders may foreclose without trustees, but not *vice versa*. Eq., § 97.

the test of, in equity, is the existence of a debt between the parties. Eq., §§ 28, 110.

distinction between, and trusts. Eq., § 111.

equitable rules as to equitable mortgages. Eq., §§ 315-17, 390.

conditional sales and. Eq., §§ 318-19.

foreclosure of railroad mortgages. Eq., §§ 320-21.

trustees are proper parties, when; when bondholders are. Eq., § 361.

mortgagee in possession does not hold adversely, in equity. Eq., § 405.

equitable rules in respect to. Eq., §§ 406-13.

federal circuit court may not decree deficiency. Eq., § 408.

power of court of equity to put purchaser in possession. Eq., § 411.

issue of special preferred stock pending foreclosure of railroad mortgage, under sanction of court. Eq., § 418.

commissions of executor applied to deficiency on mortgage from him to the estate. Eq., § 480.

railroad mortgage may cover after-acquired property. Eq., § 559.

equitable remedies on, though statutory remedy given. Eq., §§ 943-44.

concurrent remedy on note and mortgage. Eq., § 1212.

failure of title of mortgagor defeats equitable jurisdiction of foreclosure. Eq., § 1246.

injunctions in respect to. Eq., §§ 1470-74.

creditor's bill to enforce lien of; sharing *pro rata*. Eq., §§ 1938-39.

foreclosure set aside for collusion. Eq., § 2014.

MULTIFARIOUSNESS. See *Pleading in Equity*.

MULTIPLICITY OF SUITS. See *Jurisdiction in Equity*.

MUNICIPAL BONDS. See *Bonds; Injunctions*, 1, a.

MUNICIPAL CORPORATIONS. See *Injunctions*, 1, a; *Nuisances; Parties*.

equitable rights and remedies of creditors of. Eq., §§ 339-40, 344, 346-47.

equitable control over, to prevent breach of trust against inhabitants. Eq., § 345.

creditor's bill to reach equitable assets of. Eq., §§ 1940-43.

MUTUALITY. See *Trusts*.

N.

NATIONAL BANKS. See *United States Bonds*.

injunction on behalf of stockholder. Eq., § 1494.

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NE EXEAT.

continues in force after judgment. Eq., §§ 494-95.
 not granted on debt arising from embezzlement. Eq., § 1807.
 uses and object of the writ when issued; prayer for unnecessary. Eq., § 1825.
 power of district court to issue. Eq., § 1826.

NEGLIGENCE. See *Relief against Judgments*.
 remedy at law for, adequate. Eq., § 1241.

NEGOTIABLE INSTRUMENTS. See *Bills and Notes*.

NEVADA.

statute as to security and dissolution of injunction construed. Eq., § 1325.

NEW TRIALS.

equity jurisdiction almost totally disused. Eq., §§ 1960, 1998-2001; 2015, p. 743.
 for newly discovered evidence, when. Eq., §§ 1980, 2019-20, 2043.

NEXT FRIEND. See *Parties*.

NON-RESIDENT. See *Absentees; Bill of Review; Bill to Redeem; Jurisdiction; Laches; Parties; Process; Relief against Judgments*.

NOTICE. See *Following Trust Funds; Injunctions*, 3, 5; *Process*.

of a trust, is equivalent to an express declaration thereof, when. Eq., §§ 89, 90.
 those taking trust property with notice become trustees. Eq., § 90.
 to agent is to principal; to board of directors is to corporation. Eq., §§ 91-93.
 what amounts to; one taking with, is bound. Eq., §§ 143, 152.
 purchaser, with notice of claim or incumbrance, is bound. Eq., § 169.
 when no time of performance fixed, time may be made definite by request. Eq., § 186.
 by *lis pendens*; purchaser charged, though after decree *pro confesso*. Eq., § 64.
 attorney in the suit cannot be innocent purchaser. *Id.*
 creditor's bill as; requisites. Eq., §§ 1823-30.
 of an injunction, sufficient without service. Eq., §§ 1636-38.
 payment of purchase money essential. Eq., §§ 225, 226.
 purchase of trust property without notice protected. Eq., § 225.
 holder of legal title takes subject to prior equity of which he has notice. Eq., § 375.
 as affecting location on public lands. Eq., § 443.
 constructive, by possession. Eq., §§ 232, 816.

NUISANCES.

when bill for abatement not retained for further proceedings. Eq., § 447.
 when enjoined; when not. Eq., §§ 1479-82.
 authorized by law, not restrained; elevated railway; obstructing river. Eq., §§ 683, 694, 717-18.
 title of complainant; ownership of fee of adjoining lot, and not of street, insufficient to restrain street-car track or elevated railway, without special damage. Eq., §§ 689, 691, 692, 699-701.
 grounds of equity jurisdiction are inadequate remedy at law, irreparable injury, protracted litigation and multiplicity of suits. Eq., §§ 697, 707-9.
 must generally have been an adjudication at law. Eq., § 698.
 private, not enjoined at the instance of a city. Eq., § 723.
 public; complainant must show special damage. Eq., §§ 689, 691, 693-95, 700, 701.
 abatement of. Eq., §§ 704-10.
 livery-stables are not, *per se*; erection in residence part of a city not enjoined. Eq., §§ 692, 702, 703.
 apprehended; principles on which equity proceeds. Eq., §§ 703, 711.
 practice on preliminary injunction to restrain obstruction to navigation. Eq., § 712.
 obstructions to navigation. Eq., §§ 712, 717-21, 1049, 1402-10.
 obstruction of highway; injunction refused. Eq., § 713.
 jurisdiction; cause without, but effect within; corporation; bridges in two states. Eq., §§ 714-16.
 federal jurisdiction. Eq., §§ 719-21.
 enjoining dams. Eq., §§ 1405-6.

O.

OBJECTIONS. See *Jurisdiction; Master in Chancery; Pleading in Equity*.

OBLIGATION OF CONTRACTS. See *Judgments*.

of contract granting lands to railway company by the state. Eq., § 1361.
 state officers, restraining from acts impairing. Eq., §§ 1293, 1351-53, 1418-19.
 by state constitution. Eq., §§ 1887-89.

OFFICERS. See *Bonds; Injunctions*, 1, a.

OHIO.

jurisdiction of charities in. Eq., § 428.
statute as to quieting title construed. Eq., §§ 2200, 2210.

OPPRESSION. See *Duress*.

OREGON.

sections 278 and 500 of the code construed. Eq., §§ 2202-3.

OUTSTANDING TITLE.

acquired by *bona fide* purchaser, but pending suit, not availed of. Eq., § 56.
one improving land by contract with the owner cannot buy up. Eq., §§ 145, 678.
attorney cannot buy in. Eq., § 198.
nor agent or trustee. Eq., §§ 680, 644, 774.
nor tenant in common or joint owner. Eq., §§ 641, 648-50, 677.

P.

PARENT AND CHILD. See *Cancellation and Rescission; Settlements*.

PAROL TRUSTS.

enforced in equity. Eq., § 682.

PARTIES (IN EQUITY). See *Agency; Creditors' Bills, 1; Jurisdiction; Sureties; Witnesses*.

objection for want of proper, may be taken at the hearing. Eq., § 83.
who are necessary; who not. Eq., §§ 84, 85, 926, 927.
who unnecessary, to bill to enforce decree. Eq., § 168.
when cross-bill raises the question of, the bill must claim relief or aid against them, to make them necessary. Eq., § 189.
want of interest in complainant is fatal to the bill. Eq., § 196.
tax-payers cannot join in action against county officers. Eq., § 343.
whether they can sue when town not derelict in duty. Eq., § 1326.
husband may join with wife, in equity, as *prochein ami*. Eq., § 398.
to injunction suit to restrain wrongful use of corporate name. Eq., § 433.
when a party not found may be brought in by amended bill. Eq., § 600.
who indispensable; who not; objection to non-joinder waived. Eq., § 601.
sale of ancestor's land not decreed in absence of heir. Eq., § 789.
objection to jurisdiction for want of may be at hearing. Eq., § 890.
bill in federal court must show jurisdiction of the; but the court may proceed as to those before it. Eq., §§ 905, 906.
prochein ami not a party, within the judiciary act. Eq., § 907.
joinder and non-joinder under act of 1839. Eq., § 912.
all the distributees not essential to bill by one against administrator for an account. Eq., § 916.
to bill to charge executors of deceased partner. Eq., §§ 928-29.
who are nominal parties. Eq., § 936.
jurisdiction in equity as dependent upon. Eq., §§ 1017-23, 1047, 1082.
adequate remedy at law against surviving partner, when. Eq., § 1249.
made defendants instead of plaintiffs to save jurisdiction. Eq., § 1321.
procedure as to those not in court, when numerous. Eq., § 1322.
who are proper; objection must be by plea or answer. Eq., §§ 1330-31.
making state officer a party does not make state a party. Eq., § 1355.
need not be joined when very numerous. Eq., § 1362.
to suit on injunction bond. Eq., § 1615.
those materially interested are proper; if interests severable, equity will proceed. Eq., §§ 1670-71, 2250.
if bringing in would oust jurisdiction, the court will give relief without them, if possible. Eq., § 1671.
multifariousness by misjoinder of plaintiffs. Eq., § 1846.
should heirs or devisees be parties to bill charging ancestor's fraudulent conveyance? Eq., § 1848.
prior incumbrancer proper, but not necessary, to creditor's suit. Eq., § 1878.
when numerous, one may sue for all. Eq., § 1910.
omnibus bill; others coming in. Eq., §§ 1957-58.
non-joinder of defendants raised only by plea in abatement. Eq., § 1998.
or demurrer. Eq., § 2251.
who necessary, in bill for relief from judgment. Eq., §§ 2088-89.

PARTITION (IN EQUITY). See *Dower; Statute of Frauds*.

effect of decree, as compared with judgment at law. Eq., §§ 6-9, 62, 63.
when a court of equity will not follow the decree. Eq., § 63.
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PARTNERSHIP. See *Injunctions, 1, c; Reformation of Instruments*.

retired partner may proceed by bill for settlement. Eq., § 72.
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PARTNERSHIP — continued.

equitable rules concerning. Eq., §§ 247-54.

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debt not set off against separate debt. Eq., § 507.

account in cases of. Eq., §§ 537-40, 548.

bill in equity against executor of deceased partner will not lie unless survivors are either insolvent or absolutely discharged. Eq., §§ 873, 929.

equitable jurisdiction to settle affairs of. Eq., §§ 1208, 1237, 1854, 1926.

injunction by partner against partner. Eq., § 1524.

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of dissolution; how joint property made separate. Eq., §§ 1858-59.

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partner taking conveyance from partner, a trustee. Eq., §§ 1816, 1906-8.

creditor's bill to administer effects of insolvent. Eq., §§ 1849-62.

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PATENT.

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PATENTS FOR INVENTIONS.

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relief for infringement is incidental to some other equity. Eq., §§ 883, 950-51.

act providing that issue shall not affect third persons does not abolish distinction between law and equity. Eq., § 990.

jurisdiction to enjoin infringement depends on citizenship. Eq., § 1010.

jurisdiction in equity. Eq., §§ 1045-46.

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rule of damages for infringement. Eq., § 1174.

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PAYMENT.

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PENALTIES AND FORFEITURES. See *Tender*.

equity will not enforce or declare, but will relieve against, except in case of insurance premiums. Eq., §§ 233-41, 817, 826, 469, 518, 1064.

the general rule does not apply to insurance policies. Eq., § 841.

breach of condition subsequent relieved against. Eq., §§ 1293, 1854-62.

defendant not compelled to submit to discovery which will subject him to. Eq., §§ 2152-59.

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bill for, when proper. Eq., §§ 2168, 2176-79.

PERSONAL PROPERTY. See *Descent; Executors and Administrators*.**PETITION FOR REVIEW.** See *Missouri*.**PLEADING.** See *Relief against Judgments*, 2, d.**PLEADING IN EQUITY.** See *Answer in Equity; Cancellation and Rescission; Injunctions*, 5; *Laches; Ne Exeat; Parties; Practice in Equity; Replication*.

in bills of discovery, see *Jurisdiction in Equity*, 6, d.

title acquired *pendente lite* cannot be set up. Eq., § 56.

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dismissal should regularly be presented by supplemental pleading. Eq., § 74.
 on demurrer the bill is taken as true. Eq., § 94.
 on pleas, the bill and pleas are so taken, when not inconsistent. *Id.*
 how statute of frauds pleaded. Eq., § 119.
 full names of parties should be given. Eq., § 158.
 the bill is construed from facts stated, and not from such allegations as fraudulently, deceitfully, etc. Eq., § 161.
 party must rely on the case stated in his bill or answer. Eq., §§ 184, 207, 208, 218, 617-18.
 when affirmative defense set up, defendant is held to its terms as a plaintiff. Eq., § 185.
 facts occurring after suit brought not noticed unless set up by supplemental pleading. Eq., § 195.
 what relief given under prayer for general relief. Eq., § 202.
 when no answer filed, the case is decided on the title and equity in the bill. Eq., § 216.
 in cases of fraud. Eq., §§ 616-19, 750-51, 772, 825, 853, 2046.
 allegations must be sufficient to found decree upon. Eq., § 779.
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 objection to jurisdiction, or that remedy at law adequate, may be first taken at the hearing. Eq., § 890.
 how plea differs from demurrer. Eq., § 890, p. 351.
 effect of pleas to the jurisdiction. Eq., § 890, p. 351.
 bill not multifarious for including several claims of same nature against same person. Eq., § 908.
 nor a bill to open settlements and cancel a receipt, when. Eq., § 918.
 misjoinder of complainants; antagonistic causes of action. Eq., §§ 1846-47.
 satisfaction from mortgage, with foreclosure, good. Eq., § 1909.
 plea to the jurisdiction, how made. Eq., § 1078.
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as to evidence in lieu of discovery; following state law. Eq., § 2126.

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 on bill to quiet title in ejectment suit. Eq., § 1240.

PRACTICE IN EQUITY — continued.

on injunction to stay legal proceedings when defendant a non-resident. *Eq.*, § 1804.
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PRINCIPAL AND AGENT. See *Agency; Notice; Purchase for Value*, 2.**PRINCIPAL AND SURETY.** See *Sureties*.**PRIOR IN TEMPORE, POTIOR IN JURE.** See *Equity*, 2.**PRIORITIES.** See *Bonds; Equity*, 2; *Liens; Marshaling of Assets; Notice; Purchase for Value*.

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PRIVITY. See *Contracts*.**PROBATE COURTS.** See *Election; Jurisdiction in Equity*, 9, b.

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ledger must be produced, though it contains entries prior to those in question. *Eq.*, § 787.

law authorizing does not abolish discovery. *Eq.*, § 2189.

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register and receiver not restrained from proceeding, especially in absence of claimants as parties. *Eq.*, §§ 1290, 1349.

secretary of the interior not enjoined to cancel entry. *Eq.*, §§ 1296, 1363-64.

PUBLIC MONEY.

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PUBLIC OFFICERS. See *Injunctions*, 1, a.

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PUBLIC POLICY. See *Illegality; Stock*.

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1. IN GENERAL.

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and must be accompanied by the legal title, if in the exclusive jurisdiction. Eq., § 224.

2. WHAT CONSTITUTES A. See *Notice*.

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PURCHASE MONEY. See *Notice*.

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QUASI PARTIES. See *Creditors' Bills*.

QUIA TIMET. See *Quieting Title*.

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QUIETING TITLE. See *Ejectment*; *Equitable Titles*; *Patent*.

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RAILROAD MORTGAGES. See *Mortgages*.

RAILROADS. See *Guaranty*; *Mortgages*; *Nuisances*; *Trust Deeds*; *Trustees*.

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interference with property of telegraph company enjoined, when. Eq., §§ 1287, 1346-48.
land grant from state protected from forfeiture in equity by breach of condition subsequent. Eq., §§ 1293, 1354-62.
trustees of bondholders may enjoin sale of. Eq., § 1496.
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 in consideration of a settlement of account, is a good consideration; may be impeached for fraud. Eq., § 75.
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RELIEF AGAINST JUDGMENTS. See *Injunctions*, 1, b.

1. IN GENERAL.
2. WHEN JURISDICTION EXERCISED.
3. WHEN NOT EXERCISED.
4. HOW RIGHT TO RELIEF BARRED.
5. PROCEDURE.

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 jurisdiction to grant new trials almost disused. Eq., §§ 1980, 1998-2001; 2015, p. 748.
 newly discovered evidence, what it must show. Eq., §§ 1980, 2019-20.
 courts of law formerly relieved by writ of *audita querela*; equity relieves on same principle. Eq., §§ 1985, 2010-12.
 equity assists non-resident creditor to obtain payment of judgment at law. Eq., §§ 1971, 2007-9.
 the court acts on the parties before it and not directly on the judgment or decree. Eq., § 2014.
 judgment by default set aside more readily. Eq., § 2037.
 complainant's right to a discovery. Eq., § 2090.
 parties presumed to have notice of action of court. Eq., § 2108.
 bill retained without regard to citizenship. Eq., § 1004.
 bill in foreign court; defendant a non-resident or abroad. Eq., §§ 1035, 1075, 1204, 2014.
2. WHEN JURISDICTION EXERCISED.
 - a. Generally. Eq., §§ 12, 79, 80, 99, 1501.
 when judgment paid. Eq., §§ 2066-68, 2106.
 complainant must be free from negligence. Eq., §§ 1970-73, 1978, 1980-81, 1985, 2030, 2041-48, 2091-98.
 bill must show equity, and meritorious defense to the judgment. Eq., §§ 2077-87.
 judgments by confession. Eq., §§ 2108-5.
 - b. In the exclusive jurisdiction.
 equitable defense, not available at law. Eq., §§ 1963, 2007-9.
 purchase of title *pendente lite*, not available at law. Eq., §§ 54-57, 2072.
 - c. In the concurrent jurisdiction.
 fraudulent insurance judgment set aside. Eq., §§ 1991, 2040-43.

RELIEF AGAINST JUDGMENTS, WHEN JURISDICTION EXERCISED — continued.

- d. *For fraud, accident, mistake, surprise, excusable neglect, ignorance, etc.*
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 when relieved; what is. Eq., §§ 2069, 2073.
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 misapprehension and indisposition of attorney. Eq., §§ 1979, 2016-18.
 authorities discussed. Eq., §§ 2003, 2016.
 want of notice of issues. Eq., § 2073.
 neglect of counsel not relieved against, when. Eq., §§ 1961, 2002-4, 2107.
 that he is insolvent, not a ground for relief. *Id.*
 absence of counsel insufficient. Eq., §§ 1985, 2027-29.
 mere injustice not enough. Eq., § 2018.
 when proceeding not equivalent to motion, writ of error, bill of review or appeal.
 Eq., §§ 1976, 2014-15.
 sickness of witness, confused recollection, not enough. Eq., §§ 2027-28.
 nor inability to procure lost documentary evidence. Eq., § 2029.
 fraud in preventing legal defense; what does not amount to. Eq., § 2006.
 promises of agent unavailing, because by parol. Eq., §§ 1973, 2007-9.
 collusion of trustee with some creditors; inadequate consideration for sale.
 Eq., §§ 1976-77, 2014-15.
 combination to defeat defense. Eq., §§ 2035, 2039.
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 §§ 1980-81, 2019-20, 2043.
 must be extrinsic and collateral, and not appearing on the trial. Eq., §§ 1963,
 2024.
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 fraudulent insurance judgment set aside. Eq., §§ 1991-93, 2040-43.
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 failure to plead *puis darrein continuance*. Eq., §§ 1974, 2010-12.
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 murrer. Eq., §§ 1989, 2035, 2038.
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 new trials. Eq., § 1960.
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 adequate remedy at law; by *certiorari*. Eq., §§ 1997, 2059-60, 2106.
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 1987, 1995, 2006-9, 2013, 2030-34, 2044-48, 2093.
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 award not relieved against; adequate legal remedy. Eq., §§ 2091-92.
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 Eq., §§ 1973, 2013.
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 money not enjoined. Eq., §§ 1994, 2014.
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SECRETARY OF THE INTERIOR.

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SECURITIES. See *Collateral Security; Fraud, 2, 3; Liens; Mortgages.*

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SET-OFF IN EQUITY.

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 equity follows the law in respect to. Eq., §§ 502, 504.
 joint debt not set off against several, or *vice versa*. Eq., §§ 506, 507.
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STATE BONDS. See *Bonds*.

STATE LAWS. See *Injunctions*, 2; *Jurisdiction in Equity*, 5, d; 9, b; *Nuisances; Witnesses*.
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STATUTES OF LIMITATION (IN EQUITY). See *Laches*.

are as applicable in equity as at law, except as to direct trusts not denied. Eq., § 52.

See §§ 514-516, 1146.

cumulated disabilities, as infancy and coverture, not admissible. Eq., § 58.

state statutes not applicable to suits in equity in federal courts. Eq., § 1036.

plea of not enjoined. Eq., §§ 1539-40.

STOCK.

equity will compel specific performance of contract to transfer, and compel corporation to open books. Eq., §§ 81, 82.

bank held to have no lien on, as against beneficiary. Eq., § 88.

lien of corporation on, for stockholder's debt. Eq., § 862.

cancellation of certificates wrongfully issued. Eq., § 850.

irrevocable power of attorney to vote on, not against public policy, when. Eq., § 1314.

execution not necessary to a creditor's bill to reach. Eq., § 1920.

STOCKHOLDERS. See *Injunctions*, 1.

a bill to enforce a decree against, uncertain in amount, will lie. Eq., §§ 167-68.

equitable remedies for breaches of trust by officers. Eq., §§ 275-84.

pledgees cannot enjoin increase of stock, when. Eq., § 358.

liability of, in equity; national bank. Eq., § 359.

bill to establish title to shares. Eq., § 360.

cannot obtain full paid stock in lieu of subscription, without payment or tender. Eq., § 485.

relief against fraud in corporate management. Eq., §§ 633-34.

bill by, not sustained, when. Eq., § 1074.

entitled to injunction, when. Eq., §§ 1391, 1393-94.

liability for unpaid subscriptions; is not released by payment of share of debts. Eq., §§ 1890, 1903.

bound by judgment against corporation. Eq., § 1896.

STREET RAILWAYS. See *Nuisances*.**STREETS.** See *Nuisances*.**SUBPOENA.** See *Process*.**SUBROGATION.**

purchaser of land subject to a security which he pays, made to protect a surety, is not thereby subrogated to surety's rights against co-surety. Eq., § 102.

of creditor or incumbrancer paying a debt of higher nature. Eq., §§ 296, 299, 332.

SUPERSEDEAS. See *Writ of Error*.

injunction does not operate as. Eq., §§ 1521, 1735.

SUPPLEMENTAL PLEADING. See *Pleading in Equity*.**SUPPLEMENTARY PROCEEDINGS.** See *Execution*.**SUPREME COURT.** See *Boundaries; Writ of Error*.**SURETIES.** See *Injunctions*, 2; *Judicial Sales*.

when surety cannot avail himself of security to co-surety. Eq., §§ 20, 102.

may be relieved from judgment against him inequitably obtained by creditor and debtor.

when. *Id.*; §§ 1969-70, 1974, 2002-6, 2010-12.

equity to compel creditor to proceed against maker, when surety discharged by time. Eq., § 348.

no equitable liability against, when discharged at law. Eq., §§ 349, 1616.

on administrator's bond, may be sued with him in equity. Eq., § 917.

creditor may proceed against surety on administrator's bond before judgment against latter, when. Eq., § 949.

remedy at law against, on a canceled bond, is adequate. Eq., § 1239.

when not discharged by forbearance; cases reviewed. Eq., §§ 2033-34.

- SURPRISE.** See *Specific Performance*.
what is necessary to sustain defense based on. Eq., § 170.
- SURVEY.**
not reformed. Eq., § 2026.

T.

- TAX DEEDS.** See *Ejectment*.
as clouds on title. Eq., §§ 2219-21.
holder of may quiet title. Eq., §§ 2222-23.
- TAXES.** See *Ejectment*; *Income Tax*.
how redeemed from in Maine in 1882. Eq., § 55.
redemption legal, not equitable; claimant cannot intervene in equity. Eq., §§ 642, 646.
bill to compel payment of bonds by tax payers. Eq., § 1061.
bill to compel collection of, not sustained as a *mandamus*. Eq., §§ 1067, 1250-51.
injunctions in respect to. Eq., §§ 1549-88, 2206.
proceedings must strictly follow statute. Eq., § 2194.
certain federal statutes construed. Eq., § 2196.
- TAX PAYERS.** See *Parties*.
- TELEGRAPH COMPANIES.** See *Railroads*.
- TENANCY IN COMMON.**
equity will protect interest of one tenant. Eq., § 465.
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- TENDER.** See *Stockholders*.
complainant in bill to redeem must make a. Eq., §§ 150, 407.
also in bill to relieve from a forfeiture. Eq., § 496.
- TIME.** See *Condition Subsequent*; *Penalties and Forfeitures*.
not of the essence of a contract in equity; rule inapplicable, when. Eq., §§ 59, 518.
whether of the essence, in a contract claimed to create an equitable mortgage. Eq., § 116.
- TITLES.** See *Equitable Titles*; *Public Lands*; *Quieting Titles*.
- TRADE-MARK.**
use of label not enjoined, when. Eq., § 1500.
- TRESPASS.**
is a local action; federal circuit court has no extraterritorial jurisdiction of. Eq., § 910.
equity will not maintain suit to eject trespassers. Eq., §§ 1151-53.
enjoined when mischief irreparable. Eq., §§ 1458-62.
distinction between and waste discarded by courts of equity. Eq., § 1458.
- TRUST DEEDS.** See *Marshaling of Securities*; *Mortgages*.
forfeiture relieved against in equity. Eq., § 237.
on foreclosure, the court may enforce agreement contained in a trust deed. Eq., § 410.
injunctions in respect to. Eq., §§ 1470-74.
decree set aside for collusion of trustee with part of creditors. Eq., §§ 1977, 2014-15.
- TRUST FUNDS.** See *Following Trust Funds*.
equity has jurisdiction as to. Eq., § 887.
right of *cestui que trust* to protect. Eq., § 931.
- TRUSTEES.** See *Banks*; *Fiduciary Relations*; *Improvements*; *Mortgages*; *Notice*; *Trusts*.
those purchasing with notice of a trust are. Eq., §§ 90, 93.
in a mortgage, cannot foreclose without the bondholders. Eq., § 97.
cannot buy trust property; contract absolutely void. Eq., § 126.
vendor is a trustee for the purchaser, until deed made. Eq., § 290.
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acts of, shall not prejudice *cestuis que trust*. Eq., § 335.
removal of, refused. Eq., § 363.
one intermeddling with infant's property is a trustee. Eq., § 498.
payment to in Confederate money, a nullity. Eq., § 602.
equitable jurisdiction in cases of misconduct of. Eq., §§ 670-75.
case of perversion of trust by proceeding at law. Eq., §§ 875, 931.
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executors and administrators are. Eq., § 947.
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partner becomes trustee for creditors, when. Eq., § 1906.

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1. IN GENERAL.
2. EXPRESS TRUSTS.
3. IMPLIED TRUSTS

1. IN GENERAL.

not mutual, cannot generally be enforced. Eq., § 112.
 distinction as to mutuality between executed and executory. Eq., § 114.
 creation of, is within the statute of frauds. Eq., § 120.
 when partner becomes a trustee for the firm. Eq., § 253.
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 agreement for a lien constitutes a trust. Eq., § 552.
 general rules. Eq., §§ 651-57.
 of the federal courts. Eq., §§ 658-62.
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 by parol; for aliens; for creditors. Eq., §§ 682-85.
 "clean hands" of beneficiary; his laches. Eq., §§ 686-87.
 when equity has jurisdiction; when not. Eq., §§ 895-96.
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2. EXPRESS TRUSTS.

as a ground of equity jurisdiction. Eq., §§ 1110, 1166.

3. IMPLIED TRUSTS.

a. *In general.*

when a promise by heirs to ancestor in place of will, to convey to third person, is a mere naked promise, and when a trust. Eq., §§ 1, 50, 51.

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b. *Resulting trusts.*

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distinction between ordinary trust and a resulting trust or a mortgage. Eq., § 111.
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U.

UNDUE INFLUENCE. See *Cancellation and Rescission; Duress; Equity, 2.*
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UNITED STATES.

priority of the; must do equity in respect to. Eq., §§ 333, 362.

how far set-off available against. Eq., § 940.

mortgage in which the United States owns the equity may be foreclosed. Eq., § 1032.

cannot be sued or enjoined, except by its consent. Eq., §§ 1365, 1426-29.

may enjoin obstruction to public improvement in harbor. Eq., § 1513.

not bound by statutes of limitation; effect of laches. Eq., § 2021.

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UNITED STATES BONDS.

bill in equity for, deposited by bank, not sustained against federal officers. Eq., § 440

UNLIQUIDATED DAMAGES. See *Compensation and Damages; Damages.*

is no test of federal jurisdiction in equity. Eq., § 587.

USES AND TRUSTS. See *Trusts.*

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 equitable title of purchaser protected against grantee of legal title. Eq., § 486.

USURY.

equity will not add to penalties declared by the law of. Eq., § 235.

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V.

VARIANCE (IN EQUITY).

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VENDOR AND PURCHASER. See *Cancellation and Rescission; Descent; Executors and Administrators; Public Lands; Specific Performance.*

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VENDOR AND PURCHASER—continued.

when a mode of annulling a contract is provided, it is exclusive. Eq., § 802.
 on sale of purchaser's right the vendee gets only the purchaser's equity. Eq., § 805.
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VIRGINIA.

recovery of remote indorser is in equity. Eq., § 1211.
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VIS MAJOR. See *War*.**VOID AND VOIDABLE.**

distinction between. Eq., § 125.

VOLUNTARY ASSIGNMENTS.

assignor may sue in equity for surplus or to redress fraud of assignee. Eq., § 418.
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 when not reformed for mistake. Eq., § 734.
 create trusts, which may be enforced in equity. Eq., § 933.
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VOLUNTARY CONVEYANCES. See *Fraudulent Conveyances*.

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W.

WAIVER.

by failure to set up defense at law. Eq., §§ 79, 80.
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WAR.

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WAR INTEREST. See *Interest*.**WASTE.**

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WATER-COURSES. See *Injunctions*, 1, a; *Nuisances*.**WEAKNESS OF MIND.** See *Cancellation and Rescission*.**WHARFAGE.**

collection not enjoined, when. Eq., § 1546.

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 effect of promise by heir to intestate to convey to third person in place of will. Eq., §§ 1, 50.
 equity has jurisdiction to construe. Eq., §§ 430, 877, 942.
 and to require an account to ascertain amount of estate. *Id.*
 and to determine validity, incidentally. Eq., § 1044.
 cannot revoke probate, or set up spoliated will. Eq., § 1060.
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 and for recovery of property conveyed under will fraudulently proved; no adequate remedy at law. Eq., § 1223.
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party jointly interested in a purchase is incompetent. Eq., § 1141.
 covenant not to sue maker of note does not render him competent, as indorser might sue him. Eq., § 1142.
 rule as to interest disqualifying; state law does not control federal court in criminal or equity cases. Eq., § 1332.
 proper mode of objection to competency or credibility in equity. Eq., §§ 2256-57.
 proper time as to examinations as to credibility. Eq., § 2258.
 how far cross-examination waives objection to competency. Eq., § 2259.

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power of equity to grant and execute, in foreclosure. Eq., § 411.

WRIT OF ERROR.

effect of reversal of judgment. Eq., § 67.

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quære, whether will issue without filing bill, on petition in the original case. Eq., § 1875.

WRITS OF PREVENTION.

it seems that these common law writs are no longer recognized. Eq., §§ 2110, 2110b.

ECHOES FROM THE PRESS.

[From the Daily Register, New York, N. Y.]

In this volume we have an extended compilation of the Federal law on crimes and criminal procedure, including extradition. The work is well carried forward in the method heretofore pursued, and which we have previously commented upon. The volume presents over one thousand large pages of the most important opinions in full, and concise statements of the results of those of minor or only historical value.

* * * The excellence of this series in its presentation of the great body of our federal jurisprudence, in full we might almost say, under a topical arrangement is so great that we think it might be useful to suggest more consideration to the classification in detail. We are aware of the great difficulties of the task, but these difficulties themselves indicate the usefulness to the reader of overcoming them. The editor's analytical methods seem good, and it may be that they are carried as far as the nature of the plan of the work and the extent of the opinion presented will permit, but we apprehend that the convenience of the average reader and the usefulness of the work would be much increased if it were practicable as it progresses to make the analytic arrangement such as to afford a more ready clue to the contents.*

*In reply to this criticism we desire to say, that this question has been well thought over by us. While we can easily find many attorneys who will each suggest his own views as to further subdivisions of topics, yet none present such as would be satisfactory to the profession generally.

[From the Central Law Journal, St. Louis, Mo.]

A review of Volume IX, Conveyances, ends as follows:

The manuscript of this volume, after being prepared by Mr. Myer, was edited by Mr. Leonard A. Jones, of Boston, author of several well known legal treatises. We venture the opinion that the collection of cases on Railroad Mortgages, which this volume embraces, will go further to demonstrate the usefulness of the plan upon which this work is constructed than any matter in the preceding volumes. It has, in all, nine hundred octavo pages, well printed.

[From the Wisconsin State Journal, Madison, Wis.]

The text of this volume is devoted exclusively to the title, Contracts.

* * * The volume includes 105 cases from the United States supreme court reports; 148 from United States circuit and district court reports; thirty-three opinions of the attorney-general and court of claims; thirteen cases from the Federal Reporter, and twenty federal cases taken from other sources, making a total of 812 cases from original volumes.

The value and utility of this work and the material aid it affords to attorneys and courts are considerations becoming more and more obvious and conclusive on the appearance of each additional volume of the series.

[From the Inter Ocean, Chicago, Ill.]

This journal, after a review of Volume VIII, ends thus:

The order and system, and admirable arrangement of the volumes, as well as the complete index and tables of cases, have called out the unqualified approval of the profession.

[From the Commercial, Louisville, Ky.]

It is a digest and a set of reports at once.

Under the form and arrangement of a digest, the cases are arranged by topics alphabetically, the leading and important cases all being printed in full, and the substance of those secondary or inferior consequence being set out in the annotation. In this way the really valuable contents of about three hundred volumes of the Federal Reports is compressed into about thirty portly volumes, and so digested and annotated and edited as to present the matter in a most convenient and satisfactory manner. In this series one may have, therefore, the entire set of Federal adjudications at a cost only somewhat exceeding fifty cents per volume of the original reports. Volumes VII and IX, containing the titles, Constitution to Contractor and Conveyance to Coroner, respectively, are the latest to come to hand. They seem in every particular fully up to that high standard of excellence upon which the series began. Other volumes are shortly to follow, and the entire set will be concluded, it seems, within twelve months or such a matter. It may be confidently commended to book-buying lawyers.

[From the Kansas Law Journal, Topeka, Kas.]

The subjects of this volume are Crimes and Criminal Procedure, and it is one of the most valuable of the volumes yet issued. Crimes of all kinds known to the federal law are herein considered, and criminal procedure given. It is almost idle to say anything in commendation of this book, or of any volume yet issued, or of the plan of the series. Each volume is a treasure in itself, and the entire set will be the most systematic and valuable collection of federal decisions extant.

[From the Virginia Law Journal, Richmond, Va.]

They say of Volume XII, in a review too long to publish in full:

The work of the general editor is certified by Mr. John D. Lawson, the well-known author. This is the largest volume of the series which has yet appeared, and contains 1,160 pages. It seems to justify all that we have said of the work in former notices. We have seen no falling off in the careful and accurate execution of the original plan.

[From the American Law Record, Cincinnati, Ohio.]

This volume, one of the largest of the series, is devoted exclusively to the subject of crimes and criminal procedure under the United States laws, and practice in the Federal Courts, and bears the certificate of approval of the eminent law writer, John D. Lawson, whose work on "Defenses to Crimes" has been so well received by the profession. We have already expressed our opinion of this series, but we see no harm in reiterating that the practitioner has here the law, briefed according to the subject, by most able and competent hands, and from material from which there is no appeal—the Supreme Court of the United States. No fault can be found with the mechanical execution of the volume.

[From the Maryland Law Record, Baltimore, Md.]

An article fully reviewing Volume XII at much too great length to print in full ends up thus:

This volume, like all the others of the series, is complete in itself. Lawyers who attend to any criminal practice whatever will not regret the purchase of such a book.

ECHOES FROM THE PRESS.

[From the *Ohio Law Journal*, Columbus, Ohio.]

When it was announced that the Gilbert Book Company was about to undertake the preparation and publication of the decisions of the Federal courts from the organization of these courts to the date of publication, experienced publishers predicted that the enterprise would be a failure; but the result now shows they were mistaken in their calculation.

The present is the twelfth of the series. All the intervening volumes have been completed. The members of the profession who have used this series, so far as we have heard, express themselves in the most flattering terms. We recommend it because it is condensed, contains no surplusage, and is so admirably arranged that it can readily be determined whether the Federal courts have decided any given question, and the authorities upon which such decision rests, if any.

* * *

These decisions, annotated as they are, will make a pretty good law library.

[From the *Internal Rev. Record*, New York, N. Y.]

We are in receipt of another volume of that valuable publication, Myer's Federal Decisions.

* * *

When completed it will present all that is valuable in 280 volumes of Federal Reports, viz: 106 volumes of Supreme Court Reports, 142 volumes of Circuit and District Court Reports, and 88 volumes of the Opinions of Attorneys General and Court of Claims. The current law publications have also been made use of for the reports of late cases.

[From the *Legal News*, Chicago, Ill.]

The matter contained in this volume [Contracts] is very accurately and carefully prepared.

* * *

The arrangement of this series of reports is excellent. Each volume is a volume of decisions and a treatise upon the subject treated combined. The verdict of the profession upon the merits of this work has been one of approval.

[From the *Legal Intelligencer*, Philadelphia, Pa.]

After reviewing volumes IX and XII they wind up as follows:

The editor of the work has undertaken to present to the profession the vast body of Federal decisions condensed within a reasonable compass, by reporting in full the leading and important opinions, and digesting those which follow the same lead, or are otherwise not of sufficient importance to reprint at length. The series is sufficiently advanced to say that the carefully devised plan that was adopted is an excellent one, and the good judgment shown in the arrangement and selection of the cases is fully sustained.

[From the *Maryland Law Record*, Baltimore, Md.]

* * *

The whole of this volume (8) is devoted to the subject of contracts.

Since the original reports from which these decisions are compiled comprise 312 volumes, it is natural to suppose that almost every phase of the subject would be presented, and an examination of the volume shows that this is the case.

There is probably no book that will be found more useful to the general practitioner than volume 8, Myer's Federal Decisions.

[From the *Commercial Gazette*, Cincinnati, Ohio.]

We have explained the plan and nature of this work, which is now widely and favorably known for its great value. The twelfth volume just issued covers the topics under Crimes and Criminal Procedure, and is of itself a valuable addition to the library of every lawyer, whether engaged in the criminal practice or not. The cases it digests and reports are full of instruction to the student investigating the powers of the Federal Government. Many of its topics, such as "Offenses on the High Seas, Against the Internal Revenue Laws and the Post-office, Polygamy, Treason and Extradition, Foreign and Interstate," rarely appear in the state courts, and cases under these topics have been given the preference in selecting those reported in full in this volume.

[From the *Evening Times*, Albany, N. Y.]

Volume XII of this invaluable collection has been issued by the publishers. It may be considered complete in itself, and will be invaluable to every lawyer employed either in prosecution or defense of criminal cases.

* * *

In the whole catalogue of law books, there is none more useful than this.

[From the *Law Reporter*, Louisville, Ky.]

This is the twelfth volume of this valuable series. It contains every decision rendered by the U. S. Supreme, Circuit and District Courts upon the subject of Crimes and Criminal Procedure.

* * *

Many of the cases are interesting from a literary and historical standpoint as well as from the legal. We have been through the entire volume and found much very entertaining matter.

[From the "*Commercial Gazette*," Cincinnati, Ohio.]

The eighth volume of this work contains full reports of the leading cases of value, with full digests of all others, in the various Federal Courts in the matter of "contracts." The work of the editor is well done, and the volume will be found to be one of the most valuable of the great work of which it is part. The index is unusually full, abounding in titles and cross-references that enable one to speedily run down any special point in the general subject.

[From the *West Coast Reporter*, San Francisco, Cal.]

In noticing the preceding volumes of the Federal Decisions, the general plan and scope of this valuable work was stated and commended. A further examination and a somewhat extensive use of the parts already issued, have served to confirm our previously expressed opinion that this work is one of the greatest utility to the practitioner.

The present volumes (6th and 7th) contain the important subjects of "Constitution and Laws," revised by Prof. William G. Hammond, and "Consuls and Ministers," revised by James Schouler. The topics embraced under the general head of "Constitution and Laws" comprise the whole of the sixth and a greater portion of the seventh volumes, and form a most exhaustive and well arranged treatise on Constitutional Law.

This work is certainly one that every lawyer who desires his labors lightened should have on his library shelves.

ECHOES FROM THE PRESS

[From the Daily Advertiser, Boston, Mass.]

In the eighth volume of "Myer's Federal Decisions," are reported the decisions of our national courts on the general subject of Contracts, the constitutional protection of the obligation of contracts having been separately treated under the head of "Constitutional Law."

There is, accordingly, but little in this volume which is peculiar to the federal jurisprudence, most of the decisions being upon questions of the commercial law, depending upon general principles rather than upon any local regulations. But, as has often been pointed out, the decisions of the federal courts upon such subjects have always been received with the greatest deference, even outside of the domain in which they are authoritative.

The cases here reported and digested are arranged in the same manner that we have attempted to explain in noticing the previous volumes of this series, so recently that it seems unnecessary to say more than that the same high standard of editorial supervision seems to be maintained, with the result of the same accuracy and complete collection of all the adjudications upon the topic considered.

This series is the readiest and easiest means of access yet afforded to the decisions of the federal courts, and as such we regard it as of the highest value to all lawyers.

[From the Courier-Journal, Louisville, Ky.]

Volume VIII of "Myer's Federal Decisions," containing the law on all subjects between contracts and conversion, is now before the legal public. It is fully up to the high standard of merit of those preceding it. It has received the approval of Edmund H. Bennett, of the Boston bar, whose legal writings have run in the same line and are a positive assurance that the work on these subjects is thoroughly well done. Any commendation of this great work has become superfluous praise. It is too well known to need even words of approval.

[From the Inter Ocean, Chicago, Ill.]

Volume XI. of this valuable law book is edited by Benjamin R. Curtis, one of the associate editors of the series, of Boston, assisted by F. A. Farnham, of the Suffolk bar. It makes up a volume of 907 pages, and is characterized by all the painstaking completeness of previous numbers of the series.

The volumes thus far have met with the unqualified approval of the members of the profession. If the same labor is bestowed upon the succeeding volumes there will be no more valuable books upon the table or upon the shelves of the lawyer's library,

[From the Kansas Law Journal, Topeka, Kas.]

This volume contains the subjects "Contracts" to "Conversion," and might be considered a textbook on contracts. It is edited by and bears the approval of Edmund H. Bennett, and is not inferior to any in the series so far issued.

[From the American Law Record, Cincinnati, Ohio.]

This volume bears the certificate of approval of the Hon. E. H. Bennett, and, like its predecessors, is up to the standard and complete in itself, therefore it is a work which can be purchased independently of the series and without disadvantage.

[From the American Law Review, St. Louis, Mo.]

Of Volume XII they say:

* * *

"We have hitherto explained the plan of this work, and we presume that all our readers understand it. A partial examination of some of the titles of this volume, which we have recently made the subject of study, leads us to believe that Mr. Lawson's certificate of approval expresses a sound conclusion. The learned editor seems to have kept on the side of prudence in determining what cases should be printed in full and what should only be given in the form of a digest. He has printed in full some cases on the subject of extradition which we do not believe to be in all respects sound law, though they are considerably cited—notably the case of Henrich, on foreign extradition, and ex parte Smith, on interstate extradition. The opinions of the Attorney-General have afforded copious material for the various titles in his digest.

[From the Internal Revenue Record, New York, N. Y.]

At the end of a review of Volumes VIII and IX they add:

With the appearance of Volume XI, which is announced for January, this valuable work will be completed down to and including the twelfth volume, covering the letter C in the order of alphabetical arrangement. We are glad to see that its enterprising publishers, The Gilbert Book Company, St. Louis, Mo., find occasion to return thanks for the liberal patronage extended to the project.

The volumes thus far issued have appeared with such commendable promptness and completeness that there need be no hesitation in accepting their assurances that "no effort will be spared to make the remaining volumes as thorough and accurate as those now out." Their publication is an important one and deserves every encouragement.

[From the Luzerne Legal Register, Wilkes-Barre, Pa.]

The eighth volume of this important work is now presented to the profession and public. Contracts and the laws regulating them being the basis of human society, a work of this character can scarcely be overestimated. The vast number of decisions upon this subject, in all its ramifications, make an orderly compilation of cases with reference to the several divisions of the themes a laborious and difficult task, and we congratulate the editor on its successful accomplishment. An analysis of this subject, so comprehensive, under a limited number of heads, makes the work eminently practical.

* * *

The accurate and faithful presentation of the law upon so vital a subject, as declared by our highest courts, in so convenient a form, is a work worthy of the editor.

[From the Evening Times, Albany, N. Y.]

The subject of Vol. 8 is chiefly Contracts, and all the matter is accurately and carefully prepared. The decisions and notes are arranged under ten heads.

* * *

The arrangement of this series of reports is excellent. Each volume is a volume of decisions and a treatise upon the subject combined. The verdict of the legal profession upon the merits of this comprehensive work has been one of unqualified approval.

ECHOES FROM THE PRESS.

[From the Daily Register, New York, N. Y.]

This volume of the Federal Decisions upon the law of contracts embodies what is equivalent to a very substantial treatise (in the method in which many treatises are made), and gives, it appears to us, more fully than any other one volume does, the doctrines of the United States Courts upon the general principles of this important subject.

The general line of treatment is, after considering what constitutes a contract (and herein of the parties), to consider the kinds of contracts with reference to those made by letter or by telegraph and with reference to guarantees, letters of credit, the contravention of statutes or rules of public policy, duress, undue influence, mental incapacity, restraint of trade, margins and optional contracts, and fraud. The questions of construction and interpretation and those of performance and breach are followed by cases on the alteration of contracts, on the effect of the Statute of Frauds, on the time when a cause of action accrues and on the measure of damages.

[From the Law Reporter, Washington, D. C.]

A review of volume VIII winds up thus:

Each head is exhaustively considered. The volume, as a whole, excels in a great degree the numerous text books on the subject. It is fully equal to those which have preceded it, and will be in daily use in the lawyer's office. In Myer's Federal Decisions, the publishers—The Gilbert Book Co., St. Louis, Mo.—are giving to the profession a most valuable work, and they fully deserve the encouragement and assistance of all lawyers who can appreciate good law books. The mechanical execution of all of these volumes is of the best character.

We think that we can confidently repeat what we have already said heretofore, that he who gets the first volume will get the last.

[From the Maryland Law Record, Baltimore, Md.]

Volume XI is devoted to the subject of "Courts," and is edited by Benjamin R. Curtis, Esq., of Boston, one of the special editors of the work.

Like the subjects heretofore given it is treated thoroughly and exhaustively, and the book constitutes another valuable addition to a series that will sooner or later come to be considered indispensable.

[From the Law Bulletin, Columbus, Ohio.]

The matter contained in volume 8 is very accurately and carefully prepared.

The arrangement of this series of reports is excellent. Each volume is a volume of decisions and a treatise upon the subject treated combined. The verdict of the profession upon the merits of this work has been one of approval.

[From the Commercial Gazette, Cincinnati, Ohio.]

Benjamin R. Curtis is the editor of the eleventh volume of this combined digest and report of the decisions of the various Federal Courts. It includes the topics "Courts" to "Creditors' Bills," and will be found especially valuable in its treatment of the important subjects of "Jurisdiction." The name of the editor is a complete guarantee of the merits of the volume, and we can but repeat the favorable opinion of the great value of this work already expressed in our notices of the preceding volumes. [St. Louis, The Gilbert Book Company. Cincinnati, Robert Clarke & Co.]

[From the Law Reporter, Washington, D. C.]

Volume XI (Courts) of Myer's Federal Decisions has been received, and we take great pleasure in acknowledging its receipt. It is of the utmost importance that the organization, and jurisdiction, of the various courts should be accurately known.

No more admirable arrangement and treatment of the subject can anywhere be found than that of this volume. From inception to the present time the organization and jurisdiction of the various courts are exhaustively considered in the light, not of a text book, but of the most authoritative decisions we have.

(The contents are then given.)

From a glance at the table of contents it will at once be seen how fully and exhaustively the subject is treated. In the discussion of difficult questions regarding the jurisdiction of a particular court, which are likely to arise at any moment, this work will be found a faithful and authoritative guide. Its contents are not the views of an editor upon the subject, based upon the authorities, as he would contend, but the *authorities themselves* in complete and digested forms. Any lawyer would be proud to have these books in his library, and he would continually find them of the greatest utility and assistance.

With this volume are completed the first twelve volumes. Each one is equally deserving of the great favor with which it has been received. We have failed to observe, so far, a single adverse criticism upon the work, and we do not expect to see any such.

[From the Legal Intelligencer, Philadelphia, Pa.]

The present volume of this valuable series of reports covers the important subjects of Contracts and the sub-divisions that are embraced within that title, viz.: Contracts in General, the Kinds of Contracts, Consideration, Validity, Construction and Interpretation, Performance and Breach, Alteration of Contracts, the Statute of Frauds as affecting Contracts, Right of Action and when it accrues, and Measure of Damages. Great care and excellent judgment have been maintained in selecting the cases for report in full and in digesting those of minor consequence under the same sub-division. This feature bears the certificate of approval of Mr. Edmund H. Bennett, of Boston, who has revised the book. A full and minute index is appended.

[From the Virginia Law Journal, Richmond, Va.]

We think that the subscribers to this great series will find the present volume (VIII) one of the most valuable of the eleven which have appeared. It is devoted to the important subject "Contracts."

The work of the general editor is certified by Hon. Edmund H. Bennett, of Boston. This volume is of moderate size, containing 900 pages, and is printed and bound in the same excellent manner as its predecessors.

[From the Sunday News, Milwaukee, Wis.]

The latest volume of Myer's Federal Decisions covers the subject of the law of contracts as elucidated by the decisions of the various Federal courts. It is edited by B. R. Curtis, and can hardly help becoming the principal authority in this country upon its peculiar department of the law.

ECHOES FROM THE PRESS.

[From the *Luzerne Legal Register*, Wilkes-Barre, Pa.]

Benjamin R. Curtis, Esq., has edited this volume. It treats of courts. The powers of judges first receive attention. Under this chapter are fully reported several interesting cases, involving questions of practice and ethics which occasionally arise, e. g., when a judge may be challenged because interested; when he ought not to hear a motion which has already been decided before another judge of the same court. By far the larger portion of the volume is devoted to cases in which the limit of the jurisdiction of the various federal and of state courts on federal questions are discussed.

In this connection we find also the subject of citizenship, where that is necessary to jurisdiction in any phase. In vols. 6 and 7 we have already seen that privileges and immunities of citizens are fully considered from a constitutional standpoint; here it is viewed from the narrower jurisdictional one. State courts in this volume receive only a small space, a fact explained fully when we turn to the titles Appeals, Constitution and Laws, which we have already reviewed in previous numbers. Moreover, a separate title on States and Territories is promised in a future volume.

We regard it as one of the most thorough of the set. While from the nature of the subject it has none but a legal interest for the reader, it is all the more valuable to the practitioner's library.

[From the *Evening Times*, Albany, N. Y.]

Volume 11 of this great and useful work has been edited by Benjamin R. Curtis, of Boston, Mass., who is specially qualified by long study and practice to make an intelligent and systematic arrangement of all the cases relating to the principal subjects embraced in this volume, viz.: the organization and jurisdiction of the United States courts—supreme, circuit, district, and territorial.

There are also chapters on the court of claims, on justices of the peace, on *lex fori* and remedies, on contempt of court, and on various cognate judicial and political questions. All the cases relating to these subjects to be found in 812 volumes of reports—many of which are costly, and some out of print and scarce—are included in this volume. The more important cases are printed in full, and the rest sufficiently noted.

It is safe to say that the same amount of information relating to the United States courts, and practice therein, can not be found in any other one volume. It is complete in itself, and will be essential to every practitioner in the federal courts.

[From the *West Coast Reporter*, San Francisco, Cal.]

Volume eight is entirely devoted to the subject of contracts, and volume nine to the subject of conveyances. Judge Bennett certifies to an examination of the cases on contracts and approves the selections made by the editor of the cases printed in full and those which are merely digested. Mr. Leonard A. Jones, one of the editors of the *American Law Review*, is the editor of the subject of conveyances. This subject embraces the important subdivisions of deeds, mortgages of real estate, railroad mortgages, and chattel mortgages. On each of these branches of the law, Mr. Jones has exhaustively written, and is undoubtedly the greatest living authority. This fact of itself is a sufficient guarantee that the selection of cases made by him is judicious and that nothing of great value has been merely digested which should have been printed *in extenso*. The work of the publishers is of uniform excellence with preceding volumes.

[From the *Daily Register*, New York, N. Y.]

This volume (8) of the well known series presents the body of the law ruling the jurisdiction of the Federal Courts and the jurisdiction of the State Courts, so far as dependent upon or limited by the Federal law.

After the leading cases on the positions and functions of judges and their disqualification in particular cases, a collection of cases on the judicial function in general, treats of the power to adjourn, to examine records, to interfere with the judgments of a former term. The acts of clerks are also considered.

Next is treated the jurisdiction of the United States courts as dependent upon general principles and regulations common to courts of several classes. Following this the particular courts are taken up in order, commencing with the supreme court, and treating in succession the circuit courts, the districts courts, the court of claims, etc., after which come the cases on the territorial, state and other courts, in which courts martial and justices' courts are not overlooked.

The volume closes with the Federal law on contempt of court, upon the distinction of political and judicial questions and on the conflict of laws so far as involved in the law of the forum and remedies.

It can hardly be necessary for us to go further, except to say that this volume has been edited by Benjamin R. Curtis, Esq., who also acknowledges the assistance of Mr. Frank Farnham in the work.

[From the *Kansas Law Journal*, Topeka, Kas.]

Vol. VIII contains the subjects "Contracts" to "Conversion." It might be considered a text-book on contracts. The book is edited by and bears the approval of Edmund H. Bennett. The volume is not inferior to any in the series so far issued.

Vol. XI contains the subjects "Courts" to "Creditor's Bills," and is edited by Benjamin R. Curtis, and any one desiring a treatise on the jurisdiction of federal courts has it in this book.

This arrangement of Mr. Myer needs no new words of commendation. It has passed the experimental stage, and the merit of the arrangement is seen and the merit of each book assured.

[From the *American Law Record*, Cincinnati, Ohio.]

* * *

It will be seen that the entire book (Volume XI) is devoted entirely to the subject matter of Courts, and forms a complete and exhaustive treatise thereon. The editor of the volume is Benjamin R. Curtis, of Boston, a gentleman who, if he possesses a tithe of the abilities of his distinguished father, would be a sufficient guaranty of the merits of the work. The publishers of this series are endeavoring, with commendable enterprise, to carry out their undertaking, and we trust the profession will recognize their efforts by subscribing liberally for the series, although the work is so arranged that each volume may be purchased separately without disadvantage or prejudice.

[From the *Virginia Journal*, Richmond, Va.]

This volume completes the first twelve of the series, which, we judge, is about one-half of the whole number. It is edited by Mr. Benjamin R. Curtis, one of the special editors selected for the work, and therefore the usual certificate of approval is omitted. The work seems to be up to the standard.

ECHOES FROM THE PRESS.

[From the Commercial, Louisville, Ky.]

The admirable volumes of Myer's Federal Decisions are not as well known to the bar of Kentucky as they deserve. They are in fact institutes upon the law of the supreme court of the United States and our district and circuit United States courts.

The workmanship, unlike that of too many recent law books, is thoroughly lawyer-like. The cases are arranged according to subjects, as in the ordinary digest, and themselves digested by italicized subdivisions; then the cases are referred to under their appropriate minor as well as general heads. Every case bearing upon the point is also referred to in its proper place, and in addition the volumes are well indexed. The principal cases are given in full, and at the end of every series of cases is a digest of points applicable to the particular subdivision of the subject. There are twelve volumes now published.

Volume 11 of Myer's Federal Decisions is edited by Benjamin R. Curtis, one of the special editors of the work, and seems to keep up the high standard set by its predecessors. It treats of courts and the jurisdiction of supreme, circuit, district courts, court of claims, territorial, state and other courts. It deals with contempt of court, conflicts of jurisdictions, the powers of judges and justices of the peace, judicial and political questions, *lex fori* and remedies, and innumerable sub-heads and still smaller divisions, such as is manifest must come under those general heads. The volume is a large one, numbering 900 pages, and is enriched with a great number of citations. It is likely to prove one of the most useful of the series.

[From the Legal Intelligencer, Philadelphia, Pa.]

The present completes the first eleven volumes of this very important series of reports, which is intended to furnish the profession, in a condensed form, the whole body of federal decisions. This volume embraces the decisions upon the subject of courts.

* * *

In an undertaking of this kind the merit and usefulness of the work depends, of course, upon the judgment used in distinguishing the cases worthy to be reported in full from those which are to be presented in a digested form. The present maintains the high standard in this respect which has characterized the previous volumes.

[From the Internal Revenue Record, New York, N. Y.]

Volume XI of Myer's Federal Decisions covers the titles from "Courts" to "Creditors' Bill." It has been edited by Benjamin R. Curtis, Esq., one of the special editors selected for the work. Included in its table of contents are "judges; organization and summary jurisdiction; jurisdiction generally; terms; rules; officers; records; control over proceedings; jurisdiction of United States courts; justices of the peace; contempt of court; judicial and political questions; *lex fori*, and remedies." The volume is in substance a treatise upon federal court practice, the subjects coming under the other titles included in it having been considered elsewhere.

* * *

The publishers are certainly making commendable progress and one which gives promise of its completion within a reasonable period.

[From the Daily Advertiser, Boston, Mass.]

The eleventh volume of "Myer's Federal Decisions" presents the body of the federal law, as declared and explained by the United States tribunals, upon the subject of Courts, including the disqualification of judges in particular cases, the powers and general jurisdiction of courts and their officers, the jurisdiction of the different courts from the supreme court down to justices of the peace, the decisions upon contempt of court, the distinction between judicial and political questions, and the remedies given in the federal courts.

This volume has been arranged and edited by Mr. Benjamin R. Curtis, upon the same plan that has been followed in the previous numbers of the series, no case being given in full or even cited except upon points discussed and passed upon in the opinion of the court, and all the important cases bearing upon each subdivision being published in full, followed by a digest of the points decided in those opinions which merely follow some leading case or turn upon a particular state of facts without setting out any important principle of law, so as to present in a complete and compact form, readily accessible to the investigator, all the work of the federal courts, both in the way of actual decision and of reasoning, upon the subject under consideration.

This object, it seems to us, has been successfully attained in the volume before us. The analysis of the subject is natural and logical, the decisions are well arranged in the successive subdivisions, and their relative importance is carefully distinguished between the full reports and the mere digested note.

We are persuaded that the actual use of this volume will afford further evidence, both of the practical utility of the plan upon which the series is based, and of the painstaking skill and accuracy with which the editorial work has been done.

[From the Legal News, Chicago, Ill.]

The publication of the Federal Decisions in the form here presented was a work of great magnitude. When it was commenced it was said by many of good judgment that the enterprise would prove a failure, but its popularity kept increasing with the appearance of each succeeding volume.

The credit of arranging and laying out the work belongs to Mr. Myer, the manner of its execution to the various editors under him. The volume before us is edited by Benjamin R. Curtis of the Boston bar, assisted by Mr. Frank A. Farnham of the Suffolk bar. In this volume Mr. Curtis has gathered and placed in compact form all that the federal courts have decided relating to courts and creditors' bill.

[From the American Law Review, St. Louis, Mo.]

Proceeding with the titles of the law in their alphabetical order, volume VIII begins with "Contracts" and ends with "Conversion." It is not quite as large as the other volumes, but is printed in the same creditable manner as the others. Dr. Edmund Bennett, of Boston, certifies to the judicious manner in which the editor has selected the cases on contracts which are printed in full and those which are digested merely. Most of this volume is taken up with the subject of contracts, and, as a work upon contracts, embracing all the published decisions of the federal courts, either in full or in the form of abstracts, it is an addition of great value to any law library.

[From the American Law Review, St. Louis, Mo.]

Volume XI of this very important work was edited by Benj. R. Curtis, Esq., the namesake, and, we suppose, the son of one of the ablest judges that ever sat upon the supreme bench of the United States. He states in the prefatory note that he has been assisted by Mr. Frank A. Farnham, of the Suffolk, Massachusetts, bar.

Volume XII bears a certificate of approval, in respect of the title of Crimes and Criminal Procedure, of Mr. Jno. D. Lawson, a legal author of learning and reputation.

We again ask the attention of the profession to the leading characteristic of this work, which is the reprinting of the most important decisions of the federal courts in groups according to the general subjects to which those decisions relate. When the plan of the work was first called to our attention, our first thought was how in the world no one had thought of the plan before. The fact is that it had been very considerably thought of, and there was nothing at all novel in it, since several of the old English reports, two hundred years old, presented the cases in similar groups. The value of this presentation need not be suggested to the practitioner. Volume XII of this series, in the hands of a district-attorney of the United States, is sufficient for all his ordinary work in cases on the criminal side of the district court. It is the practical difference between having all the valuable judicial authority upon the topic under consideration in one book and having it in three hundred volumes.

[From the Central Law Journal, St. Louis, Mo.]

(Review of Volumes VIII and XII)

The profession will no doubt cordially welcome these additional volumes of this admirable work, which, for the value of the matter contained in it, and its excellent arrangement, far surpasses every collection of a similar character which we have ever seen. As the publication of this work progresses, we are more impressed with the merits of the plan adopted in the beginning, and the skill and fidelity with which it has thus far been worked out.

One of the volumes now before us exhausts, so far as the federal courts can exhaust it, the great subject of the law of contracts.

The twelfth volume is much larger and is equally well-arranged. The subject of the volume is subdivided into no less than thirty-five different heads.

The work, of which these volumes constitute a part, is of the most sterling merit and we can most sincerely commend it to the profession.

[From the Legal Journal, Pittsburg, Pa.]

Volume 11 of the series contains cases on the organization and jurisdiction of United States courts and has been prepared by Benjamin R. Curtis, Esq., of the Boston bar. It is uniform in arrangement with the volumes preceding, giving the important cases in full and abstracts of the remaining ones.

The objections usually urged against digests will not lie against this publication. Every case worthy of a report in full is given and the admirably arranged notes give the gist of the omitted cases. Any question may thus be easily and satisfactorily investigated. The work deserves a liberal support.

[From the West Coast Reporter, San Francisco, Cal.]

This series has now reached its twelfth volume. Its general plan and scope have been stated in previous reviews of prior volumes. Of the present volumes (XI and XII) it is sufficient to state that they are worthy of their predecessors, and serve to substantiate the wisdom of the publishers and editors of the series, in presenting to the profession the decisions of the federal courts in the present form. Volume eleven contains upwards of nine hundred pages, all of which are devoted to the subject of courts. This subject is edited by Benjamin R. Curtis, Esq., one of the special editors of the work. The arrangement of this subject is logical, and the numerous cross-references render easy an examination of the various sub-heads. Volume twelve contains about twelve hundred pages, entirely devoted to the subject of crimes. Under this head the important subject of extradition is considered. John D. Lawson, Esq., the well-known author of "Presumptive Evidence," etc., certifies to his approval of the selection of cases which are reported in full.

[From the Law Bulletin, Columbus, Ohio.]

Volume XI of this important work, treating of Courts, has been received. It is edited by Benj. R. Curtis, of Boston, Mass., who states in the prefatory note that he has been assisted by Mr. Frank A. Farnham, of the Suffolk, Massachusetts, bar.

It comprises the opinions on the powers and jurisdiction of the federal courts, questions of conflicting and concurrent jurisdiction, and the constitutional limitations upon the powers of the state and federal judiciary. As a statement of the general principles touching the constitution and powers of courts in general, as well as those relative to the federal courts in particular, we think the volume will be found to be of inestimable value in the daily business and practice of all judges and lawyers, whether state or federal.

Indeed, the further this work progresses, the more apparent becomes its great practical value. It is the practical difference between having all the valuable judicial authority upon a topic under consideration in one volume, and having it in three hundred volumes.

[From the Central Law Journal, St. Louis, Mo.]

We had occasion recently to review two of the volumes of this admirable series, Volumes VIII and XII, and bore our cordial and unqualified testimony to the merits of the compilation. Of the volume now before us, we need hardly say more than that it is worthy of its companions, and fully equal to any of them. Nevertheless, we deem it appropriate to adopt, with reference to the general work, the language used by our learned contemporary, the *Criminal Law Magazine*, in its review of a preceding volume of the series.

[Then follows a long extract from the *Criminal Law Magazine*.]

This language is as applicable to any other volume as to that relating to criminal law. The great and pre-eminent merits of this series are, first, that each subject is exhausted, and second, that everything of any value is so arranged and labelled as to be available for immediate use.

[From the Inter Ocean, Chicago, Ill.]

A long review of volume XIII, winds up as follows:

As these reports of cases are growing so voluminous and unwieldy, a condensation and systematic arrangement of the subjects are very nearly a necessity for every lawyer of large practice.

The high opinion of The Inter Ocean of this work before expressed has been fully sustained by the opinions of the leading members of the Chicago bar and from all sections of the country. A prominent member of the profession at Washington writes: "I consider 'Myer's Federal Decisions' one of the most valuable series that I have ever had occasion to use. The books are in daily use in my office, and I could not well be without them—even in this city where we have such large public libraries. I shall look forward with pleasure to the completion of the series, and expect to use them constantly during the rest of my professional career."

Another says: "The convenience of the arrangement, together with the thorough and careful manner in which the work is done, renders it much more valuable than all three of the original series, from which the work is taken. The bringing together of all the decisions upon a leading subject saves a large amount of labor in looking up thereon."

[From the Commercial, Louisville, Ky.]

They say of volume XIII:

To give all the important bankrupt cases would be impossible in a book of ordinary compass, but the principles seem to have been well and practically illustrated in the voluminous digests which will be found of great value in case of the passage of a new bankrupt law. A large part of the subject is, however, of current importance, as, for instance, that portion digested under the subdivision, "Attachments and Other Pending Suits." The validity of titles derived under process of state courts and how they are affected by the bankruptcy proceedings instituted while the state litigation is pending, their validity as affected by sales, by discharge of fraudulent preferences and kindred matters are still of present importance. The subdivision referred to is an instance of satisfactory work and a type of the whole.

These volumes are coming out with commendable promptitude, and they are certainly welcomed by the profession. Their success ought to be an encouragement to the editor and publisher to attempt a similar treatment of the immense body of state decisions.

[From the Commercial Gazette, Cincinnati, Ohio.]

Volume XIII of this wonderful reproduction of the decisions of the various federal courts contains the subjects "Damages" to "Decree," and sustains the high reputation gained by its predecessors.

Mr. Jay L. Torrey, of St. Louis, president of the national organization that grew out of the bankrupt law convention at Washington, in January, 1884, certifies to the merits of its text on "Debtor and Creditor," under which appropriate heading appears the subject of "Bankruptcy." We shall probably soon have another bankrupt law—and controversies arising under the last one are still pending—so that this portion of the work is not by any means of minor importance.

[From the Wisconsin State Journal, Madison, Wis.]

The principal title of this volume, occupying a but thirty-one pages of the text, is "Debtor and Creditor," a subject which interests the entire business world. The whole number of volumes from which cases are either given in full or carefully digested is 812, of which 106 are United States supreme court reports, 142 are circuit and district court reports, thirty-three opinions of the attorney-general and court of claims, twelve from the Federal Reporter and twenty from other sources. The general divisions of the title are 1st. of the relation of debtor and creditor generally, and under state laws, 2d. national bankrupt laws, and these are subdivided into forty separate heads.

The general plan of this volume is identical with that of the volumes which have preceded it, and the voluntary and gratuitous commendation of the merits and excellences of these volumes are equally applicable to this.

[From the Virginia Law Journal, Richmond, Va.]

The large and important subject, Debtor and Creditor, is treated under the two heads: A. The relation of debtor and creditor generally, and state laws; B. National bankrupt laws.

The cases on the latter subject here printed in full and digested will be found particularly acceptable in the event of the passage of a bankrupt law.

These cases embrace all on the subject down to and including volume 116 of the U. S. supreme court reports and volume 24 of the Federal Reporter. They seem to have been selected with much care, and with a view to give those which best illustrate the principles upon which all systems of bankrupt laws proceed, without reference to the mere details of procedure.

[From the Kansas Law Journal, Topeka, Kas.]

We have heretofore spoken of Mr. Myer's excellent arrangement, and we then exhausted our supply of complimentary adjectives in reference to the arrangement. Each book of the series so far issued has been up to the promises of the compiler.

Volume XIII contains the subject of Debtor and Creditor, and might be called a full text-book on that subject. The general subject is divided into two general sub-heads: (A) The relation of debtor and creditor generally, and under state and (B), national bankrupt laws.

The lawyer has, in one large octavo volume the adjudications of all the federal courts several branches of the principal subject can only fully appreciated by being examined.

[From the Courier-Journal, Louisville, Ky.]

Myer's Federal Decisions, volume XI, letter C, from Courts to Creditors' Bills, is now before the profession. It fully sustains the reputation made by the other volumes. This volume has been edited by Benjamin R. Curtis, of the Boston bar; his name is a guaranty of accurate work.

Volume XI is especially valuable, because it concerns the jurisdiction concurrent and original of the federal courts and also of the supreme court—one of the most important legal subjects in the whole range of American law. The entire subject of the law as to courts is reviewed and stated in this volume, making it of itself a necessity to every lawyer who ever enters a federal jurisdiction with his case.

Standard Law Library



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